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RIGHTS, REMEDIES, AND PRACTICE.

RIGHTS, REMEDIES,

AND

PRACTICE,

AT LAW, IN EQUITY, AND UNDER THE CODES.

A TREATISE ON

AMERICAN LAW

IN CIVIL CAUSES;

WITH

A DIGEST OF ILLUSTRATIVE CASES.

BY

JOHN D. LAWSON,

AUTHOR OF WORKS ON PRESUMPTIVE EVIDENCE, EXPERT EVIDENCE, CARRIERS, USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC.

IN SEVEN VOLUMES.

VOL. V

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PREFACE.

THIS volume—continuing the third division, Property Rights and Remedies—embraces the titles Insurance, Contracts, and Licenses.

J. D. L

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INSURANCE.

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§ 2037. Insurance Defined — A Contract of Indemnity. — Insurance is a contract whereby one for a consideration undertakes to pay money if another shall suffer loss. The contract of insurance is an executory contract executed by the payment of the sum insured on a loss.[1] It is a personal contract, and does not pass with the title to the property insured.[2]

§ 2038. Reinsurance. — Reinsurance is a contract of indemnity to the reinsured, whatever be the subject-matter, and binds the reinsurer to pay to the reinsured the

[1] Mutual Life Ins. Co. v. Wager, 27 Barb. 354.

[2] Disbrow v. Jones, Harr. (Mich.) 48.

loss sustained in respect to the subject insured to the extent for which he is reinsured.[1] A contract for reinsurance extends no further than the risk taken by the original underwriter; he cannot stipulate for indemnity against a risk which he has not assumed.[2] A policy of reinsurance is not void because the description of the property insured differs from that contained in the original policy, when the description may be corrected by construction, there being enough to identify the property.[3] In an action on a contract for reinsurance, defendant cannot set up a misrepresentation made while obtaining the original policy.[4] The reinsurers are liable for the costs and expenses of a suit paid to the party originally insured.[5] The reinsured, in order to recover against the reinsurer, must prove his risk or interest in the subject-matter, and the fact and amount of loss, in the same manner as the original insured must have proved them against him;[6] and the reinsurer is entitled to make the same defense to an action brought against him on the second policy as the original insurer might have done on the first policy.[7] An insurance company having reinsured in another company to indemnity itself against loss on its policy, and discharged its liability by the payment of a less amount than that of the original insurance, the sum so paid by it is the measure of indemnity to be recovered from the reinsuring company; provided such sum is within the amount of the reinsurance policy, and does not exceed the amount of actual loss, and such

[1] May on Insurance, sec. 11; Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443. A contract of reinsurance is not within the statute of frauds: Com. Ins. Co. *v.* Ins. Co., 19 How. 318. *Contra*, Egan *v.* Fireman's Ins. Co., 27 La. Ann. 368. Unless expressly authorized it is *ultra vires* the officers of an insurance company: Hutchinson *v.* Ins. Co., 53 Cal. 622.

[2] Commonwealth Ins. Co. *v.* Ins. Co., 35 Pa. St. 475.

[3] Yonkers Ins. Co. *v.* Ins. Co., 6 Rob. (N. Y.) 316.

[4] Jackson *v.* Ins. Co., 99 N. Y. 124.

[5] New York Central Ins. Co. *v.* Ins. Co., 20 Barb. 468.

[6] Yonkers Ins. Co. *v.* Hoff. Ins. Co., 6 Rob. (N. Y.) 316.

[7] New York Ins. Co. *v.* Ins. Co., 1 Story, 458; Eagle Ins. Co. *v.* Ins. Co., 9 Ind. 443; Hone *v.* Ins. Co., 1 Sand. 137; Delaware Ins. Co. *v.* Ins. Co., 3 Grant Cas. 71.

policy contains no condition for *pro-rating* loss or limiting liability.[1] Where a contract of reinsurance provides that the loss, if any, shall be payable *pro rata*, and at the same time with the reinsured, the liability of the company reinsuring accrues at the same time with the liability of the reinsured; and in order to sustain an action, it is not necessary that the company reinsured shall have actually paid the loss, but it is sufficient if they were liable to pay.[2] A judgment against the original insurer is binding upon reinsuring companies who had notice of the suit and an opportunity to defend. The liability of the insuring company can be litigated only once.[3]

ILLUSTRATIONS. — Plaintiffs' agent issued to C policies of insurance upon her mortgage interest in certain premises. Upon being notified thereof, plaintiffs directed the policies to be canceled; the agent thereupon applied to defendant to reinsure the risks, which the latter agreed to do. Subsequently, it was agreed that a policy should issue direct to C, and one was executed accordingly. *Held*, that the contract was for original insurance, and that plaintiffs could not maintain an action thereon upon the ground of a reinsurance: *Excelsior Fire Ins. Co.* v. *Royal Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 271. An insurance company knew that A was insured on his interest in a vessel, and for double the amount of its possible earnings. *Held*, that it was bound to disclose that fact to another company from which it sought reinsuranee: *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485. P. insured goods for six thousand dollars, and effected a reinsurance with defendant for two thousand dollars, the policy of reinsurance providing that the loss should be payable "*pro rata*, at the same time and in the same manner as the reinsured company." A loss happened, for which P. paid six hundred dollars in full discharge of the liability. *Held*, that P. could recover only two hundred dollars of defendant: *Illinois Mutual Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362; 16 Am. Rep. 620. The A insurance company reinsured a risk in the B company. The building was burned, the A company was sued, and the two companies agreed that the case should be fought, the A company to control the defense. Without the consent of the B company, the case was compromised. *Held*,

[1] Ins. Co. *v.* Ins. Co., 38 Ohio St. 11; 43 Am. Rep. 413.

[2] Blackstone *v.* Alemania Fire Ins. Co., 4 Daly, 299.

[3] Strong *v.* American Central Ins. Co., 4 Mo. App. 7; Strong *v.* Phœnix Ins. Co., 62 Mo. 289; 21 Am. Rep. 417.

that the B company was not liable to the A company for any part of the money paid by way of compromise: *Commercial Union Assurance Co.* v. *American Central Ins. Co.*, 68 Cal. 430. The A insurance company sold out its business to the B company. In consideration thereof the B reinsured the A company's risks, and agreed to pay, satisfy, and discharge the losses. *Held*, that this was more than a mere reinsurance, and that there was sufficient privity between a policy-holder and the B to enable the former to maintain an action against the latter for a loss: *Johannes* v. *Phenix Ins. Co.*, 66 Wis. 50; 57 Am. Rep. 249.

§ 2039. Double Insurance — Liability of Successive Insurers. — Double insurance is where two or more policies are taken out upon the same interest.[1] To constitute double insurance, both policies must be upon the same insurable interest, either in the name of the owner thereof, or of some one for his benefit.[2] The right to contribution is based upon the concurrence of the policies, and it is necessary that the several insurers should be bound with equal certainty and in the same sense for the same loss.[3] An agreement between different owners of property that one of them shall take out insurance on said property in his own name does not amount to double insurance.[4] So an insurance by a mortgagor and a mortgagee severally may be effected without the insurance of either impairing that of the other.[5] Where one of two policies of insurance in different companies covers the building only of the party insured, and the other covers the building, machinery, etc., this does not constitute double insurance.[6] In order to hold different policies of fire insurance to contribute to the same loss, the insurance must have been on the same interest in the same property, or some portion thereof. Thus on the destruction of merchandise of a consignor, with whom the consignee had contracted to keep

[1] May on Insurance, sec. 13.
[2] Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; 30 Am. Dec. 90.
[3] Baltimore Ins. Co. *v.* Loney, 20 Md. 20.
[4] Burbank *v.* Ins. Co., 24 N. H. 550; 57 Am. Dec. 300.
[5] Jackson *v.* Mass. Ins. Co., 23 Pick. 418; 34 Am. Dec. 69.
[6] Sloat *v.* Ins. Co., 49 Pa. St. 14; 88 Am. Dec. 477.

it insured, four policies on merchandise in the same warehouse, belonging to other consignees, could not be resorted to for contribution.[1] The provision for an apportionment of loss "in case of any other contract of insurance upon the property insured" only applies when the consequent contract is made by the insured himself, so that a mortgagee who insures his interest may recover, in case of loss, the full amount of the policy, although the interest of a subsequent mortgagee has been insured by the latter.[2] A provision that if the property is insured in any other office the company will only be liable to pay its ratable proportion of a loss does not bind the insured to keep up another policy which was on the property.[3]

Where there are several insurers of the same property, the insured has a right to recover of any of them to the amount of his loss, without regard to the others. But the insurer who has made good the loss has a claim on the co-insurers to be reimbursed by them a proportion of the amount which he has paid, determined by the proportion borne by each policy to the aggregate amount of all the policies upon the property.[4] The modern fire policy, however, usually contains a clause restricting the liability of an insurer, where subsequent insurances are made on the same property by other insurers to a proportionate part of any loss that may occur.[5] "This prevents the recovery of more than the whole loss by the insured. And if there were no such provision, since the insured is only entitled to an indemnity, he can recover no more than this, however much may be the amount. He may, however, resort to any one of the insurers to recover his whole loss; and in that case the insurer paying the loss will have

[1] Lowell Mfg. Co. *v.* Ins. Co., 88 N. Y. 591.

[2] Fox *v.* Ins. Co., 52 Me. 333.

[3] Lattan *v.* Ins. Co., 45 N. J. L. 453.

[4] Newby *v.* Reed, 1 W. Black. 416; Thurston *v.* Koch, 4 Dall. 348; Lucas *v.* Ins. Co., 6 Cow. 635; Wiggin *v.* Ins. Co., 18 Pick. 145; 29 Am. Dec. 576; Cromie *v.* Ins. Co., 15 B. Mon. 432; Millaudon *v.* Ins. Co., 9 La. 32; 29 Am. Dec. 433.

[5] Lucas *v.* Ins. Co., 6 Cow. 635; Fitzsimmons *v.* Ins. Co., 18 Wis. 234; 86 Am. Dec. 74.

claims over against the other insurers for their respective proportions, the several concurrent insurers being regarded as identical in interest."[1]

ILLUSTRATIONS. — A policy was for one thousand dollars on fixtures, and three thousand dollars on stock, and another was for five thousand dollars on stock and fixtures as one parcel. *Held*, not double insurance: *Howard Co.* v. *Scribner*, 5 Hill, 298. B had a bond from A for an undivided half of a mill, and gave a bond back to keep it in repair, and also agreed that A might get it insured at his expense, to secure him for the debt, and A procured an insurance on the whole mill. *Held*, that the insurance by A was not a double insurance: *Burbank* v. *Ins. Co.*, 24 N. 550; 57 Am. Dec. 300. Owners of cotton shipped it by a carrier, and insured it. The carrier at the time had annual policies covering the cargoes of its steamer, containing a clause limiting the insurance to the interest of the insured. *Held*, that this was not double insurance, and the shipper's insurers could not make the carrier's insurers contribute to their loss: *Royster* v. *Roanoke etc. Steamboat Co.*, 26 Fed. Rep. 492. A warehouseman insured his interest in goods on storage. The owner of certain of these goods insured them in another company. *Held*, that the company thus insuring the goods had no claim for contribution from the warehouseman's insurers, the case not being one of double insurance: *Home Ins. Co.* v. *Gwathmey*, 82 Va. 923. Three companies insured goods in every part of a building. One of them made a further insurance of goods in the upper stories only. A loss occurred which, in the lower stories, exceeded the amount of the first insurance, and in the upper stories exceeded the amount of the second insurance. *Held*, that the second insurance was payable in full, and that the first policies did not contribute to it: *Royal Ins. Co.* v. *Roedel*, 78 Pa. St. 19; 21 Am. Rep. 1. Defendant insured a specific parcel of property by a policy permitting other insurance, and providing for an apportionment of the loss in case of other insurance. The same, together with other property, was subsequently cov-

[1] May on Insurance, sec. 13; citing Gordon *v.* London Assurance Co., 1 Burr. 492; Lucas *v.* Jefferson Ins. Co., 6 Cow. 635; Stacy *v.* Franklin Fire Ins. Co., 2 Watts & S. 506; Newby *v.* Reed, 1 W. Black. 416; Peoria Mar. & Fire Ins. Co. *v.* Lewis, 18 Ill. 553; Baltimore Fire Ins. Co. *v.* Loney, 20 Md. 20; Sloat *v.* Royal Ins. Co., 49 Pa. St. 14; 88 Am. Dec. 477; Merrick *v.* Germania Fire Ins. Co., 54 Pa. St. 277; Millaudon *v.* Ins. Co., 9 La. 27; 29 Am. Dec. 433. And so a party holding two policies of insurance on the same property, executed by different companies on the same day, and for the same amounts, and together exceeding the amount at risk, may recover a proportionate part of a loss from each company, or may recover the whole amount from either, and leave that company to seek contribution from the other: Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145; 29 Am. Dec. 576.

ered by other policies for an entire sum less than the aggregate value of the property insured by all the policies. There was a total loss of the whole property covered by all the policies. *Held*, that the sum insured by the latter policies was to be distributed among the several parcels in the proportion which that sum bore to the total value of all the parcels, and that the amount of insurance on the specific property being less than its value, there was no over-insurance, and consequently no occasion for any apportionment: *Ogden* v. *East River Ins. Co.*, 50 N. Y. 388; 10 Am. Rep. 492. R., as agent of a company, took out, in his own name, a policy on merchandise, his own or held by him in trust or on commission; at the same time he took out policies in the name of the company on the same goods so held on commission and insured by his policy. *Held*, in an action on R.'s policy, that it covered the merchandise, and not his interest in it, and that it was contributory with the company's policies, as the insurance on the merchandise was double: *Robbins* v. *Ins. Co.*, 16 Blatchf. 122. A policy provided that in case of additional insurance "the insured shall not recover any greater portion of loss sustained than the amount hereby insured bears to the whole amount" of the insurance, and that "the company shall only be obliged to pay as if they had insured two thirds of the actual cash value of the said property." *Held*, that, in case of total loss, where the property was insured in two companies, the first was not entitled to pro-rate with the second: *Lebanon Mutual Fire Ins. Co.* v. *Kepler*, 106 Pa. St. 28. A policy was taken out by warehousemen on "merchandise" contained in their warehouses, "their own, or held by them in trust, or in which they have an interest or liability." Depositors of the merchandise who received advances thereon from the warehousemen took out other policies covering the same goods. *Held*, that the several policies constituted double insurance, and that they should bear a loss proportionally: *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. Insurance agents agreed with A to insure his buildings from date for twelve thousand dollars at three per cent in four named companies. *Held*, that this meant an equal division of the risk among the four companies: *Fitton* v. *Phœnix Assurance Co.*, 25 Fed. Rep. 880.

§ 2040. **Form of Insurance Contract—The Policy.**—No particular form of an insurance contract is required by the law. A formal policy need not be issued.[1] When an application for insurance does not set forth all the

[1] American Ins. Co. v. Patterson, 28 Ind. 17.

provisions which the policy is to contain, and the agent represents that the policy will contain certain lawful stipulations, the policy must contain them, or the insured will not be bound to accept it; but immediately on receipt of the policy he must notify the company of his refusal to accept the policy.[1] But though the law does not require any particular form for an insurance contract, the obligation is seldom at the present assumed, except under the instrument in writing, and generally under seal, called a policy. "This," says Mr. May, "should contain the names of the contracting parties; of the insurer, who signs or underwrites the policy, and hence is frequently termed the underwriter, whereby he obligates himself, in consideration of a certain sum, called the premium, to him paid by the other party, to take upon himself the hazard, called the risk, and to make good to him the particular loss he may sustain; and of the insured, who pays the premium to secure this indemnity against loss. It should also contain the precise time from which the risk commences and at which it terminates; a description of the property, or life, or other subject-matter of insurance; the conditions to which the contract is subject; the limitations upon the risk; and, in short, all such facts and *data* about which disputes may arise as are not susceptible of settlement by resort to the general principles which govern the contract."[2] One who accepts a fire insurance policy is presumed, in the absence of fraud, to know its terms and their meaning.[3]

The contract need not be in writing; it is good by word of mouth,[4] and will be presumed to be in the terms

[1] American Ins. Co. *v.* Neiberger, 74 Mo. 167.

[2] May on Insurance, sec. 29.

[3] Morrison *v.* North American Ins. Co., 69 Tex. 353; 5 Am. St. Rep. 63.

[4] Sanborn *v.* Ins. Co., 16 Gray, 448; 77 Am. Dec. 419; First Baptist Church *v.* Ins. Co., 19 N. Y. 305; Relief Fire Ins. Co. *v.* Shaw, 94 U. S. 574; Security Fire Ins. Co. *v.* Ins. Co., 7 Bush, 81; 3 Am. Rep. 301; Ellis *v.* Ins. Co., 50 N. Y. 402; 10 Am. Rep. 495; Wooddy *v.* Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732; Putnam *v.* Ins. Co., 123 Mass. 324; 25 Am. Rep. 93; Com. Ins. Co. *v.* Union Ins. Co., 19 How. 318; New England Ins. Co. *v.* Robinson, 25 Ind. 576; Kelly *v.* Ins. Co., 10 Bosw. 82;

of the forms of policies issued in ordinary cases.[1] A renewal of a policy of insurance need not be under seal, although the policy is so.[2] But the contract must be definite in its terms—both as to term and rate of premium—before it can be enforced.[3] A contract of insurance is incomplete which wants any of these five ingredients: the subject-matter, the risk insured against, the amount, duration of the risk, and the premium of insurance.[4] Words and printed figures in the margin of a policy relating to the mode of paying premiums and their amount are a part of the policy.[5] But, in general, conditions printed in small type on the back of a policy should not be deemed a part of it, to bind the insured, unless there is proof that they were brought to his notice at the time of making the contract. For, usually, the policy is transmitted to the insured after the agent and the insured have contracted; after the insured has paid a premium; and under circumstances which put it out of his power to object to such provisions inserted in it as were not in his mind or in the oral understanding which was had when he paid the premium.[6] A provision in a charter of an insurance company that it shall have power to insure property by a policy signed by the president, etc., does not restrict its general power to make a contract

Audubon *v.* Ins. Co., 27 N. Y. 216; Strohn *v.* Ins. Co., 33 Wis. 649; Lengenfelter *v.* Ins. Co., 19 Mo. App. 252. *Contra*, Cockerill *v.* Ins. Co., 16 Ohio, 148; Bell *v.* Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542. A parol contract is good, even where the charter of the company provides that its policies shall be written or printed and signed by the president: Baile *v.* Ins. Co., 13 Cent. L. J. 233; Walker *v.* Ins. Co., 56 Me. 371; Henning *v.* Ins. Co., 2 Dill. 26. But see Henning *v.* Ins. Co., 47 Mo. 425; 4 Am. Rep. 332.

[1] Hubbard *v.* Ins. Co., 33 Iowa, 325; 11 Am. Rep. 125; De Grove *v.* Ins. Co., 61 N. Y. 594; 19 Am. Rep. 305.

[2] Lockwood *v.* Middlesex Mutual Assurance Co., 47 Conn. 553.

[3] Strohn *v.* Ins. Co., 37 Wis. 625; 19 Am. Rep. 777.

[4] Tyler *v.* New Amsterdam Ins. Co., 4 Rob. (N. Y.) 151; First Baptist Church *v.* Ins. Co., 28 N. Y. 153. A memorandum: "Two hundred B | C, [W] insured to-day, p. v. o. Mr. H. @ 15c. from date," held not to be a valid contract of insurance of two hundred bales of cotton, a statute requiring the stipulations to be in writing. A definite statement of the period of insurance is indispensable: Clark *v.* Brand, 62 Ga. 23.

[5] Pierce *v.* Ins. Co., 138 Mass. 151.

[6] Bassell *v.* American Fire Ins. Co., 2 Hughes, 531.

in any other legal mode it may choose.[1] So where the charter provides that every contract must be in writing or in print, and under the seal of the corporation, it is held that this refers only to executed policies, and not to the preliminary contract, and that a parol contract to insure will be enforced by the court ordering the company to issue a valid and proper policy, according to its promise, on which suit may be brought.[2]

ILLUSTRATIONS. — A "risk was taken for two thousand five hundred dollars at two per cent," and the applicant threw a policy down on the secretary's desk, and said (according to one witness), "There is a policy, if you take it," or (according to another witness), "You are to make out a like policy," but tendered no premium till the premises to be insured were burned. *Held*, that the contract was too vague and indefinite to be binding: *Tyler* v. *Ins. Co.*, 4 Rob. (N. Y.) 151. A policy on a cargo did not cover the loss on cider frozen in the vessel, but the company promised the insured if he would go and take charge of it, and sell it to the best advantage, they would pay the deficiency, whereupon the insured complied, but the company declined to pay. *Held*, that the insured could recover the deficiency: *Willets* v. *Sun Mutual Ins. Co.*, 45 N. Y. 45; 6 Am. Rep. 31. A policy against fire was issued on a building, upon the application of an insurance-broker, who, without the owner's knowledge or authority, stated in the application that the building was used as a machine-shop. It was, in fact, used as an organ factory, the risk on which was more hazardous than on a machine-shop. The owner accepted the policy expressed to be on a machine-shop, and paid the premium. *Held*, that the policy was void, as the minds of the parties never met: *Goddard* v. *Monitor Mutual Fire Ins. Co.*, 108 Mass. 56; 11 Am. Rep. 307. A obtained a policy on his museum-building and collections, and before the expiration of the policy, he sold the insured property to B. The acting secretary of the insurance company then indorsed on the policy the words, "Loss, if any, payable to B." Afterwards B sold the museum collections, and the president of the company made an additional indorsement on the policy in the words, "This policy is hereby changed to cover chairs, benches, and furnaces, instead of museum collection, which is removed." *Held*, that the indorsements

[1] Relief Fire Ins. Co. *v.* Shaw, 94 U. S. 574; Security Ins. Co. *v.* Ins. Co., 7 Bush, 81; 3 Am. Rep. 301; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345; 15 Am. Rep. 612; Henning *v.* Ins. Co., 2 Dill. 26.

[2] Franklin Ins. Co. *v.* Colt, 20 Wall. 560.

constituted valid contracts of insurance, and that the com pany were liable thereon: *Northrup* v. *Mississippi Valley Ins Co.*, 47 Mo. 435; 4 Am. Rep. 337.

§ 2041. Construction of Policies — In General. — In construing policies of insurance, regard is had to th intent and meaning of the parties in making the con tract, rather than to the literal meaning of the word used.[1] No part of the words of a policy should be rejecte as insensible or inoperative, if a rational and intelligibl meaning can be given to them consistent with the gen eral design and object of the whole instrument.[2] A por tion of the description which is false will be disregarded where enough remains to identify the property.[3] An inaccurate description of the premises insured will no defeat the policy, if it affords the means of correcting th inaccuracy by construction of the whole instrument, to gether with extrinsic identifying evidence.[4] A specia clause which creates an exception to a general claus governs the latter clause.[5] When the consideration for policy of insurance against fire is single, and the amoun assured a gross sum, the contract is entire, although th sum assured is apportioned among several specific item of the property covered; and therefore a breach of th conditions of the policy as to one item avoids the whol policy.[6] The words "permanent policy" are not ambig uous, and evidence to show their meaning is inadmissi ble, unless a technical use is shown. They mean an insurance from year to year, and until terminated by an express notice by one of the parties to the contract to th other.[7]

[1] Cross v. Shutliffe, 2 Bay, 220; 1 Am. Dec. 645; Workman v. Ins. Co., 2 La. 507; 22 Am. Dec. 141; Patapsco Ins. Co. v. Biscoe, 7 Gill & J. 293; 28 Am. Dec. 219; Bradley v. Ins. Co., 3 La. Ann. 708; 48 Am. Dec. 465; West v. Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294.

[2] Slettiner v. Ins. Co., 5 Duer, 594.

[3] Hatch v. New Zealand Ins. Co., 6 Cal. 122.

[4] Yonkers etc. Ins. Co. v. Ins. Co. 6 Rob. (N. Y.) 316.

[5] Mitchell Furniture Co. v. Ins. Co. 17 Mo. App. 627.

[6] Plath v. Fire Ins. Association, 2 Minn. 479; 23 Am. Rep. 697.

[7] First Bap. Church v. Ins. Co., 2 How. Pr. 448.

§ 2042. Valued and Open Policies Distinguished — "Policy to Whom It may Concern." — A valued policy is one where the sum to be paid as indemnity for the loss is fixed by the very terms of the contract.[1] An open policy is one which does not by its terms fix the sum to be paid in case of a loss, but leaves it open to be afterwards proved by the insured or adjusted by the parties.[2] Under an open policy the insured must, in the case of a loss, prove the true value of the property insured; under a valued policy he is not called on to do this, for the sum stated in the policy is conclusive as to the value, in the absence of proof of fraud or of such excessive valuation as will raise a presumption of fraud.[3] To render the policy a valued one, the words "valued at" need not be used, but any language which shows the intention to fix the value of the property is sufficient.[4] Thus the following have been held to be valued policies, viz.: Where the policy contained this clause, viz.: "The amount insured being not more than three fourths of the value of said property, as appears by the proposal of the said insured";[5] where the plaintiff was by the policy insured "to the amount of $2,000; viz., on the building and fixed machinery, $1,700; on movable machinery therein, $150; on stock, raw and wrought, $150,—said insured being the lessee of said mill for one year from November 1, 1850, and having paid the rent therefor of $2,171.01, which

[1] May on Insurance, sec. 30; Cox *v.* Ins. Co., 3 Rich. 331; 45 Am. Dec. 771.

[2] May on Insurance, sec. 30.

[3] Holmes *v.* Charlestown Mutual Fire Ins. Co., 10 Met. 211; 43 Am. Dec. 428; Young *v.* Irving, 9 Scott N. R. 752; Coolidge *v.* Gloucester Mutual Ins. Co., 15 Mass. 341; Lycoming County Mut. Co. *v.* Mitchell, 48 Pa. St. 372; Laurent *v.* Chatham Fire Ins. Co., 1 Hall, 41; Cushman *v.* North Western Ins. Co., 34 Me. 487; Borden *v.* Hingham Mutual Fire Ins. Co., 18 Pick. 523; 29 Am. Dec. 614; Phœnix Ins. Co. *v.* McLoon, 100 Mass. 475; Miller *v.* Germania Fire Ins. Co., 6 Ins. L. J. 873; Alsop *v.* Ins. Co., 1 Sum. 451; Carson *v.* Ins. Co., 2 Wash. C. C. 468; Miner *v.* Tagert, 3 Binn. 205; Davy *v.* Hallett, 3 Caines Cas. 16; 2 Am. Dec. 241; Griswold *v.* Ins. Co., 3 Blatchf. 231; Commercial Ins. Co. *v.* Sennett, 37 Pa. St. 205; 78 Am. Dec. 418. The insured as well as the insurer is concluded by the valuation: Holmes *v.* Ins. Co., 10 Met. 211; 43 Am. Dec. 428.

[4] May on Insurance, sec. 31.

[5] Nichols *v.* Ins. Co., 1 Allen, 63; Fuller *v.* Ins. Co., 4 Met. 206. But see Brown *v.* Ins. Co., 105 Mass. 396; 7 Am. Rep. 538.

interest, diminishing day by day, in proportion for the whole rent for a year, is hereby insured," as to the first two items.[1] If the policy cover a number of articles of equal value under a valuation of the whole, the insured will recover of the whole valuation the proportion which the number lost bears to the whole number insured; as where ten hogsheads of tobacco specified to be worth one thousand dollars are insured, the loss of one will give the right to recover one hundred dollars, or the same proportion of the amount insured.[2] A policy enumerating certain articles, with figures indicating dollars placed opposite to each, does not constitute a valued policy.[3] Where a policy of fire insurance was issued to plaintiff, "the amount insured being not more than three fourths of the value of the property as stated by the applicant," it was held that this valuation was conclusive, in the absence of fraud, although a subsequent proviso restricted the whole amount of insurance, if an additional policy was obtained, to three fourths of the actual value of the property at the time of loss, and although there was a covenant in the application (but not in the policy) that such valuation should not be conclusive.[4] But the policy or the by-laws of the company may give the insurer a right to make a new valuation in case of a loss, in which case the value fixed in the policy cannot be recovered as of course.[5]

A policy in the name of A, "on account of whom it may concern," or with other equivalent terms, will inure to the interest of the party for whom it was intended by A, provided he, at the time of effecting the insurance, had the requisite authority from such party, or the latter subsequently adopted it. No proof is necessary that the assured had an insurable interest at that time. It is sufficient if such interest subsisted during the risk, and when

[1] Cushman *v.* Ins. Co., 34 Me. 487.
[2] Harris *v.* Ins. Co., 5 Johns. 368.
[3] Luce *v.* Springfield Ins. Co., 1 Flip. 281.
[4] Luce *v.* Dorchester Mutual Fire Ins. Co., 105 Mass. 297; 7 Am. Rep. 522. But see Brown *v.* Fire Ins. Co., 105 Mass. 396; 7 Am. Rep. 538.
[5] Post *v.* Ins. Co., 12 Met. 555; 46 Am. Dec. 702.

the loss occurred.[1] By "whom it may concern" in a policy is meant not any and every body who may chance to have an interest in the thing insured.[2] The intention of the party effecting the insurance limits the operation of such a policy, and no person can recover on such policy without first showing that his interest was intended to be protected by the policy when it was obtained.[3]

§ 2043. What may be Insured — In General. — The interests which may be the subject of insurance are many and varied. "The contract," says Mr. May, "may embrace not only personal property and real estate, but the lives of animals, among which slaves are included for this purpose; the life, health, and personal liberty of man; the solvability of a debtor; the payment of a note at maturity; the fidelity of a servant; expected profits; the damages to which growing crops are exposed from frosts and storms; the risk of death or injury by accident to the person in traveling, or otherwise; lottery tickets, where lotteries are permitted; the risk of loss of property by the capture of a fort by an enemy; the danger of loss by dishonesty, fraud, and theft, or by the non-payment of rent, interest, or income, or by the invalidity of titles, or by the death of one upon whom depends the continuance of pecuniary support or assistance."[4] But, in a general way, the following are not valid subjects of insurance, viz.: Unlawful enterprises; as, for example, lottery tickets,

[1] Hooper *v.* Robinson, 98 U. S. 528.

[2] Newson *v.* Douglass, 7 Har. & J. 417; 16 Am. Dec. 317.

[3] De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68; 33 Am. Dec. 38.

[4] May on Insurance, sec. 73; Bell *v.* Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542. Fire insurance on time, by open policies, of the future material productions of the assured in the course of his business in his trade or calling are valid contracts of indemnity, and not wager policies: Sawyer *v.* Ins. Co., 37 Wis. 503. Profits expected from a certain thing or enterprise may be insured, provided the insured has an interest in the property out of which the profits are to arise: May on Insurance, sec. 79; Sun Fire Office *v.* Wright, 3 Nev. & M. 819; 1 Ad. & E. 621; Barclay *v.* Cousins, 2 East, 544; Grant *v.* Parkinson, Park, 402; Marshall on Insurance, sec. 95; Putnam *v.* Mercantile Ins. Co., 5 Met. 391; Loomis *v.* Shaw, 2 Johns. Cas. 36; Niblo *v.* N. A. Fire Ins. Co., 1 Sand. 551; Leonarda *v.* Phœnix Assurance Co., 2 Rob. (La.) 131; Sawyer *v.* Ins. Co., 37 Wis. 503.

where lotteries are prohibited by law, or slaves, where the slave-trade or slavery is prohibited; or illegal property; as, for example, intoxicating liquors kept by the assured for illegal sale,[1] or where premises are kept for gaming purposes;[2] so an insurance policy procured by fraud is void.[3]

§ 2044. **Contract Made before Issuance of Policy.**— There may be a valid contract to insure before the making or the delivery of the policy. And this contract will be enforced by the courts.[4] But to establish an executory contract of insurance, it must appear that an agreement to insure was in fact entered into, and that nothing essential to a complete agreement was left open for future determination.[5] A contract of insurance is complete without delivery of the policy, where an application has been made which has been approved and accepted by the company, or its proper agents for that purpose, and a policy has thereupon been made and executed, and notice of such execution given to the applicant.[6] The destruction of property after the risk has commenced, and before

[1] Kelly *v.* Ins. Co., 97 Mass. 288. *Contra*, Niagara etc. Ins. Co. *v.* De Graff, 12 Mich. 124. An insurance of wines and liquors as part of a stock of drugs and medicines, and such merchandise as is usually kept in a country store, is not necessarily invalid as an insurance of liquors kept for illegal use: Carrington *v.* Lycoming Fire Ins. Co., 53 Vt. 418; 38 Am. Rep. 687. Where a by-law of a mutual insurance company provides that if buildings insured are appropriated to illegal purposes the agent must insist upon the removal of the danger, or cancellation of the policy, the mere appropriation of an insured building to illegal purposes did not avoid the policy: Behler *v.* Ins. Co., 68 Ind. 347.

[2] Lawrence *v.* Ins. Co., 127 Mass. 557; Johnson *v.* Ins. Co., 127 Mass. 555. A policy void as to buildings by virtue of a statute may be valid as to furniture therein, the illegal provisions being distinct and capable of separation, and there being no express words in the act to render the whole void: Loehner *v.* Ins. Co., 17 Mo. 247.

[3] Moore *v.* Ins. Co., 28 Gratt. 508; 26 Am. Rep. 373.

[4] May on Insurance, sec. 45; Excelsior Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343; 14 Am. Dec. 271; Gifford *v.* Ins. Co., 1 Hann. 432; Mead *v.* Davidson, 4 Ad. & E. 303; Keim *v.* Home Ins. Co., 42 Mo. 38; 97 Am. Dec. 291; Davenport *v.* Ins. Co., 17 Iowa, 276; Home Ins. Co. *v.* Adler, 77 Ala. 242. See Heiman *v.* Phœnix Ins. Co., 17 Minn. 153; 10 Am. Rep. 154. The date of the policy is not conclusive as to the time when the contract was made: Earl *v.* Shaw, 1 Johns. Cas. 314; 1 Am. Dec. 117.

[5] Johnson *v.* Ins. Co., 84 Ky. 470.

[6] Sheldon *v.* Ins. Co., 25 Conn. 207; 65 Am. Dec. 565.

the policy is issued, if there be no fraud or concealment by the party insured, makes the company liable.[1]

ILLUSTRATIONS.— Plaintiff's agent applied for insurance, and agreed upon all the terms, but left the office before the policy was filled out, which was done within a few hours, and notice thereof given by the company, accompanied by notice that the company had received information that a loss had happened. On calling for the policy, and tendering the premium, the agent was refused, on the ground that a loss had happened before the delivery, and the contract was not complete. *Held*, that the contract was complete before the loss, and the company was liable: *Kohne* v. *Ins. Co.*, 1 Wash. C. C. 93. Insurers, on receiving a premium, agreed to deliver a policy covering specific property, and afterwards sent a policy varying from the terms of the contract, and a loss occurred within the insurance contracted for. *Held*, that the insured might recover according to the contract agreed on: *Franklin Ins. Co.* v. *Hewitt*, 3 B. Mon. 231. F. entered into verbal negotiations with the agent of an insurance company for a policy. The agent was authorized "to bind the company during the correspondence," but, through his neglect, the company did not receive and act upon the application of F. until a loss by fire had occurred. *Held*, that the company was liable: *Fisk* v. *Cottenet*, 44 N. Y. 538; 4 Am. Rep. 715. Defendant's agent agreed orally with plaintiff to insure his building, and to make out and deliver a policy, the premium to be paid on delivery. No policy was made out, although the agent had authority to do so, but plaintiff's building was destroyed by fire, and he afterward tendered the premium. *Held*, that the contract of insurance was valid, and defendant was liable: *Angell* v. *Hartford Fire Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322. A policy was issued to plaintiff, as agent of the owners. Plaintiff had an interest in the property as mortgagee, of which he informed the insurers. Afterwards he obtained title by foreclosure. He notified the insurers of this, and of the fact that he had agreed to convey to a third person. They consented that the policy should remain valid till the vendee's title was perfected. *Held*, that this agreement was equivalent to issuing a new policy to plaintiff: *Benjamin* v. *Ins. Co.*, 17 N. Y. 415. Plaintiff, at the solicitation of the agent, signed an application for a policy, wherein it was provided that the policy should take effect from the day the application was approved, and gave his note for the premium. The agent gave a receipt for the note, at the same time promising plaintiff that the policy would take effect from the date of the application. The

[1] Commercial Ins. Co. v. Hallock, 27 N. J. L. 645; 72 Am. Dec. 379.

application was sent to the principal office, and was rejected; but before the agent had informed plaintiff of the failure of the negotiations, the property proposed to be insured was destroyed by fire. *Held*, not a valid contract of insurance: *Winnesheik Ins. Co.* v. *Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64. The insured, who had insurance in several companies, some of which had expired, told the agent representing these companies that he wanted insurance to a certain amount, and that if the insurance remaining in force did not amount to that much, he wanted the difference made up in renewals or new policies. By a mistake of the agent, or of both the agent and the insured, as to the policies still in force, the insured obtained only one half the insurance he desired. *Held*, that there was no contract for the renewal of the policies, which were not in fact renewed, and that the companies in which the additional insurance would have been taken but for the mistake were not liable, either by contract or estoppel: *Johnson* v. *Ins. Co.*, 84 Ky. 470.

§ 2045. Payment of Premium as Condition Precedent. — Unless otherwise provided by the policy, neither the payment of the premium nor the reception of the policy by the insured are prerequisites to a contract of insurance; such contract is completed when there is an assent to the terms of it by the parties upon a valuable consideration.[1] And even where the payment of the premium is made by its terms a condition precedent, it is open to the party to show that notwithstanding the premium has not been paid or the policy delivered, it was the intention of both parties that the policy or agreement should be considered in force.[2] When a policy of insurance is issued without payment of premium, the inference is, that the insurers intend to give credit for it. They cannot cancel the policy for non-payment, without taking some step (such as a demand anew) to put the insured in

[1] Blanchard *v.* Waite, 28 Me. 51; 48 Am. Dec. 474.

[2] May on Insurance, sec. 56; Faunce *v.* State Mutual Life Assurance Co., 101 Mass. 279; Heiman *v.* Phœnix Mutual Life Ins. Co., 17 Minn. 153; 10 Am. Rep. 154; Giddings *v.* North Western Mutual Life Ins. Co., 102 U. S. 108; Cooper *v.* Pacific Mutual Life Ins. Co., 7 Nev. 116; 8 Am. Rep. 705; Myers *v.* Liverpool etc. Ins. Co., 121 Mass. 338; Dinning *v.* Phœnix Ins. Co., 68 Ill. 415; City Ins. Co. *v.* Zoller, 4 Ins. Law J. 480; Berthoud *v.* Atlantic Fire Ins. Co., 13 La. 539; Sheldon *v.* Ins. Co., 25 Conn. 207; 65 Am. Dec. 565.

default.[1] The premium is considered paid to the company when, according to instructions, it is delivered to the express company addressed to the agent of the insurance company,[2] even though it never reaches the insurer.[3] And if the company, by its acts or by its habits and course of business, creates in the mind of the policy-holder a belief that payment of premiums may be delayed until demanded, or otherwise waives the right to demand it, the policy is binding on the company, notwithstanding the policy expressly stipulates that it shall be void unless the premium is paid.[4]

ILLUSTRATIONS. — A policy was executed and sent to the agent of the company, but was not delivered to the insured, and was withheld until payment of the premium should be made, which was not made when the insured died. *Held*, that the contract of insurance was not complete: *Collins* v. *Ins. Co.*, 7 Phila. 201. A life policy made payment of premiums a condition precedent to the binding force of the policy, but the agent, the company consenting, was in the habit of giving credit for the premiums. During such a credit, and after the agent had filled out and countersigned, as usual, a renewal receipt, which he retained in his office at the request of the assured, the latter died. *Held*, that the policy was in force: *Tennant* v. *Travelers Ins. Co.*, 31 Fed. Rep. 322. R. insured his building for one year. About the time it expired he called on the agent to renew his insurance for another year. Not having the money with him, but being considered perfectly good for it, the agent accepted the application, and forwarded it to the company, stating the facts. The company accepted the application, issued the renewal, and forwarded it to the agent, stating to him that they would hold him (the agent) responsible for the premium. *Held*, a contract between the company and R. to insure his property according to the terms and stipulations of the renewal: *Planters' Ins. Co.* v. *Ray*, 52 Miss. 325. Defendant mailed a policy of insurance to plaintiff, and with it a letter stating that its agent A would call in a few days and settle for the policy. When A called, plaintiff was not at home, and A asked plaintiff's son to tell him to forward the premium to the company

[1] Lotoix *v.* Germania Ins. Co., 27 La. Ann. 113.

[2] Whitley *v.* Ins. Co., 71 N. C. 480.

[3] Currier *v.* Ins. Co., 53 N. H. 538.

[4] Home P. Co. *v.* Avery, 85 Ala. 348; 7 Am. St. Rep. 54; Bang *v.* Ins. Co., 1 Hughes, 290; New York Ins. Co. *v.* Ins. Co., 20 Barb. 468; Fowler *v.* Ins. Co., 41 Hun, 357.

and it would be all right. *Held*, that plaintiff had a reasonable time after notification by his son within which to forward the premium, and that for a loss occurring within that time the company was liable. Three days was not an unreasonable time: *Carson* v. *German Ins. Co.*, 62 Iowa, 433. C. signed an application for life insurance, and submitted to a medical examination, under an agreement that the policy when issued should be forwarded by mail to C.'s address in New York, who, if it was found to be as agreed, was to send the premium, or if not, to return the policy; the policy to take effect when the premium was paid. Afterwards the agent so mailed it to C at New York, the envelope being marked, "Return in ten days if not called for." It was returned, uncalled for. The agent then sent the policy to another place where he supposed C. might be, but C. had died two days before it was sent. *Held*, not a complete contract of insurance, and no liability attached under it: *Rogers* v. *Ins. Co.*, 41 Conn. 97. An insurance agent sent a policy, containing a condition that no insurance should be binding until actual payment of the premium, by mail to an applicant, with the request, "should you decline the policy, please return it by return mail; if you retain it, please send me the amount" of the premium. *Held*, a waiver of the condition, and that the policy was valid: *Sheldon* v. *Ins. Co.*, 26 N. Y. 460. The insured agreed to pay $1.25 upon the death of any member, within thirty days after date of said death, being notified thereof by publication in one daily newspaper for five consecutive days. *Held*, that the assured was allowed the entire thirty days, commencing and counting from and after the last of the five days of publication: *Wetmore* v. *Mutual etc. Ins. Ass.*, 23 La. Ann. 770.

§ 2046. Acceptance by Agent Subject to Approval by Insurer.—Where the company reserves the right to approve or reject the risk taken by the agent, it will not be liable for a loss occurring before it has communicated its disapproval.[1] An insurance company is not liable on a policy, where its agent agreed with a person on terms of insurance subject to ratification by the company, and the company issued a policy on different terms, forwarding the same through the agent to the insured, with a request for its return if he did not comply with its terms,

[1] Allerbem *v.* Ins. Co., 57 Iowa, 274; Winnesheik Ins. Co. *v.* Holzgrave, 58 Ill. 516; 5 Am. Rep. 64.

which policy he retained, but without complying with its terms.[1]

ILLUSTRATIONS. — A applied to an insurance agent for a policy on his life. His application was made out, he was examined, and he gave to the agent his note for the amount of the first premium. Before it was paid, or the application forwarded to the company, A was killed. *Held*, that the company was not liable: *Covenant etc. Association* v. *Conway*, 10 Ill. App. 348. A fire insurance company having received an application for a policy, contracted to accept the risk for the term of thirty days from date, "unless the applicant is sooner notified of its rejection. If he receives no notice that the risk is rejected, the insurance will cease at the end of thirty days, unless a regular policy has been issued." After expiration of the thirty days, a loss occurred, no policy having been issued, nor notice of rejection given. *Held*, that the company was not liable: *Barr* v. *North America Ins. Co.*, 61 Ind. 488. An insurance agent agreed to insure plaintiff's house on certain specified terms in some company represented by him, but not designated. Defendant, one of these companies, decided to insure the house on entirely different terms, but before plaintiff was so informed, the company determined not to take the risk. *Held*, that there was no contract by defendant to insure: *Sheldon* v. *Helka Fire Ins. Co.*, 65 Wis. 436. A applied to the agent of several insurance companies for insurance, paid part of a premium, and after his house burned, paid the rest, demanded a policy, and failing to get it, sued one of the companies represented by the agent. There was no evidence of a contract for insurance with any particular company. *Held*, that the action was not maintainable: *New Orleans Ins. Association* v. *Boniel*, 20 Fla. 815. In a receipt given by the general agent of an insurance company, he agreed, if the application should be approved by the company, to furnish a policy to M. within thirty days "or if the application is declined, to return the above amount to him or his order on demand and return of this receipt." The application was approved by the company, and a policy sent to the agent within thirty days; but before delivery M. died, and the agent returned the policy to the company. *Held*, that the receipt did not operate as a present insurance for thirty days or until a policy should be furnished: *Marks* v. *Ins. Co.*, 117 Mass. 528. A company issued a policy on the goods of its agent, who, on the day of its receipt, made an entry in his books of accounts with the company of the amount chargeable against him for the premiun. He forwarded no letter of acceptance, nor any

[1] Myers v. Ins. Co., 27 Pa. St. 268; 67 Am. Dec. 462.

part of the premium, inasmuch as it was not the custom to forward remittances pertaining to his agency until the end of the month. The next day the goods were destroyed by fire, whereupon he immediately announced the loss to the company. *Held*, that the company was liable on the policy: *Lungstrass* v. *German Ins. Co.*, 48 Mo. 201; 8 Am. Rep. 100.

§ 2047. **Delivery of Policy — What Constitutes.** — To constitute a delivery of the policy, it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured.[1] No formal acceptance is necessary,[2] and an application for insurance may be withdrawn at any time before the policy is issued.[3] Where a policy is agreed to be delivered within a month, no demand is necessary.[4] Whether, when the charter and by-laws of a company provide that the insurance shall not take effect until the premium is paid in cash the agent taking the risk may waive these or other conditions, has been decided in different ways by different courts. In Maine such a waiver by the agent has been held sufficient to bind the company.[5] On the other hand, in other cases it has been ruled that the agent has no power to make such a waiver.[6] Where a policy is sent to the assured, and he refuses to accept it and pay the premium according to its terms and his agreement, but holds it to look into the standing of the company while it is under advisement, without delivery, acceptance, and payment of the premium, the property is at the risk of the assured,

[1] May on Insurance, sec. 60; citing New England etc. Ins. Co. *v.* Robinson, 25 Ind. 537; Whitaker *v.* Ins. Co., 29 Barb. 312; Southern Life Ins. Co. *v.* Kempton, 56 Ga. 339.

[2] May on Insurance, sec. 60; citing Xenos *v.* Wickham, L. R. 2 H. L. 296.

[3] Globe Mutual etc. Ins. Co. *v.* Snell, 19 Hun, 560.

[4] West. Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347.

[5] Bragdon *v.* Ins. Co., 42 Me. 259.

[6] Barrett *v.* Union Mut. Fire Ins. Co., 7 Cush. 175; Real Estate Mutual Fire Ins. Co. *v.* Roessle, 1 Gray, 336; Montreal Ins. Co. *v.* McGilivray, 9 L. C. Q. B. 488; Spitzer *v.* St. Mark's Ins. Co., 6 Duer, 6; Mound City Mutual Fire Ins. Co. *v.* Curran, 42 Mo. 374.

and he cannot recover in case of loss by fire. It is too late to accept the policy and tender the premium after the property is destroyed, where the policy requires prepayment, and there has been no waiver.[1]

ILLUSTRATIONS. — An application was made to the agent of defendant for a policy of insurance on the life of plaintiff's husband, the applicant paying fifty dollars, according to the rules of defendant, to be applied on the first year's premium, if the insurance should be effected. The application was forwarded to defendant's office, and a policy was made out and sent to the agent for delivery; but the insured having died two days after the policy was issued, but before its delivery, the agent refused to deliver it, although the balance of the premium was offered to be paid. *Held*, that the policy had attached: *Cooper* v. *Pacific Mutual Ins. Co.*, 7 Nev. 116; 8 Am. Rep. 705.

§ 2048. **Countersigning by Agent—Indorsements on Policy, in General.** — When the policy provides that the countersignature of an agent is requisite to the validity of the policy, this countersignature must be had.[2] But this provision may be waived.[3] Policies frequently provide that notice of other insurance, and other matters which are required to be notified to the insurer, must be indorsed on the policy; otherwise the insurance shall be void. There are a few cases in the reports which hold that this is a condition precedent which the insured must show has been complied with or he cannot recover.[4] But a more just rule is established in the later cases, viz., that by the insurer receiving such notice by word of mouth or by writing not indorsed on the policy without

[1] Millville etc. Ins. Co. *v.* Collerd, 38 N. J. L. 480.

[2] Hardie *v.* Ins. Co., 26 La. Ann. 242; Badger *v.* Ins. Co., 103 Mass. 244; 4 Am. Rep. 547.

[3] Myers *v.* Keystone Mut. Life Ins. Co., 27 Pa. St. 268; 67 Am. Dec. 463; United Life, Fire, and Marine Ins. Co. *v.* Ins. Co. of N. A., 42 Ind. 588; Westchester Fire Ins. Co. *v.* Earle, 33 Mich. 143; Hibernia Ins. Co. *v.* O'Connor, 29 Miss. 241; Walker *v.* Met. Ins. Co., 56 Me. 371; Kelley *v.* Com. Ins. Co., 10 Bosw. 82; Ellis *v.* Albany City Fire Ins. Co., 4 Lans. 433; 50 N. Y. 402; 10 Am. Rep. 495.

[4] Worcester Bank *v.* Ins. Co., 11 Cush. 265; 59 Am. Dec. 145; Hutchinson *v.* Ins. Co., 21 Mo. 97; 64 Am. Dec. 218. A charter provision of this kind, it was had in a late case, could not be waived: Couch *v.* Ins. Co., 38 Conn. 181; 9 Am. Rep. 375.

objection, he will be deemed to have waived the condition, and will be estopped from setting it up against the insured.[1]

ILLUSTRATIONS.—A policy of insurance declared that "if, without written consent herein, there is any prior or subsequent insurance, this policy shall be void." It was also provided that the policy was not to be valid unless countersigned by the general agent. *Held*, that the consent thus required must be given by the person who was to countersign: *Security Ins. Co.* v. *Fay*, 22 Mich. 467; 7 Am. Rep. 670. An application in writing for life insurance having been made by A to the company's local agent, who only had authority to collect premiums and receive applications, and A having given to the agent his note for the premium, the application, which provided that the contract should "be completed only by delivery of the policy," was forwarded to the home office, and a policy was returned to the agent, providing on its face that it was to take effect when countersigned by the agent. The policy was not countersigned nor delivered. Soon afterwards A died. *Held*, that there was no contract of insurance: *McCully* v. *Ins. Co.*, 18 W. Va. 782. On the day when an insured house was vacated, a general agent of the company was notified, and consented to its remaining vacant more than the fifteen days limited therefor in the policy. On being asked if it was necessary to have the consent indorsed on the policy, he replied that it was not; that it was indorsed on his book, and was all right. He made a memorandum of the consent in his register, but no indorsement was made on the policy, nor any report to the company of the giving of consent. No other mode of consent was specified in the policy than that by indorsement thereon. *Held*, not a waiver of the condition: *Walsh* v. *Hartford Fire Ins. Co.*, 73 N. Y. 5. The wife of N. took out a policy on his life in a life insurance company for which he was agent. The receipts for the premiums on policies of his company were in the form of renewal certificates, and contained a condition that the receipt should not be valid and binding on the company until the premium was paid and the receipt countersigned by the agent. After the death of N., receipts for the several premiums were found among his papers, but they were not countersigned by

[1] Webster *v.* Ins. Co., 36 Wis. 67; 17 Am. Rep. 479; Carrugi *v.* Ins. Co., 40 Ga. 135; 2 Am. Rep. 567; Fishbeck *v.* Ins. Co., 54 Cal. 422; Horwitz *v.* Ins. Co., 40 Mo. 557; 93 Am. Dec. 321; Hayward *v.* Ins. Co., 52 Mo. 181; 14 Am. Rep. 400; Polkington *v.* Ins. Co., 55 Mo. 172; Westchester Ins. Co. *v.* Earle, 33 Mich. 143; Planters' Ins. Co. *v.* Lynes, 38 Tex. 253; Levy *v.* Ins. Co., 10 W. Va. 560; Van Bories *v.* Ins. Co., 8 Bush, 133; Pitney *v.* Ins. Co., 65 N. Y. 6; Titus *v.* Ins. Co., 81 N. Y. 410.

him. *Held*, that the receipts were *prima facie* evidence, in an action on the policy, of the payment of the premiums: *Norton* v. *Phœnix Mutual Life Ins. Co.*, 36 Conn. 503; 4 Am. Rep. 98.

§ 2049. **Cancellation of Policy.** — When the contract has been entered into for a term, it cannot be canceled by either party before the end thereof, without the consent of both,[1] unless, of course,— and this is usually in fire insurance the case,—the policy provides that it may be canceled by notice on the part of either party at any time.[2] An agreement that if the holder of the policy wishes to cancel it, "a fair proportion of the premiums will be returned," is not void for uncertainty.[3] The right which the policy of fire insurance usually gives the insurer to cancel it at his option at any time can only be exercised in strict compliance with its terms.[4] And the insured must be placed *in statu quo*.[5] An option reserved by an insurance company to cancel a policy is not exercised by a request for the return of the policy for cancellation.[6] A tender of the amount of the unearned premium with the notice of cancellation is a condition precedent to the exercise of the right of the company to cancel the policy of insurance.[7] It cannot be exercised in the face of a fire actually threatening the property insured.[8] But the fact that the property insured is in greater danger of fire when the offer so to refund is made than when the policy was issued will not prevent the company from rescinding the contract, if acting in good

[1] May on Insurance, sec. 67. An agent to procure insurance has no power to make an agreement for cancellation: Rothschild *v.* Ins. Co., 74 Mo. 41; 41 Am. Rep. 303. But see Standard Oil Co. *v.* Ins. Co., 3 Hun, 591.

[2] May on Insurance, sec. 67; Akers *v.* Ins. Co., 94 Pa. St. 394; 39 Am. Rep. 792. And in such case the company, on the refusal of the assured to deliver up the policy for cancellation, has a remedy in equity to compel him: Connecticut Mut. Ins. Co. *v.* Home Ins. Co., 17 Blatchf. 142.

[3] Hayward *v.* Knickerbocker Life Ins. Co., 12 Daly, 42.

[4] Runkle *v.* Ins. Co., 11 Rep. 599; Chase *v.* Ins. Co., 67 Me. 85; Hathorn *v.* Ins. Co., 55 Barb. 28.

[5] Peoria Ins. Co. *v.* Botto, 47 Ill. 516.

[6] Griffey *v.* Ins. Co., 100 N. Y. 417; 53 Am. Rep. 202.

[7] Peoria Ins. Co. *v.* Botto, 47 Ill. 516.

[8] Home Ins. Co. *v.* Heck, 65 Ill. 111.

faith upon representations of their agent that the property—as cord wood piled near a railroad—is not properly protected from fires burning in the surrounding forests, the danger however not being imminent.[1] Where policies were determinable at pleasure by either side, the assured by request, the company by notice, it was held that the company's making an assignment for the benefit of its creditors did not cancel existing policies, nor did the institution of proceedings by the superintendent of insurance have this effect until it resulted in the decree dissolving the company.[2] When the life of one is insured for the benefit of another, the contract cannot be canceled without the consent of the beneficiary.[3] Employing an agent to procure a policy does not make him the agent of the insured to receive notice of cancellation.[4] The fact that a husband applied for and received a policy of life insurance for his wife, as her agent, does not empower him to surrender it without her consent.[5] An insurance company may be liable to a *bona fide* purchaser for value of the property and the policy, notwithstanding the person who procured the policy has, by mistake, ordered it canceled; and notwithstanding the money for the premium was never actually delivered in payment, if the party originally insured held an off-set against the company which operated as payment.[6]

ILLUSTRATIONS.—Defendants, in their policy, reserved the right to cancel them, "on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term." Before a loss occurred, the policy was returned for cancellation to the company's agent, who notified plaintiff's agent that he was ready to pay the unearned premium, but he did

[1] Home Ins. Co. *v.* Heck, 65 Ill. 111.
[2] Relfe *v.* Ins. Co., 10 Mo. App. 393.
[3] Forsyth *v.* Ins. Co., Ill. Sup. Ct., 1873; May on Insurance, sec. 67; Trager *v.* Ins. Co., 9 Ins. Law J. 817; Marvin *v.* Ins. Co., 4 U. C. App. 330; Chase *v.* Ins. Co., 67 Me. 85.
[4] Von Wein *v.* Ins. Co., 52 N. Y. Sup. Ct. 490; Hermann *v.* Ins. Co., 100 N. Y. 411; 53 Am. Rep. 197. But see Grace *v.* Ins. Co., 16 Blatchf. 433.
[5] Stilwell *v.* Mutual Life Ins. Co., 72 N. Y. 385.
[6] Marsh *v.* N. W. Nat. Ins. Co., 3 Biss. 351.

not in fact pay it until a month subsequent; in the mean time the loss occurred. *Held*, that plaintiff could recover: *Hollingsworth* v. *Germania Ins. Co.*, 45 Ga. 294; 12 Am. Rep. 579. A general agent, having instructed a local agent to cancel a certain policy, the latter sent the canceling card in a letter to the assured, and stated that the unearned premium was in his hands, subject to the order of the assured. But before the assured received the letter, the local agent told him not to mind the card, as he would carry the risk till the assured heard from him again. Afterwards the assured wrote to the local agent to transfer the policy to another company, of which he was also agent, but before compliance the loss occurred. *Held*, that there was no cancellation of the policy: *Ætna Ins. Co.* v. *Maguire*, 51 Ill. 342. The charter of an insurance company provided that the cancellation of any policy could not take effect until entered on the books of the company, to which time the right to make assessments was reserved. In 1861 the board of directors passed a resolution that, owing to the civil commotion and consequent great number of incendiary fires, risks on all policies outside the county of St. Louis would be discontinued on notice thereof by the secretary. *Held*, that such notification to a policy-holder would not terminate the liability, without such entry: *Landis* v. *Home Mut. Fire and Marine Ins. Co.*, 56 Mo. 591.

§ 2050. **Duration of Risk—When It Commences and Terminates—Renewals.**—A policy of insurance, as a general rule, takes effect from its date, and covers risks, beginning at that time, unless otherwise provided.[1] If the agreement is, that it is to cover risks prior to its date, the insurer will be bound for a loss occurring during that period.[2] If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes.[3] If it be delivered, but upon the express stipulation that it is to take effect on a certain day, that stipulation will control;[4] or upon the express understanding that it is not to take effect till another policy has been surrendered, it will not

[1] Ruse *v.* Ins. Co., 23 N. Y. 516; Whitaker *v.* Ins. Co., 29 Barb. 312.

[2] Hallock *v.* Ins. Co., 26 N. J. L. 268.

[3] Lightbody *v.* N. A. Ins. Co., 23 Wend. 18; City of Davenport *v.* Peoria Mar. & Fire Ins. Co., 17 Iowa, 276; Hubbard *v.* Ins. Co., 33 Iowa, 125; 11 Am. Rep. 125.

[4] American Horse Ins. Co. *v.* Patterson, 28 Ind. 17; Western *v.* Genesee Mut. Ins. Co., 12 N. Y. 258.

relate back so as to cover a loss which occurs prior to the required surrender.[1] When the property is distant, and its *status* unknown to either party, an insurance against fire will bind the insurer for a loss occurring before the date of the contract, if such appears, either from the policy or from attending circumstances, to have been the intention of the parties.[2] Insurance from a given day until a certain other given day, and for so long after as the insured shall pay the premium paid on the first day, extends to and includes the latter day.[3] Where a policy fails to state for how long it is issued, and in fourteen days the property burns, an action on the policy may be maintained.[4] A parol agreement with an insurance company, made in October, that a policy for twelve months should be issued in the early part of November, would, by its terms, cover a loss occurring on the morning of November 19th.[5] A renewal of a policy of fire insurance is in effect a new contract of insurance, and, unless otherwise expressed, on the same terms and conditions as the original policy; and a notice that the insured premises had become vacant, required and given under the original policy, should be given again under the renewed policy, the same state of vacancy continuing.[6] Where the term for which an insurance is effected is about to expire, and a premium is paid for another term, for which a renewal receipt is given, under the conditions contained in the policy, such renewal receipt does not constitute a new agreement of insurance, but merely revives an expiring contract and continues it in force another term. And if a loss occurs within the new term, a recovery must be had upon the original contract, if a recovery is to be had at all.[7] Where a policy having expired June 10, 1878, a

[1] Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.
[2] Security Fire Ins. Co. *v.* Ins. Co., 7 Bush, 81; 3 Am. Rep. 301.
[3] Isaacs *v.* Royal Ins. Co., 22 L. T. 681.
[4] Schroeder *v.* Ins. Co., 109 Ill. 157.
[5] Home Ins. Co. *v.* Adler, 71 Ala. 516.
[6] Hartford Fire Ins. Co. *v.* Walsh, 54 Ill. 164; 5 Am. Rep. 115.
[7] New England etc. Ins. Co. *v.* Wetmore, 32 Ill. 221.

renewal dated June 19th by its terms continued the policy in force for a year from June 10th, a loss from a fire occurring June 16, 1879, cannot be deemed within the policy.[1] After a policy is forfeited it cannot be renewed or revived except by an express agreement of the insurers.[2] Mere loose general conversation relating to the renewal of a policy had between the assured and an agent authorized to renew policies cannot be deemed equivalent to a renewal;[3] nor does the fact that the assured, after the expiration of the term of his policy, applied to have it continued in force temporarily, and received no reply, justify him in supposing that the policy was continued.[4]

ILLUSTRATIONS. — Plaintiff applied for a policy on his premises; the application was accepted, and the policy was made out and executed. But plaintiff not having the money to pay the premium, the policy remained in the hands of the company until two months thereafter, when plaintiff paid the premium and received the policy. Before such payment and delivery, the premises had been destroyed by fire, which fact plaintiff did not disclose to the company. *Held*, that upon receipt of the premium and delivery of the policy the contract to insure related back to the date of the policy, and that the company was liable for the sum assured: *Baldwin* v. *Ins. Co.*, 56 Mo. 151; 17 Am. Rep. 671. The term named in the policy was one year, and the premium thirty dollars; it had been renewed for a second year on payment of a like premium, and upon the agreement for a second renewal the same amount of premium was paid, but the testimony did not show that anything was said as to the time the renewed policy was to run. *Held*, that the renewal was for one year: *Scott* v. *Ins. Co.*, 53 Wis. 238. A policy was issued by defendant upon plaintiff's "hop-house while drying hops," from August 15, to October 15, 1875. The hop-house was destroyed by a fire which occurred within the time specified, but after plaintiff had ceased drying hops. *Held*, that defendant was not liable: *Langworthy* v. *Ins. Co.*, 85 N. Y. 632.

§ 2051. **Warranties.** — A warranty is a stipulation inserted in writing on the face of the policy, on the literal

[1] Fuchs *v.* Ins. Co., 60 Wis. 286.
[2] Diehl *v.* Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302.
[3] O'Reilly *v.* Corp., 101 N. Y. 575.
[4] Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6; 4 Am. St. Rep. 622.

truth or fulfillment of which the validity of the entire contract depends.[1] It is in the nature of a condition precedent, and must be strictly complied with. Warranties are said to be affirmative or promissory. An affirmative warranty is one which alleges the existence at the time of a particular fact; a promissory warranty agrees or warrants that something shall be done in the future, or shall be omitted to be done.[2] If the warranty be a statement of facts, it must be literally true; if of an intention or promise to be performed in the future, it must be literally performed. It matters not that it is not material to the risk.[3] And there can be no excuse for its not being performed. "The contract is that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law, or the act of God, the insured can have no claim."[4] The word "warranty" need not be used; any statement or stipulation or form of words upon the absolute truth of which it is clear the contract is intended by the parties to depend will amount to a warranty.[5] On the other hand, even the use of the word "warranty" will not make

[1] Arnould on Insurance, cited in May on Insurance, sec. 156.

[2] May on Insurance, sec. 157.

[3] May on Insurance, sec. 156; Duncan *v.* Ins. Co., 6 Wend. 488; 22 Am. Dec. 539; Inman *v.* Ins. Co., 12 Wend. 460; Burritt *v.* Ins. Co., 5 Hill, 193; 40 Am. Dec. 345; Kennedy *v.* Ins. Co., 10 Barb. 286; Wall *v.* Ins. Co., 14 Wall. 385; Jennings *v.* Ins. Co., 2 Denio, 75; Belings *v.* Ins. Co., 20 Conn. 137; Washington Ins. Co. *v.* Merchants' Ins. Co., 5 Ohio St. 450; Mutual Ins. Co. *v.* Miller, 39 Ind. 475; Wood *v.* Ins. Co., 13 Conn. 533; 35 Am. Dec. 92; Glendale Woolen Co. *v.* Proctor, 21 Conn. 19; 54 Am. Dec. 309.

[4] May on Insurance, citing Cooper *v.* Farmers' Mut. Fire Ins. Co., 50 Pa. St. 331; 88 Am. Dec. 544; Newcastle Fire Ins. Co. *v.* MacMorran, 3 Dowl. P. C. 255; Sayles *v.* North Western Ins. Co., 2 Curt. 612; Witherell *v.* Marine Ins. Co., 49 Me. 200; Pawson *v.* Watson, Cowp. 785; Anderson *v.* Fitzgerald, 24 Eng. L. & Eq. 1; 4 H. L. Cas. 484; Duckett *v.* Williams, 2 Cro. & M. 348. And see Snyder *v.* Ins. Co., 13 Wend. 92; Fowler *v.* Ins. Co., 7 Wend. 270; Inman *v.* Ins. Co., 12 Wend. 460; Goicoechea *v.* Ins. Co., 6 Mart., N. S., 51; 17 Am. Dec. 175; Farmers' Ins. Co. *v.* Snyder, 16 Wend. 481; 30 Am. Dec. 118; Daniels *v.* Ins. Co., 12 Cush. 416; 59 Am. Dec. 192; Hartford etc. Ins. Co. *v.* Harmer, 2 Ohio St. 452; 59 Am. Dec. 685; McLoon *v.* Ins. Co., 100 Mass. 472; 1 Am. Rep. 129.

[5] Wright *v.* Ass. Co., 41 N. Y. Sup. Ct. 1; 5 Bigelow's L. & Acc. Ins. Cas. 401.

one, where it is clear from the language that this is not the intention of the parties.[1] A statement in an application that "applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for or material in reference to this insurance" is a warranty on the part of the insured that all the facts inquired into are correctly given, whether material or not, and all other facts material to the risk are correctly given, even if not inquired into; nor can a provision that "the misrepresentation or suppression of material facts shall destroy his claim for a damage or a loss" qualify the previous covenant, because it can have its full effect consistently with it.[2] A representation that there is no building within ten rods of that sought to be insured is an express warranty; and if there is a building within that distance, there can be no recovery on the policy.[3] So is an answer in a policy whether a watchman is employed on the premises during the night.[4] So where a policy recites in the description of the building insured that it is "occupied for stores below, the upper portion to remain unoccupied during the continuance of the policy," the recital as to the occupancy of the lower story is an affirmative or an express warranty, which, if false at the time the policy was issued, will operate to avoid it, whether material to the risk or not; but it is not a continuous warranty. The stipulation, however, in regard to the upper story of the building is a promissory or executory warranty, a non-compliance with which at any during the

[1] Scales *v.* Scanlan, 6 Ir. L. 367; Howard etc. Ins. Co. *v.* Cormick, 24 Ill. 455; Kingsley *v.* Ins. Co., 8 Cush. 393; Fitch *v.* Ins. Co., 59 N. Y. 587; 17 Am. Rep. 372. Under the heading of "conditions and agreements," in a life insurance policy, was this condition: "1. That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the interests of this company." Held, that the statements of the application were warranties: Kelsey *v.* Universal etc. Ins. Co., 35 Conn. 225.

[2] Tebbetts *v.* Hamilton Ins. Co., 1 Allen, 305; 79 Am. Dec. 740.

[3] Frost *v.* Ins. Co., 5 Denio, 154; 49 Am. Dec. 234.

[4] Sheldon *v.* Ins. Co., 22 Conn. 235; 58 Am. Dec. 420.

existence of the policy will operate to avoid it, whether material to the risk or not.[1]

The failure to give an answer to a question in an application is not a warranty, either one way or the other,[2] nor does it avoid the policy;[3] nor is the recital in a policy that the assured is the owner of the property insured a warranty;[4] nor are the words "clerk sleeps in the store," in an application for insurance copied into the policy, a warranty.[5] Where a house and personal property in it are insured in the same policy, and the insurance is voidable as to the realty by reason of false representations of the applicant as to title, it will not be held valid as to the personalty, unless it clearly appears that the insurer would have taken both risks separately.[6] But in a New York case a policy insured fourteen distinct classes of property, some real and some personal, separately valued at a gross sum. The policy contained a warranty against encumbrances. There were outstanding mortgages on the real estate. The whole property was consumed. In an action on the policy, it was held that the loss was severable, and the insured might recover for the personalty, there being nothing in the circumstances to indicate any different intention on the part of the insurer.[7]

§ 2052. **What Papers are Part of Contract.** — Where the application, the conditions therein, the by-laws of the company, or any other matters are referred to in the policy, and by express words made part of it, or the policy states that they are issued upon the faith of them, here the extraneous matters are as much a part of the policy as if

[1] Stout *v.* City Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539.

[2] Carson *v.* Ins. Co., 33 N. J. L. 300; 39 Am. Rep. 584; Armenia Ins. Co. *v.* Paul, 91 Pa. St. 520; 36 Am. Rep. 676.

[3] Armenia Ins. Co. *v.* Paul, 91 Pa. St. 520; 36 Am. Rep. 676.

[4] Southern Ins. etc. Co. *v.* Lewis, 42 Ga. 587.

[5] Frisbie *v.* Ins. Co., 27 Pa. St. 325.

[6] Ætna Ins. Co. *v.* Resh, 44 Mich. 55; 38 Am. Rep. 228.

[7] Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452; 29 Am. Rep. 184.

written in it.[1] So the policy may be explained or controlled by the written application,[2] or by the survey.[3] And the same has been held where other papers annexed to a policy were referred to in it as "accompanying articles";[4] where certain "conditions of insurance" were printed on the other half of the sheet on which was printed the policy.[5] In fire policies representations made at the time of obtaining the policy are not a part of the policy unless distinctly referred to in it.[6] So a reference in a fire policy to the application and survey as containing a particular description of the property does not constitute such description a warranty, unless there is something in the policy to show that it is the intention to make the description a warranty.[7] If a policy refers to a written application not signed, authorized, or ratified by the insured, he will not be bound by it, although it is made a part of the contract and a warranty.[8] In the following cases it was decided that the matters were not part of the contract, viz.: On the back of the policy an indorsement showing the classes of risks, with the rights of the different classes, this indorsement not being referred to in the policy;[9] by-laws of the company printed on the back of the policy;[10] an indication in a policy of the place where the preliminary written application may be found on file;[11] the description of a building intended to be insured, filed in the office of the

[1] Cushman *v.* Ins. Co., 63 N. Y. 404; Murdock *v.* Ins. Co., 2 N. Y. 210; Duncan *v.* Ins. Co., 6 Wend. 488; 22 Am. Dec. 539; Wood *v.* Ins. Co., 13 Conn. 533; 35 Am. Dec. 92; Burritt *v.* Ins. Co., 5 Hill, 188; 40 Am. Dec. 345; Dewees *v.* Ins. Co., 34 N. J. L. 244; Holmes *v.* Ins. Co., 10 Met. 211; 43 Am. Dec. 428.

[2] Norris *v.* Ins. Co., 3 Yeates, 84; 2 Am. Dec. 360; Kennedy *v.* Ins. Co., 10 Barb. 285.

[3] Sheldon *v.* Ins. Co., 22 Conn. 235; 58 Am. Dec. 420; Stewart *v.* Ins. Co., 5 Hun, 261; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362.

[4] Hill *v.* Ins. Co., 6 Ins. Law J. 314.

[5] Murdock *v.* Ins. Co., 2 N. Y. 210; Kensington Nat. Bank *v.* Yerkes, 86 Pa. St. 227.

[6] Holmes *v.* Ins. Co., 10 Met. 211; 43 Am. Dec. 428.

[7] Farmers' Ins. & Loan Co. *v.* Snyder, 16 Wend. 481; 30 Am. Dec. 118.

[8] Lycoming Fire Ins. Co. *v.* Jackson, 83 Ill. 302; 25 Am. Rep. 386.

[9] Stone *v.* U. S. Casualty Co., 34 N. J. L. 371.

[10] Kingsley *v.* Ins. Co., 8 Cush. 393.

[11] Com. Ins. Co. *v.* Monninger, 18 Ind. 352.

company;[1] instructions and rules of a foreign mutual insurance company not referred to in the application or the policy, nor notified to the applicant or beneficiary.[2]

ILLUSTRATIONS. — A fire policy contained this provision: "This company will not be liable for more than two thirds the cash value of any building hereby insured." *Held*, that the fact that the provision was in fine print, and was not discovered by the holder of the policy until after the insured building had been burned, did not deprive the insurance company of the benefit of such provision: *Ervin* v. *New York Central Ins. Co.*, 3 Thomp. & C. 213. A life policy contained a stipulation that it should be void if a certain declaration made in the application by or for the person whose life was insured, "and upon the faith of which this agreement was made, shall be found in any respect untrue." *Held*, that such declaration constituted a portion of the contract, and was made material by the contract, and the only question of fact respecting the same was, whether it was true or false, without reference to its materiality, or the belief of the person making it that it was true: *Day* v. *Mutual Benefit Life Ins. Co.*, 1 McAr. 41; 29 Am. Rep. 565. By the terms of a policy issued by a mutual insurance company, the insured undertook to pay "assessments made pursuant to the articles of association and by-laws," and the company agreed, "according to the provisions of said articles," to pay and settle losses. *Held*, that the charter and rules were to be taken as part of the contract in the same manner as if introduced into the body of the instrument: *Simeral* v. *Dubuque Ins. Co.*, 18 Iowa, 319. In a policy of fire insurance reference was made to an application for an expired policy issued by another company through the same agent by the words "per application No. 1234." On the back of that application was a diagram of the insured premises. By the printed directions accompanying the expired policy the agents were required to draw such diagram. There was no evidence that the insured ever saw or had anything to do with the diagram. *Held*, 1. That reference to the application did not make it a part of the present policy; 2. That the presumption was that the diagram was drawn by the agent, and the insured was not bound by it: *Vilas* v. *New York Central Ins. Co.*, 72 N. Y. 590; 28 Am. Rep. 186. An application for a policy of life insurance contained an agreement that the answers and statements should "be the basis and form part of the contract or policy, and if the same be not in all respects true and correctly stated, the said policy shall be void according to the

[1] Delonguemare v. Ins. Co., 2 Hall, 589.

[2] Markey v. Mutual Benefit etc. Ins. Co., 103 Mass. 78.

terms thereof." The policy declared that the insurance was "in consideration of the representations," etc., and that fraud and intentional misrepresentations vitiate the policy, but did not otherwise refer to the application. *Held*, that the agreement and statements in the application did not become a part of the policy, and were not warranties, and that the policy was avoided only for fraud or intentional misrepresentations: *American Popular Life Ins. Co.* v. *Day*, 39 N. J. L. 89; 23 Am. Rep. 198.

§ 2053. Warranties are Strictly Construed.—Warranties are not favored; and where the language is capable of more than one construction, it will be held to import a simple representation, rather than a warranty.[1] By a warranty in a policy of fire insurance the insured is held only to a bare and limited compliance with the exact meaning of his engagement, which is not to be extended by construction to include anything not necessarily implied in its terms.[2] A stipulation in an application against fire, which is afterwards effected, that ashes are kept at all times in brick, is complied with if the ashes are kept in some mode equally safe.[3] A representation that there is a force-pump connected with a starch manufactory does not include a hose by implication.[4]

§ 2054. Written Matter Prevails over Printed Words.—Where the written matter in the policy conflicts with or contradicts the printed matter, the former will prevail.[5] Where they do not conflict, the policy is construed so as to give effect to both.[6] Where a special indorsement on an insurance policy exempts the insurer from liability for a partial loss, this must control an irreconcilable printed clause.[7]

[1] May on Insurance, secs. 162 et seq.; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72; 22 Am. Dec. 567; Price *v.* Phœnix Ins. Co., 17 Minn. 497; 10 Am. Rep. 166.

[2] Sayles *v.* Ins. Co., 2 Curt. 610.

[3] Underhill *v.* Ins. Co., 6 Cush. 440.

[4] Peoria Marine and Fire Ins. Co. *v.* Lewis, 18 Ill. 553.

[5] Mut. Fire Ins. Co. *v.* Coatesville, 80 Pa. St. 467; Nat. Bank *v.* Ins. Co., 95 U. S. 673; Wilkins *v.* Ins. Co., 30 Ohio St. 317; 27 Am. Rep. 455; Nicolet *v.* Ins. Co., 3 La. 366; 23 Am. Dec. 458.

[6] Goicoechea *v.* Ins. Co., 6 Mart., N. S., 51; 17 Am. Dec. 175.

[7] Chadsey *v.* Guion, 97 N. Y. 333.

§ 2055. **Representations — In General.** — Representations, like warranties, are either affirmative or promissory, the former being the affirmation of the existence of a fact at the time; the latter, a promise to be afterwards performed. A material falsity of the first kind will avoid the contract; a material falsity of the second kind, unless fraudulent, will not.[1] A representation is a statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into. A misrepresentation in the law of insurance is a statement of something as fact which is untrue in fact, and which the insured states, knowing it to be untrue, with the intent to deceive the insurers, or which he states positively as true without knowing it to be true, and which has a tendency to mislead.[2]

§ 2056. **Representations must be Material.** — The representation must be material. A representation is said to be material to the risk when it is of a kind calculated to influence the insurer in determining whether or not he will accept the risk, and what premium he will charge.[3] It is not a point material to the risk that a mill situated in the corner of one section is described in the application as being in the adjoining corner of the next section, just across a stream.[4] But where a fire policy is conditioned to be void "in case of any misrepresentation whatever," any misrepresentation, whether material or not, will avoid it.[5]

ILLUSTRATIONS. — An application for fire insurance contained a statement that "the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condi-

[1] May on Insurance, secs. 182 et seq.; Curell *v.* Ins. Co., 9 La. 163; 29 Am. Dec. 439.

[2] May on Insurance, sec. 181; citing Daniels *v.* Ins. Co., 12 Cush. 416; 59 Am. Dec. 192; Campbell *v.* Ins. Co., 98 Mass. 381; Hartford Ins. Co. *v.* Harmer 2 Ohio St. 452; 59 Am. Dec. 684; Bobbitt *v.* Ins. Co., 66 N. C. 70; 8 Am. Rep. 494; North American Ins. Co. *v.* Throop, 22 Mich. 146; 7 Am. Rep. 638.

[3] May on Insurance, sec. 184; Continental Ins. Co. *v.* Kasey, 25 Gratt. 268; 18 Am. Rep. 681.

[4] Prieger *v.* Ins. Co., 6 Wis. 89.

[5] Graham *v.* Fireman's Ins. Co., 87 N. Y. 69; 41 Am. Rep. 349.

tion, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and the same is hereby made a condition of the insurance and a warranty on the part of the assured." And the policy made the application a part of it and a warranty. *Held*, that the warranty was only such as was described in the application, and embraced only such statements as were material to the risk, and known to the insured to be false: *Redman* v. *Hartford Fire Ins. Co.*, 47 Wis. 89; 32 Am. Rep. 751. A policy of life insurance was stipulated to be void if the answers in the application should "be found in any respect to be untrue." *Held*, that a negative answer as to whether the party "ever met with any accident or serious injury" would not avoid the policy, where rendered untrue only by the fact that there had been a slight injury in no way affecting the future health of the applicant: *Wilkinson* v. *Connecticut etc. Ins. Co.*, 30 Iowa, 119; 6 Am. Rep. 657. A policy which was not "a valued policy" contained a stipulation that "in a valued policy an overvaluation shall render absolutely void a policy issued upon such . . . . valuation," and in the survey a question was asked as to the value, and erroneously answered. *Held*, that the overvaluation was not "material to the risk": *Cox* v. *Ætna Ins. Co.*, 29 Ind. 586. The charter of an insurance company provided that they should have a lien on all buildings insured. *Held*, that a false representation of title by the applicant was material to the risk, and avoided the policy: *Pinkham* v. *Morang*, 40 Me. 587.

§ 2057. Matters of Opinion. — Where the answer to the question involves a matter of opinion, an honest, though erroneous, answer is not a misrepresentation.[1] Thus

[1] In Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 508, the supreme court of the United States say: "As to the alleged breach of the warranty of the interest of the plaintiff in the life of Dillenberg, there is this answer: The statement of the plaintiff as to the amount of his interest was necessarily conjectural. No one can affirm with absolute certainty that he has an interest to a definite sum in the life of another, where the interest depends upon the result of an existing partnership or other business transactions not yet terminated. The value of his interest in such cases will always be more or less a matter of opinion. The statement in that regard must of necessity be taken as a mere estimate. If, therefore, the plaintiff had an interest in the life of Dillenberg, and his estimate was made in good faith, the declaration cannot be deemed untrue so as to constitute a breach of the warranty. The extent of a man's interest in the life of another, depending upon a continuing partnership or the results of business transactions not yet completed, is, in the nature of things, uncertain, and in such cases all that can be required is that he had an actual interest, and that his estimate was made in good faith, without any purpose to deceive."

where the insured, in answer to a question as to the locality of neighboring buildings, described certain sheds in conformity to the truth, but added that they "would not endanger the buildings if they should burn," this addition was but matter of opinion, and did not amount to a misrepresentation.[1]

§ 2058. **Subsequent Change Immaterial.**—A change in the matters represented subsequent to the making of the contract does not affect it.[2] The erection of a new building by the assured adjoining the insured building, if no injury actually results, and there is no provision in the contract against it, does not vitiate the policy.[3] The drawing of a lottery with the consent and participation of the assured in a building insured against loss by fire as a "shoe manufactory" does not avoid the policy on the building nor on the stock therein.[4] A statement in an application for an insurance on a house, that the house is unoccupied, but is to be occupied by a tenant, is not a warranty either that the house will remain occupied or that it will be occupied by a tenant.[5] A description of a house as "occupied by" the insured is not an agreement that the insured shall continue in occupation of it.[6] An insurance of a "dwelling-house" does not imply an engagement that it shall always be occupied whilst the risk endures.[7] An answer in an application that "the facilities for extinguishing fires" were "force-pump and abundance of water" is not a guaranty that the pump

[1] Dennison *v.* Ins. Co., 20 Me. 125; 37 Am. Dec. 42.

[2] Southern etc. Ins. Co. *v.* Kempton, 56 Ga. 339; Franklin Ins. Co. *v.* Colt, 20 Wall. 560; Blodd *v.* Ins. Co. *v.* 12 Cush. 472; Hughes *v.* Ins. Co., 27 Conn. 10; Stebbins *v.* Ins. Co., 2 Hall, 632.

[3] Gates *v.* Madison County Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360; Stetson *v.* Ins. Co., 4 Mass. 330; 3 Am. Dec. 217.

[4] Boardman *v.* Ins. Co., 8 Cush. 583.

[5] Hughes *v.* Ins. Co., 27 Conn. 10; O'Neil *v.* Ins. Co., 3 N. Y. 122; Herrick *v.* Ins. Co., 48 Me. 558; 77 Am. Dec. 244; Catlin *v.* Ins. Co., 1 Sum. 434; Hough *v.* Ins. Co., 29 Conn. 10; 76 Am. Dec. 581.

[6] Joyce *v.* Maine Ins. Co., 45 Me. 168; 71 Am. Dec. 536.

[7] Cumberland Valley Mut. Protection Co. *v.* Douglas, 58 Pa. St. 419; Rafferty *v.* Ins. Co., 18 N. J. L., 480; 38 Am. Dec. 525.

shall always be kept in good order for use;[1] nor is a statement in an application that a cask of water is kept in the third story of the building insured.[2] A clause in a policy that "all the above barns are used for hay, straw, grain unthrashed, stabling, and shelter," does not constitute a warranty that the buildings shall be used in that manner, and in no other.[3] A policy is not avoided by the fact that a quantity of rags was in premises insured at the time of the fire, where the applicant represented that no rags were kept in or near the premises, it not appearing that the representation was untrue when made.[4] A statement in an application for insurance on a thrashing-machine that the machine is located in a certain barn is not a stipulation on the part of the applicant, or a condition of insurance on the part of the insurer, that the location shall remain unchanged; or if changed, that while changed the insurance shall cease or be suspended.[5] The words "no fire in or about said building except one under kettle (used for heating water), and made perfectly secure against accident," in a policy of insurance, do not constitute a warranty on the part of the assured that no other fires shall be used in the building during the continuance of the policy, but refer only to the condition of the property at the time insurance was effected.[6] A representation by the assured that he was a "switchman" is not a contract that he would do no act connected with the occupation of a "brakeman," in performing the duties wherein he was killed.[7] A clause in an application for a policy of insurance that the party insured was to take an inventory of his stock every three

[1] Gilliat v. Pawtucket etc. Ins. Co., 8 R. I. 282; 91 Am. Dec. 229; Cady v. Ins. Co., 4 Cliff. 206; Townsend v. Ins. Co., 18 N. Y. 168.

[2] Jones Mfg. Co. v. Ins. Co., 8 Cush. 82; 54 Am. Dec. 742.

[3] Billings v. Ins. Co., 20 Conn. 139; 50 Am. Dec. 277.

[4] Gould v. York etc. Ins. Co., 47 Me. 403; 74 Am. Dec. 495.

[5] Everett v. Ins. Co., 21 Minn. 76.

[6] Schmidt v. Ins. Co., 41 Ill. 296.

[7] Provident etc. Ins. Co. v. Fennell, 49 Ill. 180.

months is not a condition by which the policy is to be defeated and become of no force.[1]

But "a representation is a continuous statement from the time it is made, during the progress of the negotiations, and down to the time of the completion of the contract; so that though in point of fact the representation be true when actually made, yet if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract if the change be material and to the prejudice of the insurers, or be such as might probably influence their opinion as to the advisability of accepting the risk. The law regards it as made at the instant the contract is entered into."[2]

§ 2059. **Statutes as to Warranties and Representations.** —A statute of Massachusetts[3] provides that in all fire policies "the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or part of the contract, except so far as they are incorporated in full in the policy, and so appear on its face before the signatures of the officers of the company." In Missouri and Kentucky it is provided by statute that "no misrepresentation . . . . shall be deemed material or avoid the policy, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due or payable."[4]

§ 2060. **Concealment.** — Concealment is the willful withholding of some fact material to the risk which the

[1] Wynne *v.* Liverpool etc. Ins. Co., 71 N. C. 121.

[2] May on Insurance, sec. 190; citing Trail *v.* Baring, 4 Giff. 485; 10 L. T., N. S., 215; Whitley *v.* Ins. Co., 71 N. C. 480.

[3] Stats. 1864, c. 191, sec. 1.

[4] The statute applies even when the applicant has made an express warranty: White *v.* Ins. Co., 4 Dill. 177; Chamberlain v. Ins. Co. 55 N. H. 249. *Contra* in Kentucky: Farmers' etc. Ins. Co. *v.* Curry, 13 Bush, 312; 26 Am. Rep. 194.

insurer had a right to know and which the insured was under a duty to disclose. It is a *suppressio veri*. It is a fraud on the insurer by leading him to believe that to be true which is not true.[1] The fact, however, must be known to the applicant; there can be no concealment of a fact which is not known to the insured.[2] And it must also be known to be material to the insurance.[3] So it is not concealment not to state facts which the insurer knows or ought to know,[4] or facts which lessen instead of increase the risk. A material concealment cannot be pleaded where the premises have been thoroughly examined by the broker through whom the application has been transmitted to the company, on which such inspection is conclusive.[5]

ILLUSTRATIONS.— A had been confined in an insane asylum, but discharged as cured. On applying for insurance on his life, he did not disclose this fact, not thinking it material. *Held*, no concealment: *Mallory* v. *Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410. In an action upon a fire insurance policy, a defense was that carpenter-work was being done in the building insured, which was not disclosed to the insurers. There was no actual concealment of fraud proved, no misrepresentation or intentional suppression of facts, nor was any inquiry made, at the time of issuing the policy, as to the uses for which the building was to be applied. *Held*, that it was for the jury to say whether there was a concealment of the facts by the insured which would avoid the policy: *People* v. *Ins. Co.*, 2 Thomp. & C. 268.

[1] How *v.* Ins. Co., 64 Barb. 81; Daniels *v.* Ins. Co., 12 Cush. 416; 59 Am. Dec. 192. The question of materiality is for the jury: Fireman's Ins. Co. *v.* Walden, 12 Johns. 513; 7 Am. Dec. 340. Concealment of material facts by an applicant for fire insurance will not vitiate the policy, it seems, as it would a marine policy, if no inquiry is made as to those facts; but if such inquiry is made, the concealment is as fatal to a fire policy as to a marine one: Burritt *v.* Ins. Co., 5 Hill, 188; 40 Am. Dec. 345.

[2] Hall *v.* Ins. Co., 6 Gray, 185; Beebe *v.* Ins. Co., 25 Conn. 51; 65 Am. Dec. 553.

[3] May on Insurance, sec. 202; Wise *v.* Ins. Co., 2 Bigelow's L. & Acc. Ins. Cas. 43; 34 Md. 582; Dennison *v.* Ins. Co., 20 Me. 125; 37 Am. Dec. 42. A concealment which is not fraudulent will avoid a policy if the conditions annexed to the policy and the form of application require the concealed fact to be stated, and if one of the conditions expressly provides that "any misrepresentation or concealment" will vitiate the policy: Burritt *v.* Ins. Co., 5 Hill, 188; 40 Am. Dec. 345.

[4] May on Insurance, sec. 207; Fowler *v.* Ins. Co., 6 Cow. 673; 16 Am. Dec. 460; Home Ins. Co. *v.* Garfield, 60 Ill. 124; 14 Am. Rep. 27. But see Stoney *v.* Ins. Co., 3 McCord, 387; 15 Am. Dec. 634.

[5] Michael *v.* Ins. Co., 10 La. Ann. 737.

§ 2061. What Facts need not be Disclosed.—It has been held that—the questions not being asked of the applicant—it did not constitute concealment not to disclose the following facts: That there is other insurance on the property;[1] in what manner the building is heated or lighted;[2] the character or occupations of the occupants of the building;[3] the character of the adjoining buildings;[4] that the applicant is insolvent, and there are judgment liens on the property;[5] that the agent of the insurer had declined risks near by;[6] that the property is encumbered;[7] the fact of a pending litigation affecting the premises insured;[8] that the building insured stood on the land of another under a verbal agreement terminable at six months' notice;[9] that the property insured, a carpenter-shop, was heated by stoves, or to say what provision was made for warming, unless the heating was effected in an unusual and extraordinary manner;[10] that the federal guards, who were in charge of the property, smoked pipes, and had fire in the immediate vicinity for the purpose of warming themselves;[11] that lamps were used in the building.[12]

ILLUSTRATIONS.—A policy required the insured to state the distance of the building insured from neighboring buildings. *Held*, that an omission to mention buildings on another street, and from which there was no reasonable apprehension of danger, is not such a suppression of the truth as invalidates the policy, though the fire is communicated from them: *Dennison* v. *Ins. Co.*, 20 Me. 125; 37 Am. Dec. 42. In an application for insurance on goods, the assured stated, in answer to questions, that the building in which they were was occupied by one tenant; the condition of the policy required a description of the build-

[1] May on Insurance, sec. 207.
[2] Girard Ins. Co. *v.* Stephenson, 37 Pa. St. 295; 78 Am. Dec. 424; Clark *v.* Ins. Co., 8 How. 235.
[3] Lyon *v.* Ins. Co., 2 Rob. (La.) 266.
[4] Satterthwaite *v.* Ins. Co., 14 Pa. St. 393.
[5] City Ins. Co. *v.* Carrugi, 41 Ga. 660.
[6] Lightbody *v.* Ins. Co., 23 Wend. 18.
[7] Delahay *v.* Ins. Co., 8 Humph. 684.
[8] Hill *v.* Lafayette Ins. Co., 2 Mich. 476.
[9] Fletcher *v.* Ins. Co., 18 Pick. 419.
[10] Girard Fire Ins. Co. *v.* Stephenson, 37 Pa. St. 293; 78 Am. Dec. 424.
[11] Keith *v.* Globe Ins. Co., 52 Ill. 518; 4 Am. Rep. 624.
[12] Clark *v.* Ins. Co., 8 How. 235.

ing the goods were in, but none of its occupancy, which was specially required when insurance was desired on a building. *Held*, that the assured was not obliged to state the occupancy; that his statement of it did not amount to a warranty, but only to a representation, the falsity of which was immaterial if the loss was not occasioned by the nature of the occupancy: *Howard etc. Ins. Co.* v. *Cornick*, 24 Ill. 455.

§ 2062. **What Facts must be Disclosed.**—But it has been held that it constituted a concealment to fail to disclose that attempts had been made to burn the insured property[1] or property contiguous to it.[2] So the omission to mention all buildings within ten rods of an insured building, where the conditions annexed to the policy and the printed form of application furnished to the assured require that fact to be stated, is fatal to an action on the policy where the omitted buildings are of a hazardous nature with respect to danger from fire.[3]

§ 2063. **Conditions and Stipulations in Policy—Notice of Change of Circumstances.**—Where by the terms of the policy the insured is required to give notice of any particular fact, no time being specified, it is only essential that the notice be given within a reasonable time.[4]

§ 2064. **Notice Required—Requisites of.**—If the policy does not otherwise provide, notice by word of mouth to any agent of the insurer is sufficient.[5] The notice need not be given *instanter;* a reasonable time is allowed to the insured in which to give it.[6] An office which issues a subsequent policy will be presumed to

[1] Curry *v.* Commonwealth Ins. Co., 10 Pick. 535; 20 Am. Dec. 547; Bebee *v.* Hartford Mut. Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; New York Bowery Ins. Co. *v.* New York Ins. Co., 17 Wend. 359; North American Fire Ins. Co. *v.* Throop, 22 Mich. 146; 7 Am. Rep. 638.

[2] Walden *v.* Ins. Co., 12 La. 134; 32 Am. Dec. 116.

[3] Burritt *v.* Ins. Co., 5 Hill, 188; 40 Am. Dec. 345.

[4] May on Insurance, sec. 216.

[5] McEwen *v.* Ins. Co., 5 Hill, 101; Schenck *v.* Ins. Co., 24 N. J. L. 447.

[6] Kimball *v.* Ins. Co., 8 Gray, 33; Mellen *v.* Ins. Co., 5 Duer, 101; 17 N. Y. 609.

have notice of the prior one.[1] And where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of each company.[2] But the knowledge of or notice to the broker through which both insurances are effected is not the knowledge of or notice to the insurers.[3]

§ 2065. Consent of Insurer.—Though the notice is required by the policy to be given in writing, and the consent of the insurer to be indorsed on the policy, yet if parol notice is given of the insurance to the insurer or his agent, and no objection is made, this will be considered as a waiver of the provision, and the forfeiture will not be enforced.[4]

§ 2066. Provisions against "Other Insurance"—In General.—Policies usually provide that they shall become void if "other insurance" exist at the time the risk is taken, and is not disclosed, or if additional insurance be subsequently obtained on the same property without notice to the insurer. Such conditions are legal, and a violation of them will work a forfeiture.[5] In a clause in a policy, "if the said insured or assigns shall hereafter make any other insurance," etc., the word "assigns" means, not assignees or transferees of the property, but of the

[1] Barnes *v.* Union Ins. Co., 45 N. H. 21; Horwitz *v.* Equitable Ins. Co., 40 Mo. 557; 93 Am. Dec. 321.

[2] Von Bories *v.* United Life etc. Ins. Co., 8 Bush, 133.

[3] Mellen *v.* Hamilton Mut. Fire Ins. Co., 17 N. Y. 609; 5 Duer, 101; McLachlan *v.* Ætna Ins. Co., 4 Allen (N. B.), 173. But see Fishbeck *v.* Phœnix Ins. Co., 54 Cal. 422.

[4] Thompson *v.* St. Louis Mut. Life Ins. Co., 52 Mo. 469; Hayward *v.* National Ins. Co., 52 Mo. 181; 14 Am. Rep. 400; Horwitz *v.* Equitable Mut. Ins. Co., 40 Mo. 557; 93 Am. Dec. 321; Franklin *v.* Atlantic Fire Ins. Co., 42 Mo. 456; Combs *v.* Hann. Sav. & Ins. Co., 43 Mo. 148; 97 Am. Dec. 383; Northup *v.* Miss. Val. Ins. Co., 47 Mo. 435; Viele *v.* Germania Ins. Co., 26 Iowa, 9; 96 Am. Dec. 83; Walsh *v.* Ætna Life Ins. Co., 30 Iowa, 133; 6 Am. Rep. 664; Von Bories *v.* United Life etc. Ins. Co., 8 Bush, 133; Peck *v.* New London County Mut. Ins. Co., 22 Conn. 575; Nat. Fire Ins. Co. *v.* Crane, 16 Md. 260; 77 Am. Dec. 289.

[5] Hutchinson *v.* Ins. Co., 21 Mo. 97; 64 Am. Dec. 218; Obermyer *v.* Ins. Co., 43 Mo. 573; Conway Tool Co. *v.* Ins. Co., 12 Cush. 144; 59 Am. Dec. 172; Worcester Bank *v.* Ins. Co., 11 Cush. 265; 59 Am. Dec. 145; Ill. Ins. Co. *v.* Fex, 53 Ill. 151; 5 Am. Rep. 38. But see Gee *v.* Ins. Co., 55 N. H. 65; 20 Am. Rep. 171.

policy.[1] A condition that every person "insuring" must give notice "of any other insurance effected," etc., applies to subsequent as well as prior insurance.[2] Where insurance is effected without any policy being issued, nothing more is required in case of an additional insurance in another company than notice, although the usual form of policies required the notice to be indorsed on the policy, or otherwise acknowledged in writing.[3] Where at the time of insurance the insurers write across the policy, "Privilege for four thousand five hundred dollars additional insurance," such indorsement authorizes the insured to effect additional insurance upon the same property to that amount without notifying the insurers thereof.[4] Where an insurance company renews a policy, with the knowledge of the existence of other insurance, contrary to its provisions, it is estopped to afterwards claim that this renewal was inoperative, or the policy void by reason of the existence of such other insurance.[5] An insurance on goods in the store is not within the rule of an insurance company making void the policy on the store in case the assured shall be allowed to insure the same or "any other property connected with it in any other company or at any other office."[6] Where a stranger, without the knowledge of the insured, obtains additional insurance, the clause respecting additional insurance is not violated.[7]

ILLUSTRATIONS.—A by-law that "persons insuring with this company may insure with other companies, with the consent of the directors indorsed on the policy," was adopted by the directors of an insurance company, and printed on the back of the policies. *Held*, that this by-law, by reasonable construction, implied a prohibition: *Hygum* v. *Ins. Co.*, 11 Iowa, 21. A policy required notice of further insurance to be given, and the assent of the company indorsed on the policy, or otherwise acknowl-

[1] Bates *v.* Commercial Ins. Co., 1 Cin. Rep. 523.
[2] Warwick *v.* Ins. Co., 44 N. J. L. 83; 43 Am. Rep. 343.
[3] Eureka Ins. Co. *v.* Robinson, 56 Pa. St. 256; 94 Am. Dec. 65.
[4] Benedict *v.* Ins. Co., 31 N. Y. 389.
[5] Carroll *v.* Ins. Co., 38 Barb. 402.
[6] Jones *v.* Ins. Co., 18 Me. 155.
[7] Williams *v.* Cincinnati Co., Wright, 542; Harris *v.* Ins. Co., Wright, 544.

edged and approved by them in writing. *Held*, that a letter from the secretary of the company saying, "I have received your notice of additional insurance," was a sufficient approval and acknowledgment in writing: *Potter* v. *Ins. Co.*, 5 Hill, 147. A policy provided that it should be void for additional insurance not consented to by the company in writing on the policy; the agent of the company, in reply to a letter of the insured, wrote him a letter stating that the company would allow other concurrent insurance, and would place it for him at the same rate. *Held*, that this did not waive the condition of the policy, as it was not a consent to specific additional insurance, and was a mere revocable offer: *Allemania Fire Ins. Co.* v. *Hurd*, 37 Mich. 11; 26 Am. Rep. 491. A fire policy provided that it should be void in case of other insurance without written consent on the policy, and that the use of general terms or anything less than a distinct specific agreement clearly expressed and indorsed on the policy should not be a waiver of any condition. There was other subsequent insurance, notified to the general agent, who assented, but postponed indorsing consent, for his own convenience. *Held*, a waiver: *American Central Ins. Co.* v. *McCrea*, 8 Lea, 513; 41 Am. Rep. 647. A fire policy stipulated against other insurance, and for cancellation at the pleasure of the insured. The insured obtained other insurance, and while intending to have the policy canceled, he did not notify the company, but assigned the policy for cancellation, and assigned his claim for unearned premiums. *Held*, that the company was not liable for the unearned premiums, the policy becoming defunct by the act of the insured in procuring other insurance: *Colby* v. *Cedar Rapids Ins. Co.*, 66 Iowa, 577. One of the conditions of a policy required that "notice of all previous insurances upon property insured by the company should be given, or the policy should be void." *Held*, that the condition was confined to previous insurances by the party insuring: *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend. 386; 12 Wend. 507. By the rules of an insurance company all policies were declared void which should be made to cover property previously insured, unless such previous insurance be indorsed upon the policy when it issues. *Held*, that this did not apply to vitiate a policy which authorized in terms the insured to "keep insured" a specified additional amount: *Philbrook* v. *Ins. Co.*, 37 Me. 137. A policy contained a provision that in case of further insurance the insurers should only be held for the proportion of loss that their insurance bore to the whole amount of insurance, and that the policy should be void by further insurance without notice to them. Further insurance was effected, and notice of the amount given to the insurers, but there was

an incorrect statement of the companies in which it had been effected. *Held*, that this did not avoid the policy: *Benjamin* v. *Ins. Co.*, 17 N. Y. 415.

§ 2067. What is and is not "Other Insurance." — Substituting a new policy in another company for one held at the time of the insurance, even for a smaller amount, has been held to fall within a condition against "subsequent insurance" without consent.[1] A policy is avoided by obtaining subsequent insurance with mere oral consent of the president of the insurance company, when the by-laws of the company provide that insurance subsequently obtained without the written consent of the president shall avoid the policy, and that the by-laws shall in no case be altered except by a vote of two thirds of the members of the company.[2] The clause forbidding other insurance without consent of the company is not restricted to forbidding insurances of precisely the same property against precisely the same risk. If the insured obtains other insurance upon the property named in the policy, in connection with other property, without consent, etc., the first policy is forfeited.[3] Where a policy, issued to and upon personal property owned by tenants in common, contains a condition avoiding it in case of other insurance upon the same property, not consented to by the insurer, in writing, upon the policy, a policy issued to one of the tenants in common, without mention therein of the joint ownership, is "other insurance."[4] Other or subsequent insurance which is invalid is not a breach of a condition against "other insurance."[5] A re-

[1] Burt *v.* Ins. Co., 2 Gray, 397. But it is not "new insurance": Picaud *v.* Ins. Co., 1 L. C. Jur. 284.

[2] Hale *v.* Mechanics' Ins. Co., 6 Gray, 169; 66 Am. Dec. 411.

[3] Phœnix Ins. Co. *v.* R. R. Co., 28 Ohio St. 69.

[4] Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6.

[5] Hardy *v.* Union Mut. Fire Ins. Co., 4 Allen, 217; Stacey *v.* Franklin Ins. Co., 2 Watts & S. 506; Jackson *v.* Massachusetts Mut. Fire Ins. Co., 23 Pick. 418; 34 Am. Dec. 69; Gale *v.* Belknap County Ins. Co., 41 N. H. 170; Schenck *v.* Mercer County Mut. Ins. Co., 24 N. J. L. 447; Philbrook *v.* New England Mut. Ins. Co., 37 Me. 137; Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520; Hubbard *v.* Ins. Co., 33

newal of a policy known to the insurer at the time of the contract is not "other insurance."[1]

ILLUSTRATIONS. — Husband and wife mortgaged the wife's premises, and got an insurance thereon payable to the mortgagee, as his interest might appear. The policy was conditioned to be void in case of subsequent insurance, whether valid or not, without consent written on the policy. The wife alone procured another insurance in her own name. *Held*, 1. That the first insurance was of the mortgagors' and not of the mortgagees' interest; 2. That the first insurance was avoided by the second: *Continental Ins. Co.* v. *Hulman*, 92 Ill. 145; 34 Am. Rep. 122. The agent of an applicant for fire insurance stated what he believed to be the existing insurance on the property. As a matter of fact, the company to which application was made had

Iowa, 325; 11 Am. Rep. 125; Thomas *v.* Ins. Co., 119 Mass. 121; 20 Am. Rep. 317; Knight *v.* Ins. Co., 26 Ohio St. 664; 20 Am. Rep. 778; Lindley *v.* Ins. Co., 65 Me. 368; 20 Am. Rep. 701; Fireman's Ins. Co. *v.* Holt, 35 Ohio St. 189; 35 Am. Rep. 601; Jersey City Ins. Co. *v.* Nichol, 8 N. J. Eq. 291; 40 Am. Rep. 625; Emery *v.* Ins. Co., 51 Mich. 469; 47 Am. Rep. 590; Behrens *v.* Ins. Co., 64 Iowa, 19. *Contra*, Allen *v.* Ins. Co., 30 La. Ann. 1386; 31 Am. Rep. 243; Landers *v.* Ins. Co., 86 N. Y. 414; 40 Am. Rep. 554; Funke *v.* Ins. Co., 29 Minn. 347; 43 Am. Rep. 216; Somerfield *v.* Ins. Co., 8 Lea, 547; 41 Am. Rep. 662; Royal Ins. Co. *v.* McRae, 8 Lea, 531; 41 Am. Rep. 656. A statute which provides that when property is once insured, a second insurance upon the same property without the consent of the prior insurer avoids the first policy, applies even though the second policy be voidable: Lackey *v.* Georgia etc. Ins. Co., 42 Ga. 456. Where an insurance policy is conditioned to be void in case of "any other insurance" without consent, "whether valid or not," another policy in and of itself invalid and void, so that it constitutes no contract of insurance, is not within the prohibition, but if to avoid it requires the production of extraneous facts, it is within the prohibition: Phœnix Ins. Co. *v.* Lamar, 106 Ind. 513; 55 Am. Rep. 764. A policy of insurance which provides that "when the assured shall increase the risk of the insurance the policy shall become void," is avoided by the increase of risk by the assured, and does not render invalid a subsequent policy of insurance upon the same property, which provides that the existence of other insurance shall avoid the policy: Jackson *v.* Ins. Co., 5 Gray, 52. The plaintiff, having a valid insurance in one company conditioned to be void if the assured should have existing, during the existence of such policy, any other contract of insurance, whether valid or not, obtained a policy from the defendants upon part of the same property, which was also conditioned against double insurance. Held, 1. That the first policy did not terminate instantly upon the execution of the second so as to save the condition in the second, and that there was a double insurance within the terms of the second policy; and 2. *Semble*, that the condition in the first policy, making it void in case of an invalid contract of insurance, was void: Gee *v.* Ins. Co., 55 N. H. 65; 20 Am. Rep. 171.

[1] Pitney *v.* Ins. Co., 65 N. Y. 6. A stipulation in a policy of insurance that "notice of any other insurance already made, or which shall afterwards be made elsewhere on the same property," shall be given to the company, is violated by a renewal of a former policy in another company, without the notice stipulated: Healey *v.* Imperial etc. Ins. Co., 5 Nev. 268.

issued a prior policy which was forgotten by all. Had it been remembered, the policy applied for would not have been issued. *Held*, that it was none the less valid: *Bridgewater Iron Co.* v. *Ins. Co.*, 134 Mass. 433. A policy of insurance on a "frame building, detached, occupied by the assured as a tannery," and on an engine, machinery, etc., therein, and containing a condition against further insurance, *held*, not to be vitiated by subsequent insurance on simply "his frame building detached, occupied by the assured as a tannery": *Sunderlin* v. *Ins. Co.*, 18 Hun, 522.

§ 2068. Non-payment of Premium as Agreed Forfeits Policy.—The punctual payment of the premiums is of the essence of the contract of insurance, and where the policy provides that it shall terminate if the premiums be not paid at certain times, the non-payment of the premiums at those times forfeits all right under the policy.[1] A contract of insurance is indivisible. A payment of a part of a premium due will not prevent a forfeiture.[2] Where payment is made a condition precedent, the first payment of a life insurance premium by a third person, without the knowledge of the insured, although with his money, is of no effect.[3]

ILLUSTRATIONS.—A policy of insurance provided that it should be voidable if, after an assessment had been declared, "and notice thereof forwarded to the insured by mail or otherwise," she should for thirty days neglect to pay the same, and such notice was mailed to her while she was out of the state, but on receipt thereof she forwarded the amount, which the company refused to receive, the policy having been annulled. *Held*, that she could not recover for a loss: *Greeley* v. *Ins. Co.*, 50 Iowa, 86. A policy stipulated that the company would pay all loss to the property insured resulting from fire, and not exceeding the amount specified, during one year from the date of the policy. There were further provisions in the policy, expressly

[1] Klein *v.* Ins. Co., 104 U. S. 88; Wheeler *v.* Ins. Co., 82 N. Y. 543; 37 Am. Rep. 594; Wall *v.* Ins. Co., 36 N. Y. 15; Abell *v.* Ins. Co., 18 W. Va. 400; Ewald *v.* Ins. Co., 60 Wis. 431; Mandego *v.* Life Ass'n, 64 Iowa, 134. The privilege under the usual provision of surrendering up a policy of life insurance, and receiving a paid-up policy, is available only during the life of the policy: People *v.* Widows' and Orphans' Benefit Life Ins. Co., 15 Hun, 8.

[2] Willcutts *v.* Northwestern Mut. Life Ins. Co., 81 Ind. 300.

[3] Whiting *v.* Massachusetts Ins. Co., 129 Mass. 240; 37 Am. Rep. 317.

providing that the company should not be held liable under the policy until the premium in full was actually paid, and that if the premium was not paid within fifteen days from the date of the policy, it should be null and void. A loss by fire occurred to the property covered by the insurance after the delivery of the policy, but before the premium was paid, and before the expiration of the "fifteen days." The insured, while the fifteen days were still unexpired, tendered the amount of the premium, and claimed indemnity for the loss. *Held*, that actual payment of the premium not only within the "fifteen days," but before loss, was necessary to render the company liable under the policy, and that the holder, not having fulfilled the conditions, could not recover for the loss: *Bradley* v. *Potomac Fire Ins. Co.*, 32 Md. 108; 3 Am. Rep. 121. A few days after the death of the assured, who had refused to pay the annual premium on demand, a friend of his, and subordinate agent of the company, in ignorance of the death, paid the premium and took the receipt, which, on learning of the death, he returned, receiving his money back. *Held*, that this payment and renewal gave the payee of the policy no rights thereby: *Miller* v. *Ins. Co.*, 110 Ill. 102.

§ 2069. **Taking Premium Note—Effect of.**—Where a premium note is taken for the premium, the payment of the premium in cash or at the time is thereby waived.[1] The omission of the assured to sign the premium note at the time when the risk is taken does not render the contract void for want of consideration, where it was the custom of the company to dispense with such signature until after the policy was recorded.[2] And the condition in a policy as to prompt payment of the premiums is not waived as to other premiums by the acceptance of a note for the first and an extension of time thereon.[3] When the policy is forfeitable for non-payment of the premium, but does not distinctly provide that the non-payment of a note given therefor at maturity shall work a forfeiture, as this clause is inserted for the benefit of the insurers it

[1] Thompson *v.* Ins. Co., 104 U. S. 252; McAllister *v.* Ins. Co., 101 Mass. 558; 3 Am. Rep. 404; New England Ins. Co. *v.* Hasbrook, 32 Ind. 447. And insurance companies have power to give credit for premiums and take promissory notes therefor: McIntyre *v.* Preston, 5 Gilm. 48; 48 Am. Dec. 321.

[2] Warren *v.* Ocean Ins. Co., 16 Me. 439; 33 Am. Dec. 674.

[3] Mobile Ins. Co. *v.* Pruett, 74 Ala. 487.

must be taken most strongly against them, and the non-payment of the note at maturity will not work a forfeiture.[1] Thus where two notes were taken, one subject to the condition and the other not, the failure to pay the latter was held not to work a forfeiture.[2] Where an insurance company takes for a premium due a foreign bill of exchange drawn by the insured, it being agreed that if the bill is not paid at maturity the policy shall lapse, the company is bound to present the bill at maturity, although the drawee has refused acceptance, and although he has in his hands no funds of the drawer.[3]

ILLUSTRATIONS. — A policy provided that on default in the payment of any installment on the note given by the insured, the policy should be null and void until payment, when it revived, though not to impose any liability for loss incurred during the default. *Held*, that during the period when the policy was void the insured was not chargeable with premiums: *Matthews* v. *American Ins. Co.*, 40 Ohio St. 135.

§ 2070. Non-payment of Premium Note or Interest thereon. — But where the policy is void by its terms, if the premium note or notes or the interest thereon are not paid at maturity, a failure to pay them at those times will forfeit the policy.[4] The insured cannot excuse himself from non-payment on the ground that no demand was made on him.[5] Where the premium was, by the contract, subject to a variation, dependent upon the dividends to which the insured was entitled, it was the duty of the company to give him seasonable notice of the amount of his dividends, in order that he might be enabled, in due

[1] McAllister *v.* Ins. Co., 101 Mass. 558; 3 Am. Rep. 404.

[2] New England Ins. Co. *v.* Hasbrook, 32 Ind. 447.

[3] Knickerbocker Ins. Co. *v.* Pendleton, 112 U. S. 696.

[4] Thompson *v.* Ins. Co., 104 U. S. 252; Baker *v.* Ins. Co., 43 N. Y. 283; Rochner *v.* Ins. Co., 63 N. Y. 160; Pitt *v.* Ins. Co., 100 Mass. 500; Catoir *v.* Ins. Co., 33 N. J. L. 487; Robert *v.* Ins. Co., 1 Dian. 355; Russum *v.* Ins. Co., 1 Mo. App. 228; Security Ins. Co. *v.* Gober, 50 Ga. 404; Williams *v.* Ins. Co., 31 Iowa, 541; Att'y-Gen. *v.* Ins. Co., 80 N. Y. 152; Lewis *v.* Ins. Co., 44 Conn. 72; Mason *v.* Ins. Co., 10 W. Va. 572; Patch *v.* Ins. Co., 44 Vt. 481; Williams *v.* Ins. Co., 19 Mich. 451; 2 Am. Rep. 95; Joliffe *v.* Ins. Co., 39 Wis. 111; 20 Am. Rep. 35; Continental Ins. Co. *v.* Daly, 33 Kan. 601; Kerns *v.* Ins. Co., 86 Pa. St. 171.

[5] McIntyre *v.* Ins. Co., 52 Mich. 188.

time, to pay or tender the balance remaining unpaid upon the premium.[1] In Kentucky, it has been held that where the premium is paid partly in cash and partly in a note, which is regarded as practically a loan to the insured, secured by the profits or dividends which may be earned, while a failure to pay the cash premium or any note which may be given for it promptly works a forfeiture, a failure to pay the interest on the note as it accrues will not, although the policy provides that failure to pay in advance annually the interest on unpaid notes or loans on account of annual premiums shall terminate the policy.[2]

ILLUSTRATIONS. — A condition in an insurance policy provided that if, at the time of a loss, any assessment on the premium note of the assured should be past due and unpaid, the policy should be void. Upon a suit to recover upon the policy for a loss, it appeared that the plaintiff had paid one assessment upon his premium note, but had neglected to pay a second assessment of the same amount, though notified. After the loss he offered to pay the assessment, but the company refused to receive it. *Held*, that the policy was void: *Southern Mutual Ins. Co.* v. *Taylor*, 33 Gratt. 743. A life insurance policy-holder gave note at three months, May 21st, for a half-year's premium then due, the agent of the company giving him a receipt stating that it was "for renewal of the policy." By the terms of the policy it was to lapse if the premium was not paid when due. *Held*, that the note and receipt did not operate to renew the policy for a period beyond the maturity of the note, and that if it was not then paid the policy lapsed: *Wilmot* v. *Ins. Co.*, 46 Conn. 483. A life policy was issued to plaintiff's decedent in April, 1866, expressed to be made in consideration of a premium, already paid, and of a like sum to be annually paid during the continuance of the policy, and providing that the policy should "not take effect until the premium was paid," and that the policy should be forfeited "in case any premium due upon the policy should not be paid at the date when payable." The first premium was paid partly in cash and partly in promissory notes, but the notes were not paid, and the insured died March, 1867. *Held*, that the policy had taken effect, and that the non-payment of the notes did not bar plaintiff's recovery, because the "forfeiture" clause referred to premiums after the first: *McAllister* v. *New England Mutual Ins. Co.*, 101 Mass. 558; 3 Am. Rep. 404.

[1] Phœnix Ins. Co. v. Doster, 106 U. S. 30.

[2] St. Louis etc. Ins. Co. v. Grigsby, 10 Bush, 310.

§ 2071. Time of Payment.—A premium due on a certain day must be paid on or before midnight of that day, and if paid before that hour, even after a loss, it will be sufficient.[1] Where the premium falls due on Sunday, it may be paid on the following day, even after a loss.[2]

§ 2072. What is and is not an Excuse for Non-payment of Premium. — It is a good excuse for the non-payment of the premium that the insurers had already declared the policy forfeited, or declared that they would not receive it if tendered;[3] or that the insurance company had gone into compulsory liquidation and was being wound up at the time.[4] So it is a good excuse that the company had appointed a new agent whom the insurer was not able to find.[5] War between the country of the insurer and the insured has been held to be an excuse for the non-payment of premiums during its continuance.[6] Insanity or sickness or other incapacity of the insured is no excuse for not paying the premium on the day appointed,[7] nor the fact that the wife, in whose behalf the policy was taken out, and who was to pay the premiums, did not know of its existence.[8]

[1] Och *v.* Ins. Co., 21 Pittsb. Leg. Jour. 98.

[2] Hammond *v.* Ins. Co., 10 Gray, 306; Howland *v.* Ins. Co., 121 Mass. 499.

[3] Pilcher *v.* Ins. Co., 33 La. Ann. 322; Hayner *v.* Ins. Co., 69 N. Y. 435.

[4] In re Albert Life Ins. Co., L. R. 9 Eq. 703; United States Ins. Co. *v.* Tardy, 2 Ins. Law J. 673. But not that the company was "unsafe": Taylor *v.* Ins. Co., 9 Daly, 489. The insured must show that, had the company been solvent, he would have been ready and willing to pay: People *v.* Globe Mutual Life Ins. Co., 32 Hun, 147. A policy of life insurance provided that a paid-up policy would be issued, upon default in payment of any premium after three annual payments, on condition of the surrender of the original policy, duly receipted, within sixty days after such default. Held, a condition precedent, not excused by the fact that the insurer was enjoined during the sixty days from issuing any policies: Universal Life Ins. Co. *v.* Whitehead, 58 Miss. 226; 38 Am. Rep. 322.

[5] Seamans *v.* Ins. Co., 3 Fed. Rep. 325; South. Ins. Co. *v.* McCain, 96 U. S. 84; Bradwell *v.* Ins. Co., 75 N. C. 8.

[6] The decisions on this question are conflicting: See *post*, Title Contracts — Payment.

[7] Wheeler *v.* Ins. Co., 82 N. Y. 543; 37 Am. Rep. 594; Thompson *v.* Ins. Co., 104 U. S. 252; Carpenter *v.* Ins. Co., 68 Iowa, 453; 56 Am. Rep. 855.

[8] Klein *v.* Ins. Co., 104 U. S. 88. A husband, in insuring his life for the benefit of his wife and children, acts as their agent. Their rights do not depend on a delivery of the policy to

§ 2073. Waiver of Forfeiture—In General.—The forfeiture may be waived, as, for instance, by the acceptance of the premium after it is overdue.[1] Where an agent receives notice that the insured was sick at the time when a payment was due under the policy, and thereupon takes the money after the proper time, and turns it over to the company, the latter cannot afterwards insist on a forfeiture under the terms of the policy.[2] So when the amount of the payment required is, from the course of business of the parties, known only to the insurer, who keeps silent as to the amount when asked, and the day consequently goes by without payment being made, he cannot take a benefit from the lapse.[3] If an insurance company accepts in lieu of the premium an order on a third person, it must give notice of the non-payment of the order before it can claim a forfeiture.[4]

ILLUSTRATIONS.—A premium was not paid when due. The company offered to overlook the default if it was paid at once. A fortnight later the amount was sent, the insured then being sick, and he died on the next day. *Held*, that the company was not bound by its acceptance and receipt: *Servoss* v. *Western Mutual Aid Society*, 67 Iowa, 86. A brakeman took out an accident insurance policy, which provided that a claim could not be maintained for an accident occurring while a premium remained unpaid. An arrangement was made by which the railroad company was to pay premiums to the insurance company from the brakeman's wages. A payment was due at the time of an accident, but no demand had been made on the railroad company for it. *Held*, that the brakeman was not precluded from recovering on his policy: *Lyon* v. *Travelers Ins.*

them. The husband cannot without their consent surrender the policy. If he does, and in consequence no notices that premiums are due are sent afterwards, a failure to pay such premiums does not necessarily work a forfeiture: Whitehead *v.* New York Life Ins. Co., 102 N. Y. 143; 55 Am. Rep. 787.

[1] Mutual Ben. Ins. Co. *v.* Robertson, 59 Ill. 123; 14 Am. Rep. 8; Mutual Ins. Co. *v.* French, 30 Ohio St. 240; 27 Am. Rep. 443; Walsh *v.* Ins. Co., 30 Iowa, 133; 6 Am. Rep. 664; Bouton *v.* Ins. Co., 25 Conn. 542; Mowry *v.* Ins. Co., 9 R. I. 346; Rockwell *v.* Ins. Co., 20 Wis. 335; Bodine *v.* Ins. Co., 51 N. Y. 117; 10 Am. Rep. 566; Joliffe *v.* Ins. Co., 39 Wis. 111; 20 Am. Rep. 35.

[2] Piedmont etc. Life Ins. Co. *v.* Lester, 59 Ga. 812.

[3] Meyer *v.* Knickerbocker Life Ins. Co., 73 N. Y. 516; 29 Am. Rep. 200.

[4] National Benefit Ass'n *v.* Jackson, 114 Ill. 533.

Co., 55 Mich. 141; 54 Am. Rep. 354. A policy provided that when a premium note was taken for a cash premium, any default in its payment should operate to suspend the company's liability until it should be paid. The assured gave such a note, and immediately after it was due, having another policy which he desired canceled, and the unearned premium thereon applied to this note, and not knowing how much would be due the company, he proposed, by letter, to pay, asking for a statement of the amount, whereupon the company at once applied upon the note the amount in their hands, and directed him, by letter, to remit the balance, which he did by first mail; but a loss occurred before the remittance was mailed. *Held*, that the forfeiture was waived: *Sims* v. *State Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 311. An insured, having expressed an intention of giving up his policy, was told by the president of the defendant company to keep it alive, and if he could not meet payments when due, the company would give him whatever accommodation was necessary. The insured having relied on this statement, and the company having for several years after received the premiums after they were due, *held*, that the provision in the policy for forfeiture in case of non-payment of the premiums when due was waived: *Dilleber* v. *Ins. Co.*, 7 Daly, 540. A policy of insurance provided for forfeiture for non-payment of premiums when due, and the company received payment of the same after due without objection, and sent out letters with the following words, printed in prominent letters: "Every policy is non-forfeiting," so as to lead the assured to believe that no forfeiture would be exacted. *Held*, that these facts were sufficient to prevent the company from insisting upon a forfeiture because a subsequent premium was not promptly paid when due: *Home Life Ins. Co.* v. *Pierce*, 75 Ill. 426.

§ 2074. **Waiver of Forfeiture—By Usage.**—A usage of the insurance company to allow a certain time after the day appointed by the policy in which payment might be made is a waiver of the forfeiture.[1] An insurer is estopped to insist on a forfeiture for delay in payment of premiums, if his course of conduct has led the insured to

[1] Cotton States Ins. Co. *v.* Lester, 62 Ga. 247; 35 Am. Rep. 122; Pino *v.* Merchants' Mutual Ins. Co., 19 La. Ann. 214; 92 Am. Dec. 529; Howell *v.* Knickerbocker Ins. Co., 44 N. Y. 276; 4 Am. Rep. 675; Ruse *v.* Mutual etc. Ins. Co., 26 Barb. 557; Buckbee *v.* United States Ins. Co., 18 Barb. 541; Thompson *v.* St. Louis Mutual Ins. Co., 52 Mo. 469; Helm *v.* Ins. Co., 61 Pa. St. 107; 100 Am. Dec. 621; Ins. Co. *v.* Warner, 80 Ill. 410; Fitzpatrick *v.* Ins. Co., 25 La. Ann. 443.

believe that the premiums would be received after the appointed day.[1] So where the company has been accustomed to send notice to the insured when the premium fell due, it cannot exact a forfeiture for non-payment without giving such notice.[2]

ILLUSTRATIONS. — A policy provided that it should "cease and determine," should the premium not be paid when due. At the time a premium became due, the company had changed its agent, without notice to the assured, though notice had been sent to other policy-holders. The assured sent the amount of the premium to the city in which he had been accustomed to pay his premiums, but his agent was unable to find the agent of the company. On a previous occasion, a payment made a month after becoming due was received without objection. The assured died sixty days after the premium was due. *Held*, that the policy was not avoided: *Seamans* v. *Northwestern Mutual Life Ins. Co.*, 1 McCrary, 508.

§ 2075. Notice of Loss — Time in Which It must be Given — Notice in General. — Where the policy or the charter of the company requires that the notice of loss be given within a certain time, it is requisite that it be given within the specified time.[3] Where a policy provided that "in case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss," etc., it was held that immediate notice of loss only was required.[4] So where a policy provided that the assured should forthwith give notice of the loss, "and within thirty days render a particular account of such loss, ... and shall also produce a certificate" of a certain character from the chief of the fire department, etc., it was held that the provision must be construed strictly to avoid a forfeiture, and that it did

not require such certificate to be produced within thirty days.[1] The policy frequently requires that the notice be given "forthwith," or "as soon as possible," or "immediately," etc. These phrases require simply due diligence under the particular circumstance of the case.[2] In particular cases these have been held to be reasonable, viz.: A notice eight days after the fire, and five after it came to the knowledge of the insured;[3] a notice given November 13, 1871, of a loss by the great Chicago fire of October 9;[4] a sworn statement of the fact and circumstances of the fire, signed by the insured the morning after the fire, forwarded on the following day by the agent to the secretary of the company.[5] But the following were held to be unreasonable, viz.: A notice four months after the loss;[6] eleven days;[7] eighteen days;[8] twenty days;[9] thirty-eight days;[10] forty-eight days.[11]

§ 2076. **Mode of.**—The notice need not be in writing;[12] but a notice by parol to the agent is of no effect, where the charter contains a condition requiring notice of the loss to be given in writing to the secretary or one of the directors.[13] Where the policy required the assured to give the insurers notice of any mortgage made on the property, it was held that the assured was bound to give actual notice, and the sending of notice by mail was insufficient, unless it was

[1] Badger *v.* Glen's Falls Ins. Co., 49 Wis. 389.

[2] Kingsley *v.* Ins. Co., 8 Cush. 393; Edwards *v.* Ins. Co., 3 Gill, 176; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; 49 Am. Dec. 74; Phillips *v.* Ins. Co., 14 Mo. 220; Peoria Ins. Co. *v.* Lewis, 18 Ill. 533; Prov. etc. Ins. Co. *v.* Baum, 29 Ind. 236; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

[3] New York Ins. Co. *v.* Ins. Co., 20 Barb. 468; Sabench *v.* Ins. Co., 24 N. J. L. 447; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

[4] Knickerbocker Ins. Co. *v.* McGinnis, 87 Ill. 70.

[5] Beatty *v.* Lycoming County Mutual Ins. Co., 66 Pa. St. 9; 5 Am. Rep. 318.

[6] McEvers *v.* Lawrence, 1 Hoff. Ch. 172.

[7] Trask *v.* Ins. Co., 29 Pa. St. 198; 72 Am. Dec. 622.

[8] Edwards *v.* Ins. Co., 75 Pa. St. 380.

[9] Whitehurst *v.* Ins. Co., 7 Jones, 433; 78 Am. Dec. 247.

[10] Inman *v.* Ins. Co., 12 Wend. 452.

[11] Brown *v.* Assurance Co., 40 Hun, 101.

[12] Killips *v.* Ins. Co., 28 Wis. 472; 9 Am. Rep. 506.

[13] Patrick *v.* Farmers' Ins. Co., 43 N. H. 621; 80 Am. Dec. 197.

actually received by the company.[1] Where proof of notice of loss is required to be made before the nearest notary, a few yards' more or less distance from the burnt premises of the residence of two neighboring notaries will not be regarded by the court.[2] A notice to an insurance company claiming for a total loss of a wooden dwelling-house, without mentioning the stone-work and bricks which were left unconsumed, is a sufficient compliance with a by-law which requires the insured in case of partial loss to state the amount of damage done and the value of such parts as remain.[3] Notice of loss will not be rendered ineffectual by the omission to mention that the debt of the assignee as mortgagee was also secured on other property.[4] Where a condition required that in case of loss the insured should forthwith give notice to the secretary, it was held that an examination of the insured the morning after the fire, and reducing his testimony to writing by the local agent of the company, who transmitted it to the secretary, was sufficient notice.[5]

§ 2077. By Whom and to Whom Given.—The assured, no other party being interested, is the proper person to give the notice. But although the notice is required from the insured, a notice signed by an agent or by a third person at the request of the insured, though not on its face appearing to have been by his request, is sufficient.[6] If the policy has been assigned by the assured with the assent of the insurers, the notice of loss should come from the assignee.[7] Notice from the real party in interest, though not insured, will be sufficient in any case.[8] And a notice from the local agent of the company,

[1] Plath *v.* Minnesota Farmers' Mut. Ins. Co., 23 Minn. 479; 23 Am. Rep. 697.

[2] Peoria Ins. Co. *v.* Whitehill, 25 Ill. 466.

[3] Wyman *v.* Ins. Co., 1 Allen, 301.

[4] Barnes *v.* Ins. Co., 45 N. H. 21.

[5] Beatty *v.* Lycoming County etc. Ins. Co., 66 Pa. St. 9; 5 Am. Rep. 318.

[6] Stimpson *v.* Monmouth Mutual Fire Ins. Co., 47 Me. 349; Sims *v.* Ins. Co., 47 Mo. 54; 4 Am. Rep. 311.

[7] Cornell *v.* Le Roy, 9 Wend. 163.

[8] Graham *v.* Fireman's Ins. Co., 9 Rep. 285; Watertown Ins. Co. *v.* Grover, 41 Mich. 131; 32 Am. Rep. 146.

upon information communicated to him by the assured, is sufficient.[1] Where the policy specifies the particular officer or agent to whom the notice must be given, it is essential that such person shall receive the notice.[2] Where a policy provides that all persons assured sustaining any loss or damage should forthwith give notice to the secretary of the company or other authorized officer, etc., a notice to a director is not sufficient.[3] A notice of loss need not be given to the secretary of a company in person, if it is given and received at its office or place of business.[4] A notice of loss to the secretary is sufficient if transmitted in writing by the local agent of the company upon information conveyed to him by the assured.[5] Under a policy issued by two companies making themselves severally liable, notice of loss addressed to but one company, but delivered to the agent of both who countersigned the policy, is sufficient to bind both.[6]

§ 2078. Notice may be Waived. — The insurer may waive the notice either expressly, or impliedly by conduct.[7] The following have been held to amount to a waiver of the notice, viz.: Payment of a part of the amount claimed to be due under the policy;[8] or a special examination, known to the insured, by the agent of the insurers, and the making a schedule of the property burned;[9] or a direction to go on and furnish the proofs;[10] or refusing, on other grounds, to pay the loss.[11] But receiving the notice without objection to its not being in time is not a waiver.[12]

[1] West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

[2] Patrick *v.* Ins. Co., 43 N. H. 621; 80 Am. Dec. 197; Inland etc. Ins. *v.* Stauffer, 33 Pa. St. 397.

[3] Inland Ins. Co. *v.* Stauffer, 33 Pa. St. 397.

[4] Herron *v.* Ins. Co., 28 Ill. 235; 81 Am. Dec. 272.

[5] West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

[6] Bernero *v.* Ins. Co., 65 Cal. 386.

[7] May on Insurance, sec. 464; Rokes *v.* Ins. Co., 51 Md. 512; 34 Am. Rep. 323.

[8] Westlake *v.* Ins. Co., 14 Barb. 207.

[9] Badger *v.* Ins. Co., 49 N. Y. 389; Beatty *v.* Ins. Co., 66 Pa. St. 9; 5 Am. Rep. 318.

[10] Cann *v.* Ins. Co., 1 Russ. & C. (Nova Scotia) 240.

[11] Bennett *v.* Ins. Co., 15 Abb. N. C. 234; Walsh *v.* Ins. Co., 54 Vt. 351.

[12] St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; 49 Am. Dec. 74.

§ 2079. Preliminary Proofs — In General. — Stipulations in the policy that the insured shall furnish certain preliminary proofs of loss, when loss has been sustained, are conditions precedent, without compliance with which no recovery for a loss can be had. But they will be construed strictly against the insurers, and liberally in favor of the insured, upon whom they impose burdens.[1] Where no policy has been issued, the insured is not bound by the conditions as to proof of loss.[2] A condition in a policy that the assured shall furnish proofs of loss will not prevent a recovery if he is unable, without fault or fraud on his part, to procure them.[3] The insanity of the insured will excuse a failure to furnish preliminary proofs.[4] But not the fact that the policy has been lost.[5] Preliminary proofs are not admissible as evidence for the plaintiff on the trial of an action on the policy, to prove his case.[6] And though they are admissions which may be proved against him, still he may contradict them, and show that they are false or incorrect.[7]

§ 2080. Preliminary Proofs — Time and Mode of Furnishing. — Where preliminary proofs of loss are required by the policy to be furnished within a certain time, this

[1] May on Insurance, sec. 465; citing Gelatly *v.* Minnesota etc. Soc., Weekly Jurist, 1880; Catlin *v.* Springfield Fire Ins. Co., 1 Sum. 434; Wellcome *v.* People's Equitable Mutual Fire Ins. Co., 2 Gray, 480; Mason *v.* Harvey, 8 Exch. 819; Spring Garden Mutual Ins. Co. *v.* Evans, 9 Md. 1; 66 Am. Dec. 30; Roper *v.* Lendon, 1 El. & E. 825; Com. Ins. Co. *v.* Sennett, 41 Pa. St. 161; Blakeley *v.* Ins. Co., 20 Wis. 205; 91 Am. Dec. 388; Bumstead *v.* Ins. Co., 12 N. Y. 81; Gilbert *v.* Ins. Co., 23 Wend. 43; 35 Am. Dec. 543; Battaile *v.* Ins. Co., 3 Rob. (La.) 384; Great West Ins. Co. *v.* Staaden, 26 Ill. 360.

[2] Baile *v.* Ins. Co., 13 Cent. L. J. 233.

[3] Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa, 308; Foster *v.* Ins. Co., 1 Edm. Sel. Cas. 290.

[4] Germania Ins. Co. *v.* Boykin, 12 Wall. 433.

[5] Blakeley *v.* Ins. Co., 20 Wis. 205; 91 Am. Dec. 388.

[6] Citizens' Fire Ins. Co. *v.* Doll, 35 Md. 89; 6 Am. Rep. 360; Newmark *v.* London and Liverpool Life and Fire Ins. Co., 30 Mo. 160; 77 Am. Dec. 608; Newton *v.* Mutual Benefit Ins. Co., 2 Dill. 154; Planters' Ins. Co. *v.* Comfort, 50 Miss. 662; Ætna Ins. Co. *v.* Farrell, 3 Ins. Law J. 852; Browne *v.* Clay Ins. Co., 68 Mo. 133.

[7] McMaster *v.* Ins. Co., 55 N. Y. 222; 14 Am. Rep. 239; Maher *v.* Ins. Co., 67 N. Y. 283; Mutual Benefit Ins. Co. *v.* Newton, 22 Wall. 154; Connecticut Ins. Co. *v.* Schwenk, 94 U. S. 593; American etc. Ins. Co. *v.* Day, 39 N. J. L. 89; 23 Am. Rep. 198.

must be done.[1] If no time is specified, a reasonable time is allowed.[2] If particular facts are required to be proved, or any particular mode of proof is required, the facts must be proved, and in substantially the mode specified, or excuse shown. If books of account and vouchers are required, they must be produced,[3] unless excused; as where they were destroyed by the fire which occasioned the loss,[4] or where without fault they were not within the control of the assured,[5] or if it should appear that he kept no books.[6] Delivery of proofs to the local agent of the company is sufficient.[7] Proofs of loss may be made by the agent of the insured, in the absence of the latter.[8] When the by-law of an insurance company requires proofs of loss to be sworn to by the owner of property, an oath by a husband, his wife owning the property insured, is not sufficient.[9] Where the policy provides that a loss shall not be payable until the assured produces the certificate of a magistrate to certain required facts, the production of such certificate, unless the company have themselves prevented the obtaining it, or waived its want, is a condition precedent to the right to sue.[10] So where by the policy the assured must procure a certificate of a magistrate, notary public, or clergyman most contiguous to the place of the fire, that the fire occurred without fraud, before the loss shall be deemed payable, this is a condition precedent to the

[1] Smith *v.* Ins. Co., 1 Allen, 297; 79 Am. Dec. 733. A requirement that "immediate notice shall be given in writing to the company at Hartford, stating," etc., and "proof shall be furnished within seven months from the happening of the accident," does not require proof of the injury to be sent to Hartford: Scheiderer *v.* Travelers Ins. Co., 58 Wis. 13; 46 Am. Rep. 618.

[2] May on Insurance, sec. 465. Nine months is too long: Scammon *v.* Ins. Co., 101 Ill. 621.

[3] Cinque Mars *v.* Eq. Ins. Co., 15 U. C. Q. B. 143, 246; Jube *v.* Brooklyn Fire Ins. Co., 28 Barb. 412; Farmers' Ins. Co. *v.* Mispelhorn, 50 Md. 180.

[4] Mechanics' Fire Ins. Co. *v.* Nichols, 16 N. J. L. 410.

[5] Huckberger *v.* Prov. Wash. Ins. Co., 1 Chic. L. N. 353.

[6] Wightman *v.* West. Mar. & Fire Ins. Co., 8 Rob. (La.) 442.

[7] Ins. Co. *v.* Hope, 58 Ill. 75; 11 Am. Rep. 48.

[8] German Fire Ins. Co. *v.* Grunert, 112 Ill. 68.

[9] Spooner *v.* Ins. Co., 53 Vt. 156. If one gets his wife to make the inventory, he is liable for false statements made therein: Mullin *v.* Vermont Mutual Fire Ins. Co., 58 Vt. 113.

[10] Johnson *v.* Phœnix Ins. Co., 112 Mass. 49; 17 Am. Rep. 65.

assured's right of recovery, and such certificate must be by the nearest, not by any, magistrate.[1] A condition in a fire policy that the certificate of loss shall be under seal of the magistrate or notary "nearest the fire, and not concerned in the loss," is intended to secure an impartial arbiter. A magistrate whose house was not insured, and was burned by fire communicated from the house of the insured person, and before whom a complaint had been entered against the latter, charging him with setting the fire, would not be a proper person therefor.[2] In Massachusetts a magistrate "not concerned in the loss as a creditor" was held to mean a magistrate not so concerned by reason of having an interest in the property insured, or in the policy as security for an obligation to himself, and not to disqualify a magistrate from acting who was a general creditor of the assured.[3] Where the nearest magistrate refused the certificate, and that of the next nearest was obtained, the condition was not complied with, and the insurance is not recoverable.[4] The magistrate's certificate need not be in the precise words of the policy.[5]

§ 2081. Waiver of Preliminary Proofs.—The absence or insufficiency of preliminary proofs required by the policy may be waived by the insurer, either expressly or by his conduct.[6] The following have been held a waiver, viz.: The refusal of the insurer to pay, on other grounds; as that the contract was never completed,[7] or that the insured had no interest,[8] or any other grounds having no

[1] Leadbetter v. Ætna Ins. Co., 13 Me. 265; 29 Am. Dec. 505.

[2] Wright v. Ins. Co., 36 Wis. 522.

[3] Dolliver v. Ins. Co., 131 Mass. 39.

[4] Leadbetter v. Ins. Co., 13 Me. 265; 29 Am. Dec. 505.

[5] Ætna Fire Ins. Co. v. Tyler, 16 Wend. 385; 30 Am. Dec. 90.

[6] Georgia Ins. Co. v. Kinner, 28 Gratt. 88; Cornell v. Leroy, 9 Wend. 163; Harris v. Ins. Co., 35 Conn. 310, the court saying: "It is the duty of the insurers, pending the consideration of the proofs of loss, to bear themselves with all good faith towards the claimant; and if they are dissatisfied with the proof furnished, and have, or have not, the right to demand further proof before their liability becomes fixed, they ought to make known to the assured the fact and the nature of these demands without unnecessary delay; otherwise, they will be held to have waived their rights in this regard."

[7] Tayloe v. Ins. Co., 9 How. 390.

[8] Coursin v. Ins. Co., 46 Pa. St. 323.

reference to the sufficiency or insufficiency of the preliminary proof;[1] as if the refusal to pay is upon the ground that the property lost was not included in the risk,[2] or that the insured has forfeited his right to recover by fraud,[3] or that the fire was an incendiary one.[4] So is the refusal of the insurer to pay without giving reasons.[5] So a part payment of the loss, or a promise to pay, or an adjustment, is a waiver of objection to preliminary proofs;[6] so is the retention of them for over a month a waiver of objections to their sufficiency;[7] so is refusing to furnish the insured with the usual and proper blanks on which to make the proof;[8] so is refusing to return the proof to the agent when he has offered to have it amended;[9] so is failing to point out objections thereto

[1] Covenant Ins. Co. *v.* Spies, 114 Ill. 413; Ziekle *v.* Ins. Co., 64 Wis. 442; Heath *v.* Ins. Co., 1 Cush. 257; Ætna Ins. Co. *v.* Tyler, 16 Wend. 85; 30 Am. Dec. 90; Bodle *v.* County Mut. Ins. Co., 2 N. Y. 53; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; 49 Am. Dec. 74; O'Niel *v.* Buffalo Fire Ins. Co., 3 N. Y. 122; Clark *v.* New England Ins. Co., 6 Cush. 342; 53 Am. Dec. 44; Insurance Co. *v.* Connor, 17 Pa. St. 136; McMasters *v.* West Chester County Mut. Ins. Co., 25 Wend. 383; Hibernia Ins. Co. *v.* Meyer, 39 N. J. L. 482; Mercantile Ins. Co. *v.* Holthaus; 43 Mich. 423; Planters' Ins. Co. *v.* Deford, 38 Md. 382; Tisdale *v.* Mutual Benefit Ins. Co., 91 U. S. 238; Mason *v.* Citizens' Ins. Co., 10 W. Va. 572; Martin *v.* Ins. Co., 20 Pick. 389; 32 Am. Dec. 220; Cedar Rapids Ins. Co. *v.* Shrimp, 16 Ill. App. 248; O'Brien *v.* Ins. Co., 52 Mich. 131; Knickerbocker Ins. Co. *v.* Pendleton, 112 U. S. 696; Boice *v.* Ins. Co., 38 Hun, 246; Lebanon Ins. Co. *v.* Erb, 112 Pa. St. 147.

[2] Franklin Ins. Co. *v.* Coates, 14 Md. 285.

[3] Peoria Ins. Co. *v.* Whitehill, 25 Ill. 466. In a suit on a life policy, a defense denying all responsibility is a waiver of notice and proof of death: McComas *v.* Covenant Mut. Life Ins. Co., 56 Mo. 573.

[4] Fireman's Ins. Co. *v.* Floss, 67 Md. 403; 1 Am. St. Rep. 398.

[5] Allegre *v.* Maryland Ins. Co., 6 Har. & J. 408; 14 Am. Dec. 289; Harriman *v.* Queen Ins. Co., 49 Wis. 71; Tayloe *v.* Merchants' Ins. Co., 9 How. 390; Graves *v.* Washington Mar. Ins. Co., 12 Allen, 391; Roberts *v.* Cocke, 28 Gratt. 207; Girard Agr. etc. Co. *v.* Merchants' Life etc. Co., 9 Week. Not. Cas. 425; Goodwin *v.* Lancashire etc. Ins. Co., 18 L. C. J. Q. B. 1; West Rockingham Ins. Co. *v.* Sheets, 26 Gratt. 854; Aurora etc. Ins. Co. *v.* Kranich, 36 Mich. 289; Bank of Oil City *v.* Guardian etc. Ins. Co., 4 Ins. Law J. 473; Portsmouth Ins. Co. *v.* Reynolds, 9 Ins. Law J. 606; Akin *v.* Liverpool etc. Ins. Co., 6 Ins. Law J. 341; Williamsburg Ins. Co. *v.* Cary, 83 Ill. 453.

[6] Westlake *v.* Ins. Co., 14 Barb. 206; Owen *v.* Ins. Co., 57 Barb. 518; Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241; State Ins. Co. *v.* Todd, 82 Pa. St. 272; Eastern R. R. Co. *v.* Relief Ins. Co., 105 Mass. 570; Levy *v.* Ins. Co., 10 W. Va. 560; 27 Am. Rep. 578.

[7] Keeney *v.* Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60; Prentice *v.* Knickerbocker Ins. Co., 77 N. Y. 483; 33 Am. Rep. 651.

[8] Dean *v.* Ins. Co., 4 Thomp. & C. 497; Gillally *v.* Odd Fellows' Society, 27 Minn. 215; Grattan *v.* Ins. Co., 80 N. Y. 281; 36 Am. Rep. 617.

[9] Findeisen *v.* Ins. Co., 57 Vt. 520.

that might have been obviated within the limited time;[1] so is referring them to its adjuster, and retaining them for five months.[2] Where the insurers express satisfaction with the preliminary proofs as offered by the insured, they cannot subsequently withdraw that approval, but will be bound by it.[3] Where the insurers place their refusal to pay the loss expressly upon some particular defect in the preliminary proofs, they cannot afterwards object to other defects not then specified,[4] or upon grounds entirely distinct from such defects, making no objection to these.[5] Where proofs of loss are prepared in conformity with the direction of an insurance company's agent, and submitted to the company, which retains them for several days, and then sends a general notice to the person claiming under the policy that the proofs are defective, without specifying in what particular, additional proofs need not be furnished.[6]

A mere examination of the premises is not a waiver of proofs;[7] nor is a waiver of notice a waiver of preliminary proof;[8] nor does a reply of the president to an explanation of the reason of failure to give notice that the company would be disposed to do what is right amount to such waiver;[9] nor a mere proposal to arbitrate, the proposition being accompanied by a statement that the party proposing has no power to waive;[10] nor a letter from the secretary denying responsibility, stating that the proofs are unsatisfactory, and reserving all objections to a recovery.[11]

[1] Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465.

[2] Commercial Union Assurance Co. *v.* Hocking, 115 Pa. St. 407; 2 Am. St. Rep. 562.

[3] Atlantic Ins. Co. *v.* Wright, 22 Ill. 462.

[4] Phillips *v.* Ins. Co., 14 Mo. 220; Ripstein *v.* Ins. Co., 57 Mo. 86.

[5] Blake *v.* Ins. Co., 12 Gray, 265; Hartford Ins. Co. *v.* Harmer, 22 Ohio, 452; 59 Am. Dec. 684; Noyes *v.* Ins. Co., 30 Vt. 659; Turley *v.* Ins. Co., 25 Wend. 374; Unthank *v.* Ins. Co., 4 Biss. 357.

[6] Pratt *v.* New York Central Ins. Co., 55 N. Y. 505; 14 Am. Rep. 304.

[7] Brush *v.* Ins. Co., 6 Phila. 252.

[8] Desilver *v.* Ins. Co., 38 Pa. St. 130.

[9] Smith *v.* Ins. Co., 1 Allen, 297; 79 Am. Dec. 733.

[10] Niagara Ins. Co. *v.* Lewis, 12 U. C. C. P. 15.

[11] Citizens' Ins. Co. *v.* Doll, 35 Ind. 89; 6 Am. Rep. 360.

ILLUSTRATIONS. — A policy required, in case of loss, a certificate of certain facts from the nearest magistrate or notary public. On the 22d of March following a loss in January, a certificate of a notary public was sent, and was not objected to by the company until the day of trial, when they set up that another notary public lived about one square nearer to the property lost. One witness positively testified to a promise by the company's agent to pay the loss. *Held*, that the company had waived their right to object to the certificate: *Byrne* v. *Ins. Co.*, 20 Ind. 103.

§ 2082. Particular Account of Loss — Requisites of. — The policy usually provides that the preliminary proof shall contain a particular account of the loss or damage. Says Mr. May:[1] "What and how particular this must be will depend upon the nature of the property insured. If, for instance, it be a dwelling-house, a statement that it was totally destroyed on a given day will be sufficient, if there was in fact a total loss. If, however, there is a partial loss, the extent of the damage should be stated. So in cases of insurance upon merchandise and personal effects generally, where the loss is only partial, the particulars of the nature, quality, and quantity of the effects and of the damage sustained should be given, in order to aid the insurers to form a judgment as to the amount of the loss. . . . . It should be stated what was the cause of the loss or damage, so far as to bring it within the risk insured against; as that it was by fire, or by death, or by flood, or by storm, or by some particular accident, as the case may be, but not to the extent of stating how it happened or was occasioned."[2] To comply with the condition of a fire policy requiring as particular an account of the loss and damage as the nature of the case will admit, where all the books, invoices, and vouchers are preserved, the insured must give, in his preliminary proofs, full and

[1] May on Insurance, sec. 474.

[2] Withholding after a loss has occurred the necessary information, invoices, documents, and proofs will not bar a recovery on the policy, unless the withholding be with fraudulent intent: Betts *v.* Franklin etc. Ins. Co., Taney, 171.

exact particulars of his loss.[1] It is not a sufficient compliance with a condition in a policy of fire insurance, on "household furniture $367" and "groceries $233," requiring that, in case of loss, "the insured shall . . . . within thirty days deliver to the secretary a particular account" of the loss, where the statement sent by the insured is a mere reiteration of the description in the policy: "household furniture $367," and "groceries $233"; and the fact that the company received such a statement at the end of twenty days, but gave no notice of insufficiency, is not a waiver of the condition demanding a "particular" statement.[2] But where all the books, vouchers, etc., were consumed with the goods, a statement of the gross amount lost and the circumstances of the loss, under oath, was held sufficient.[3] A by-law of an insurance company providing that in case of loss the assured shall, as soon as possible, deliver a particuler account in writing, under oath, stating the value of the property lost and of that saved, is sufficiently complied with by a claim for a total loss of the property, stating its value, if some of the property is saved without his knowledge.[4] A policy may stipulate for an examination, under oath, and that a refusal to answer questions or to sign the examination shall cause a forfeiture.[5] But ordinarily the refusal of the assured to submit to an examination on oath, or to answer on such examination material questions respecting the loss, as required by provisions of the policy, does not work a forfeiture of all claim under the policy, but only suspends payment thereon until this is done.[6] Where, by the express terms of a policy of insurance, the insurers are not liable unless the loss amounts to seven and a half per cent, the plaintiff is bound, as in

[1] Jones *v.* Mechanics' Fire Ins. Co., 36 N. J. L. 29; 13 Am. Rep. 405.
[2] Beatty *v.* Lycoming Ins. Co., 66 Pa. St. 9; 5 Am. Rep. 318.
[3] Norton *v.* Ins. Co., 7 Cow. 645; Peoples' Ins. Co. *v.* Pulver, 127 Ill. 246.
[4] Harkins *v.* Ins. Co., 16 Gray, 591.
[5] Gross *v.* Ins. Co., 22 Fed. Rep. 74.
[6] Wilde *v.* Ins. Co., 1 Dill. 441.

all similar cases, to bring his claim by proof, within the provisions of the contract.[1]

§ 2083. Effect of Fraud or Mistake in Preliminary Proof. — An honest mistake in the proof of loss does not estop the insured from showing the real loss, even where he had sworn to the truth of the proof.[2] Where the policy provides that "fraud or false swearing" in the preliminary proof shall bar a recovery, the fact that the amount of the loss as found by a jury is less than that stated in the preliminary proof will not sustain a defense of "fraud or false swearing."[3] Such fraud and false swearing, to defeat the recovery, must have been material, intentional, and for the purpose of defrauding.[4] A claim honestly made is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or over-estimate; but if the insured, with reference to the quantity or the value of the goods insured, makes a claim which he knows to be false and unjust, and which may defraud, then he cannot recover anything.[5] But a mere willful false statement which cannot defraud will not prevent recovery.[6] The failure, however, to mention circumstances known to him, tending to show that the fire was purposely set, may be fraudulent.[7]

[1] Merchants' Mutual Ins. Co. *v.* Wilson, 2 Md. 217.

[2] Waldeck *v.* Ins. Co., 53 Wis. 129; McMaster *v.* Ins. Co., 55 N. Y. 222; 14 Am. Rep. 239; Schmidt *v.* Ins. Co., 55 Mich. 432.

[3] Franklin Ins. Co. *v.* Culver, 6 Ind. 137; Moore *v.* Ins. Co., 29 Me. 97; 48 Am. Dec. 514; Hoffman *v.* Ins. Co., 1 La. Ann. 216; Dogge *v.* Ins. Co., 49 Wis. 501.

[4] Moadinger *v.* Mechanics' Mutual Ins. Co., 2 Hall, 490; Marion *v.* Great Republic Ins. Co., 35 Mo. 148; Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283; Commercial Ins. Co. *v.* Huckberger, 52 Ill. 464; Beck *v.* Germania Ins. Co., 23 La. Ann. 575; McMaster *v.* Ins. Co., 55 N. Y. 222; 14 Am. Rep. 239; Hubbard *v.* Hartford Fire Ins. Co., 33 Iowa, 325; 11 Am. Rep. 125; Insurance Companies *v.* Weide, 14 Wall. 375; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; Clark *v.* Phœnix Ins. Co., 36 Cal. 168; Jones *v.* Ins. Co., 36 N. J. L. 29; 13 Am. Rep. 405; Helbing *v.* Ins. Co., 54 Cal. 156; 35 Am. Rep. 72; Carson *v.* Ins. Co., 33 N. J. L. 300; 39 Am. Rep. 584.

[5] Chapman *v.* Pole, 22 L. T., N. S., 307; Sibley *v.* Ins. Co., 8 Ins. Law J. 401; Dogge *v.* Ins. Co., 49 Wis. 501; Raffel *v.* Ins. Co., 7 La. Ann. 244.

[6] Shaw *v.* Scottish Ins. Co., 1 Fed. Rep. 761.

[7] Smith *v.* Queen Ins. Co., 1 Hann. 311.

So is a demand under oath on the part of the assured for the whole amount of the loss, where part of the loss is payable to mortgagees.[1] But not his statement that he "owned" the property, where it appears that he had only an estate for life.[2] Exaggerating the value of the insured property, although done, not with intent to gain the excess, but only to induce the company to make a speedy settlement, and to accord a sufficient sum to cover the true value, is a fraud within a provision in the policy that all fraud or attempt at fraud, on the part of the insured, shall cause a forfeiture.[3]

§ 2084. Limitation of Suit on Policy — As to Time. — Where a loss is payable, by the terms of the policy, a certain time after proof is made, suit cannot be brought until after the expiration of that time;[4] but if the insurer absolutely refuse payment, suit may be brought immediately.[5] The provision of the charter of a mutual company that no execution shall issue upon any judgment against it until three months after the rendition thereof will be enforced, although the judgment be founded upon a foreign judgment rendered long before.[6] A condition in a policy of fire insurance that no action against the insurers for the recovery of any claim upon the policy shall be sustained unless commenced within a certain period after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted if an action for its enforcement be subsequently commenced, is valid, and is generally held not to be in contravention of the policy of statutes of limitation.[7] But there may be legal

[1] Lewis *v.* Ins. Co., 63 Iowa, 193.
[2] Andes *v.* Ins. Co., 71 Ill. 620.
[3] Sleeper *v.* New Hampshire Fire Co., 56 N. H. 401.
[4] Camberling *v.* McCall, 2 Yeates, 281; 1 Am. Dec. 341.
[5] Allegre *v.* Ins. Co., 6 Har. & J. 408; 14 Am. Dec. 289.
[6] Judkins *v.* Ins. Co., 39 N. H. 172.
[7] Thompson *v.* Ins. Co., 25 Fed. Rep. 206; Amesbury *v.* Bowditch Mutual Fire Ins. Co., 6 Gray, 596; Glass *v.* Walker, 66 Mo. 32; Riddlesbarger *v.* Hartford Ins. Co., 7 Wall. 386; Cray *v.* Hartford Ins. Co., 1 Blatchf. 280; Brown *v.* Roger Williams Ins. Co., 7

excuses for not bringing the action within the time limited, and of these are the following, viz.: Impossibility of performance on account of other conditions of the policy. Thus under a provision that no suit shall be sustainable unless commenced within six months after loss, and elsewhere providing that the company will pay any loss sixty days after due notice and proof, the six months do not begin to run until after the sixty days;[1] so where a suit is to be brought within six months from the time of the loss, and the loss is not payable until sixty days after the adjustment, and the parties, in good faith, and without objection, are occupied so long in adjusting the loss that sixty days from the date of the adjustment does not expire within the six months, a suit brought at the expiration of sixty days will be sustained;[2] so where the insurable interest was a mechanic's lien, the value of which could only be determined by a judgment of court upon suit, which was brought immediately upon the occurrence of the loss, but did not come to judgment till after the expiration of the time limited for bringing suit for the loss, it being also stipulated that proof of the value of the loss must be made before it could be demanded, it was held that the limitation of the suit was inoperative;[3] so where the delay is caused by hopes of amicable adjustment held out by the company.[4] A limitation subject to

R. I. 301; 5 R. I. 304; Wilson *v.* Ætna Ins. Co., 27 Vt. 99; Williams *v.* Vermont Mutual Ins. Co., 20 Vt. 222; Peoria Ins. Co. *v.* Whitehill, 25 Ill. 466; North Western Ins. Co. *v.* Phœnix Oil and Candle Co., 31 Pa. St. 449; Bruce *v.* Savannah Mutual Ins. Co., 24 Ga. 97; Portage County Mutual Ins. Co. *v.* West, 6 Ohio, 599; Carter *v.* Humboldt Fire Ins. Co., 12 Iowa, 287; Stout *v.* City Fire Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Ripley *v.* Ætna Ins. Co., 29 Barb. 552; Fullam *v.* New York Union Ins. Co., 7 Gray, 61; 66 Am. Dec. 462; Patrick *v.* Ins. Co., 43 N. H. 621; 80 Am. Dec. 497; Merchants' Ins. Co. *v.* Lacroix, 35 Tex. 249; 14 Am. Rep. 370; Chandler *v.* Ins. Co., 20 Minn. 85; 18 Am. Rep. 385.

[1] Ellis *v.* Ins. Co., 64 Iowa, 507. But see Chambers *v.* Ins. Co., 51 Conn. 17; 50 Am. Rep. 1.

[2] Mayor *v.* Ins. Co., 10 Bosw. 537; Badger *v.* Ins. Co., 9 Ins. L. J. 627; Chandler *v.* Ins. Co., 21 Minn. 85; 18 Am. Rep. 385; Barnum *v.* Ins. Co., 97 N. Y. 188.

[3] Stout *v.* Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539.

[4] Grant *v.* Ins. Co., 5 Ind. 23; 61 Am. Dec. 74; Killips *v.* Ins. Co., 28 Wis. 472; 9 Am. Rep. 506; Little *v.* Ins. Co., 123 Mass. 380; 25 Am. Rep.

a condition which may be defeated by either party, as that no suit shall be brought until the case has been submitted to arbitration, since either party may refuse to arbitrate, is invalid.[1] A suit brought after the expiration of the time limited, although a prior suit commenced within the limited period may have been nonsuited, or judgment thereon arrested, cannot be maintained.[2] That an action is brought in a court which has no jurisdiction of the defendant does not extend the time for bringing suit in a court having the requisite jurisdiction.[3] But where a suit was commenced within the time limited, but by mistake the name of the wrong company was inserted in the body of the summons, the defendant having voluntarily appeared to move to dismiss, the plaintiff was allowed to amend by inserting the name of the defendant, and proceed with his suit.[4] A new promise or acknowledgment will not revive a cause of action barred by such limitation.[5]

ILLUSTRATIONS. — A policy provided that suit was not to be brought until the expiration of two months after the loss became due. A loss was allowed, payable in sixty days. *Held*, that suit might be brought two months after the allowance was made: *Utica Ins. Co.* v. *American Mutual Ins. Co.*, 16 Barb. 171; *Chandler* v. *Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385. A loss was not to be payable till an inventory was sent and an appraisal permitted by the insured, and nothing was done about an appraisal by either party. *Held*, that a recovery might be had without an appraisal: *Com. Ins. Co.* v. *Robinson*, 64 Ill. 265; 16 Am. Rep. 557. Suit was brought thirteen days before the expiration of the time limited. The writ was immediately placed in the hands of the officer, who made return that he could not find the defendant. The next day, which was two days after the expiration of the time limited, another summons

96; St. Paul Ins. Co. *v.* McGregor, 63 Tex. 399. But see Gooden *v.* Ins. Co., 20 N. H. 73; Blank *v.* Ins. Co., 36 La. Ann. 599.

[1] Leach *v.* Ins. Co., 58 N. H. 245.

[2] Riddlesbarger *v.* Ins. Co., 7 Wall. 386; Brown *v.* Ins. Co., 7 R. I. 301; Wilson *v.* Ins. Co., 27 Vt. 99; Arthur *v.* Ins. Co., 78 N. Y. 462; O'Laughlin *v.* Ins. Co., 3 McCrary, 543. But see Franklin Ins. Co. *v.* McCrea, 4 G. Greene, 229.

[3] Keystone Mutual Benefit Ass'n *v.* Norris, 115 Pa. St. 446; 2 Am. St. Rep. 372.

[4] Burton *v.* Ins. Co., 26 Ohio, 467.

[5] Williams *v.* Ins. Co., 20 Vt. 222.

was issued, with which the defendant was served. *Held*, that the action was sustainable: *Peoria Ins. Co.* v. *Hall*, 12 Mich. 202. A policy provided that a loss thereunder should be payable sixty days after proof thereof, and that a suit for the recovery of any claim under the policy should be brought within twelve months after the loss occurred. *Held*, that the twelve months did not commence to run until the loss was due and payable,—the expiration of the sixty days after the proof of the same: *Spare* v. *Ins. Co.*, 9 Saw. 142. A fire insurance policy limited the time for suing upon it to a "term of twelve months next after the loss or damage shall occur." *Held*, that this term did not begin to run until twelve months after the loss became payable by the terms of the policy: *Steen* v. *Niagara Fire Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297. A policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur; and also that no suit could be maintained until arbitrators had fixed the amount of the loss. *Held*, that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred: *Barber* v. *Fire and Marine Ins. Co. of Wheeling*, 16 W. Va. 658; 37 Am. Rep. 800. *Contra*, *Johnson* v. *Ins. Co.*, 91 Ill. 92; 33 Am. Rep. 47. A policy was conditioned that no suit upon it should be sustained unless commenced within a year after the claim should accrue. An action was commenced upon it within the year, and on the trial it appeared that in the statement of encumbrances in the application a mortgage had been omitted. The plaintiff offered to show that the defendant's agent was informed of the mortgage, but omitted it by mistake. The court excluded the evidence, but offered to allow the plaintiff to amend his complaint, setting up the mistake. The plaintiff refused, and was nonsuited. Afterwards, and after the lapse of a year from the accruing of the claim, he commenced another suit. *Held*, not maintainable, although the defendant's counsel accepted the costs in the first suit, and gave the plaintiff's counsel time to make case or exceptions: *Arthur* v. *Homestead Fire Ins. Co.*, 78 N. Y. 462; 34 Am. Rep. 550. A policy provided that no suit should be maintained thereon unless commenced within twelve months after loss or damage. To avoid this provision set up in defense to an action thereon, the plaintiff showed that a third person had obtained an injunction restraining the defendant from paying and the holders from receiving the loss or damage under the policy. The New York statute of limitations provides that when the commencement of an action shall be stayed by injunction the time of the continuance of the injunction shall not be

part of the time limited for the commencement of the action. *Held*, 1. That the injunction did not suspend the operation of the limitation nor relieve from the forfeiture; 2. That the exception in the statutes does not apply to limitations by contract, but only to statutory limitations; 3. That the injunction did not restrain the bringing of an action: *Wilkinson* v. *First National Ins. Co.*, 72 N. Y. 499; 28 Am. Rep. 166. One of the provisions was, that no suit for a recovery under the policy should be sustainable in any court unless commenced within twelve months next after the loss should occur. A creditor of the insured attached the amount due his debtor under the policy for a loss, by a process of foreign attachment, within twelve months after such loss occurred, and the creditor, after the twelve months had expired, brought *scire facias* against the insurance company. *Held*, that the attachment suit saved the claim against the limitation contained in the policy, and that the *scire facias* might be sustained: *Harris* v. *Phœnix Ins. Co.*, 35 Conn. 310.

§ 2085. **As to Place.**—A condition in a policy limiting the place where the action is to be brought,[1] or that suit is only to be brought in a certain state, is invalid.[2]

§ 2086. **Waiver of Conditions.** — These conditions as to action may be waived by the insurer either expressly or impliedly.[3] Thus a condition allowing an exemption from suit for a certain time after the loss is waived by the insurer refusing absolutely to pay,[4] or by a general denial of any liability on the part of the company.[5]

ILLUSTRATIONS. — Losses were to be paid within ninety days after proofs should be completed and filed, and a suit not commenced within six months after the loss to be barred. Amended proof of the loss, which occurred on July 5th, was filed with the company, on their suggestion of the defect made October 7th, on October 14th, and it was stated by the secretary January 2d, in reply to an inquiry, that the claim would be paid January 14th. *Held*, that this was a suspension of this stipulation: *Ames* v. *Ins. Co.*, 14 N. Y. 253.

[1] Nute v. Ins. Co., 6 Gray, 174; Hall v. Ins. Co., 6 Gray, 185; Amesbury v. Ins. Co., 6 Gray, 596.

[2] Reichard v. Ins. Co., 31 Mo. 518.

[3] Ripley v. Ins. Co., 29 Barb. 552; Columbian Ins. Co. v. Lawrence, 2 Pet. 25; Graves v. Ins. Co., 12 Allen, 391; Coursin v. Ins. Co., 46 Pa. St. 323.

[4] Hoffecker v. Ins. Co., 5 Del. 101; Cobb v. Ins. Co., 11 Kan. 93.

[5] Norwich etc. Co. v. Ins. Co., 34 Conn. 561; Phœnix Ins. Co. v. Taylor, 5 Minn. 492; Warner v. Ins. Co., 14 Wis. 318.

§ 2087. Agreements to Refer to Arbitration. — A stipulation that suit shall not be brought on the policy, but that the dispute shall be referred to arbitration, is invalid, as ousting the jurisdiction of the courts.[1] A stipulation in a policy for a reference in case of a difference of opinion "as to the amount of loss or damage" does not apply to a case where there is no difference of opinion as to the amount of loss, but the company denies all liability under the policy.[2] But a clause in a life policy that the company would pay the amount insured for if in the opinion of their surgeon-in-chief the party did not die of intemperance, is a condition precedent to the right of the plaintiff to recover, and is not void as contravening public policy or ousting the courts of their jurisdiction, the agreement being complete and the arbitrator designated.[3] A clause in a policy requiring direct or positive proof that the death of the assured was caused by external violence and accidental means, and was not the result of design, either on the part of the assured or any other person, will not prevail as a rule of evidence on the trial of an action against the insurer. Courts will not permit the course of justice to be stipulated or contracted in such manner as to defeat the ends to be subserved by a trial.[4]

ILLUSTRATIONS. — A policy provided that any controversy concerning loss or damage should be submitted to arbitrators at the request of either party, and that no suit should be brought on the policy until after an award. Arbitrators were appointed. They failed to agree. The assured then brought suit on the policy. *Held*, that the agreement to arbitrate was revocable, and that the bringing of the action revoked it: *Commercial Union Assurance Co.* v. *Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562.

[1] See Title Arbitration and Award; Allegre *v.* Ins. Co., 6 Har. & J. 408; 14 Am. Dec. 289; Robinson *v.* Ins. Co., 17 Me. 131; 35 Am. Dec. 239; Wynkoop *v.* Ins. Co., 91 N. Y. 478; 43 Am. Rep. 686.

[2] Lasher *v.* Ins. Co., 18 Hun, 98; 55 How. Pr. 318; Mentz *v.* Ins. Co., 79 Pa. St. 478; 21 Am. Rep. 80; Phœnix Ins. Co. *v.* Badger, 53 Wis. 284; Wallace *v.* Ins. Co. 4 McCreery, 123; Nurney *v.* Ins. Co. 30 N. M. 350.

[3] Campbell *v.* Ins. Co., 1 McAr. 246; 246; 29 Am. Rep. 591.

[4] Utter *v.* Travelers Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913.

§ 2088. **Waiver and Estoppel — In General.** — If the insurer deliver the policy after a full knowledge of facts upon which its validity may be disputed, this is a waiver of them, and he will thereafter be estopped, when a claim is made, from setting up such facts as a defense.[1] In like manner, any acts, declarations, or course of dealing after delivery by the insurers with a knowledge of the facts constititung a breach of a condition of the policy recognizing the policy as still valid, and from which the insured might fairly infer that he was protected, will amount to a waiver of such breach, and estop the insurers from setting it up in defense.[2] Acceptance of premiums knowing that the policy is subject to forfeiture for violation of a condition is a waiver of the conditions.[3] An insurance company may waive the right to treat a policy as void because of the want of sole and unconditional ownership by recognizing it as valid after knowledge of the facts.[4] Conditions in a policy avoiding it if the interest of the insured be other than the entire and sole ownership, and this be not so represented to the company, and so expressed in the written part of the policy, also in case of other insurance without the consent of the company written thereon, is waived by the omission of the general agent, although informed by the insured, to note the facts on the policy.[5] Issuing a policy after notice of the existence of previous

[1] Mahoney *v.* Ins. Co., L. R. 6 Com. P. 252; Commercial Ins. Co. *v.* Ives, 51 Ill. 402; Morrison *v.* Universal etc. Ins. Co., L. R. 8 Ex. 40; Geib *v.* Enterprise Ins. Co., 1 Dill. 449; Lorillard Fire Ins. Co. *v.* McCulloch, 21 Ohio St. 176; 8 Am. Rep. 52; Richmond *v.* Niagara Fire Ins. Co., 79 N. Y. 230; Peoria Marine and Fire Ins. Co. *v.* Perkins, 16 Mich. 380; Van Schaeck *v.* Niagara Ins. Co., 68 N. Y. 134; Bennett *v.* North British etc. Ins. Co., 81 N. Y. 273; 37 Am. Rep. 501; Shaw *v.* Scottish Provincial Ins. Co., 1 Fed. Rep. 761; Michigan etc. Ins. Co. *v.* Lewis, 30 Mich. 41; Germania Fire Ins. Co. *v.* McKee, 94 Ill. 494; Smith *v.* Commonwealth Ins. Co., 49 Wis. 322; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345. Delivering the policy and receiving the premium estops the insurer from denying the fact that the contract of insurance was made: In re State of Pennsylvania Ins. Co., 22 Fed. Rep. 109.

[2] Georgia Ins. Co. *v.* Kinner, 28 Gratt. 88; Titus *v.* Ins. Co., 81 N. Y. 410; Phœnix Ins. Co. *v.* Stevenson, 78 Ky. 150; Pennsylvania Fire Ins. Co. *v.* Kittle, 39 Mich. 51.

[3] Northwestern etc. Ins. Co. *v.* Amerman, 16 Ill. App. 528.

[4] Lewis *v.* Ins. Co., 63 Iowa, 193.

[5] Richmond *v.* Niagara Fire Ins. Co., 79 N. Y. 230.

policies of insurance in other companies on the same property without indorsing its written consent, etc., is a waiver of the condition requiring it.[1] The requirement that a consent to other insurance must be indorsed on the policy may be waived by the failure of the company to repudiate the verbal consent of its general agent, the assured having acted in the belief that the consent was effectual.[2] So a company may estop itself from contesting a suit on a policy on the ground that certain encumbrances were not disclosed, if for a year it has appeared desirous to adjust and pay the loss, and has not declared that the policy was avoided.[3] Where insurance has become forfeited by a sheriff's sale of the property, the company may waive the forfeiture, and the property having then been reacquired by the assured, the obligation of the policy will reattach.[4] The written assent of a fire insurance company to a transfer of a policy does not operate as a waiver of a prior forfeiture of the policy by a breach of one of its conditions, although the agents of the company were fully aware of the breach at the time.[5] That an insurance agent wrote, acknowledged, and witnessed a deed of conveyance is not a waiver of the condition in the policy against alienation.[6] Under a provision that a waiver of any conditions must be "clearly expressed and indorsed on the policy," the oral agreement of the company to pay after the loss without the required statement thereof is not a waiver.[7]

ILLUSTRATIONS. — An insurance company might have declared a fire policy forfeited for a change of title in the property insured, but, knowing all the facts, called for proofs of loss, and promised to pay the loss. *Held*, that the forfeiture was waived: *Silverberg* v. *Ins. Co.*, 67 Cal. 36. The holder of a fire policy

[1] Richardson *v.* Westchester Fire Ins. Co., 15 Hun, 472.

[2] Morrison *v.* North America Ins. Co., 69 Tex. 353; 5 Am. St. Rep. 63.

[3] Niagara Fire Ins. Co. *v.* Miller, 120 Pa. St. 504; 6 Am. St. Rep. 726.

[4] Elliott *v.* Ashland Mutual Fire Ins. Co., 117 Pa. St. 548; 2 Am. St. Rep. 703.

[5] Ins. Co. of N. America *v.* Garland, 10 Ill. 220.

[6] Lahiff *v.* Ins. Co., 60 N. H. 75.

[7] Universal etc. Ins. Co. *v.* Weiss, 106 Pa. St. 20.

died, leaving a will disposing of all his property, and the company, knowing of his death, issued annual renewals thereof in his name. *Held*, a waiver of a condition avoiding it in case of any transfer without the written consent of the company: *Robinson* v. *Ins. Co.*, 18 Hun, 395. Property was insured by the original policy to the amount of two hundred dollars, and after the policy was claimed to have been forfeited by the introduction of new elements of risk, the company, with full knowledge of the facts, by an indorsement on the policy, added one hundred dollars to the risk on the same property, and in the indorsement stated the whole risk as thus increased to be three hundred dollars. *Held*, that the forfeiture was waived by the company: *Rathbone* v. *Ins. Co.*, 31 Conn. 193. On May 29th a life insurance company wrote to a person, whose policy was forfeited by failure to make a certain payment, that if he would send a certificate of his good health from a certain physician, with remittance for premiums due, the policy would be reinstated; all of which he did June 6th, but the company declined to fulfill, alleging that the privilege expired May 28th. *Held*, that the waiver was valid; that the time he took for response and remittance was not unreasonable; that no further tender was required: *Miesell* v. *Ins. Co.*, 76 N. Y. 115.

§ 2089. Negligence of Insured as a Defense. — That the fire was caused by the negligence of the insured, or by that of his tenants, agents, or servants, is no defense.[1] One of the objects of insurance is recompense for one's negligence; therefore if the negligence of the assured is not willful, or of such a degree as amounts to fraud, the

[1] Cumberland Valley Mutual Protection Co. *v.* Douglas, 58 Pa. St. 419; 98 Am. Dec. 298; Shaw *v.* Robberds, 6 Ad. & E. 75; Catlin *v.* Springfield Fire Ins. Co., 1 Sum. 434; Sanford *v.* Mechanics' Mutual Fire Ins. Co., 12 Cush. 541; Daniels *v.* Hudson River Fire Ins. Co., 12 Cush. 416; 59 Am. Dec. 192; Mickey *v.* Burlington Ins. Co., 35 Iowa, 174; 14 Am. Rep. 494; Austin *v.* Drewe, 6 Taunt. 436; 4 Camp. 561; Maryland Fire Ins. Co. *v.* Whitford, 2 Law Transcript, 284; Columbian Ins. Co. *v.* Lawrence, 10 Pet. 507; Gates *v.* Madison County Mutual Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360; Williams *v.* New England Mutual Fire Ins. Co., 31 Me. 219; Johnson *v.* Berkshire Mutual Fire Ins. Co., 4 Allen, 388; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213; Gove *v.* Farmers' Mutual Fire Ins. Co., 48 N. H. 41; 97 Am. Dec. 572; National Ins. Co. *v.* Webster, 83 Ill. 470; Germania Ins. Co. *v.* Sherlock, 25 Ohio St. 33; Jameson *v.* Royal Ins. Co., 7 I. R. C. L. 126; Perrin *v.* Ins. Co., 11 Ohio, 147; 38 Am. Dec. 729; St. Louis Ins. Co. *v.* Glasgow, 8 Mo. 713; 42 Am. Dec. 661; Henderson *v.* Ins. Co. 10 Rob. (La.) 164; 43 Am. Dec. 176. Neglect by the servants of one assured to obey his orders that the water-casks in the building should be kept full, and which the assured had represented, but not warranted, to be "kept full constantly," does not avoid the policy: Daniels *v.* Ins. Co., 12 Cush. 416; 59 Am. Dec. 192.

insurer will be responsible.[1] Mr. May says: "No case in life insurance has been found where negligence of usual precautions in the preservation of health, or even the utmost carelessness and recklessness relative thereto, have been made a ground of defense. Yet no doubt many cases of death have occurred attributable to such negligence as the cause."[2] A policy on goods against loss by fire is not avoided by the use for a single night of the building in which they are stored as a shelter for the crew of a vessel which had filled with water; and the insurers are liable for a loss occasioned by the crew's making a fire, contrary to the express directions of the assured, in a store which is in an unsafe condition at the time.[3] The term "gross negligence," as used in a condition in a policy of insurance exempting from loss on that account, is the want of that diligence which even careless men are accustomed to exercise.[4] A failure to comply with a provision in a policy that in case of loss or misfortune "the insured shall use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured," or with like stipulations as to forwarding property to its destination, and not selling except at public sale, will preclude a recovery for any increase of the loss caused by such non-compliance.[5] Under such a clause the insured is not obliged, where the goods consist of shirts, bosoms, and collars, which have been injured chiefly by water or handling, to have them "relaundried."[6] Where the policy requires the insured, in case of exposure to loss or damage by fire, to use all possible diligence to preserve his goods, and provides, in case of his failure to do so, that the insurers shall not be liable for any loss sustained in consequence of such neglect, if

[1] Phenix Ins. Co. *v.* Sullivan, 39 Kan. 449.
[2] May on Insurance, sec. 409.
[3] Loud *v.* Ins. Co., 2 Gray, 221.
[4] Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230.
[5] Franklin Ins. Co. *v.* Cobb, 2 Cin. Rep. 87.
[6] Hoffman *v.* Ins. Co., 1 Rob. (N. Y.) 501; 19 Abb. Pr. 325; 32 N. Y. 405; 88 Am. Dec. 337.

the insured shall remove his goods, the circumstances as they existed at the time the removal was made must determine the necessity for the removal; and whatever loss or damage is necessarily sustained by the removal of the property insured, when the danger of its destruction by fire was so direct and immediate that a failure to have made the removal while he had the power would have been gross negligence on his part, he is entitled to recover under the policy.[1]

ILLUSTRATIONS.—Plaintiff's buildings, which were insured, were intentionally set on fire by his wife, who was insane, and who had been left alone by the plaintiff. It appeared that she had frequently been left alone before this occasion. *Held*, that plaintiff, in leaving his wife alone, had not been guilty of such a degree of negligence as would constitute a defense: *Gove* v. *Farmers' Mutual Fire Ins. Co.*, 48 N. H. 41; 2 Am. Rep. 168. An applicant for a policy of fire insurance covenanted to keep his stoves and pipes well secured. After the policy was issued, the wife of the assured, intending to remove for the summer a stove, the pipe of which passed through the floor of an upper room and thence into the chimney, took down the pipe in the upper room and placed a bed over the hole in the floor, but did not remove the stove and pipe below. Afterwards, forgetting what she had done, she built a fire in the stove, which set fire to the bed and burned the house. *Held*, that the assured could recover on the policy: *Mickey* v. *Burlington Ins. Co.*, 35 Iowa, 174; 14 Am. Rep. 494.

§ 2090. **Fraud or Misconduct of Insured.**—That the loss was the result of fraud on the part of the insured will prevent a recovery;[2] and the same rule applies to gross negligence amounting to fraud.[3] The same has been held as to misconduct;[4] as where one sets fire to a steamboat by throwing on combustibles, brought to an improper place in contravention of law, and for the purpose of getting up a great head of steam while the steamboat is racing with another boat.[5] Evidence that plain-

[1] Case *v.* Ins. Co., 13 Ill. 676.

[2] Henderson *v.* Ins. Co., 10 Rob. (La.) 164; 43 Am. Dec. 176; Western Ins. Co. *v.* Miller, 1 Handy, 325; Huckins *v.* Ins. Co., 31 N. H. 238.

[3] Robinson *v.* Ins. Co., 27 N. J. L. 134.

[4] Chandler *v.* Ins. Co., 3 Cush. 328.

[5] Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 387.

tiff's agent intentionally set fire, from which a loss arose, for the purpose of defrauding the insurer, the agent having taken an insurance on goods in the same building, is inadmissible in defense against an action on another policy taken out by such agent for account of the plaintiff, where there is no evidence that the plaintiff was implicated in the fraudulent design.[1] One who, after effecting for his own benefit insurance on another's life, murders him to obtain the insurance-money, forfeits his right thereto.[2] The assignee of a policy of insurance containing a provision "that all fraud, or attempt at fraud, by false swearing or otherwise, shall be a complete bar to any recovery for loss under it," cannot enforce a recovery, although the assignment was made with the consent of the insurance company, if the transfer proved to be fraudulent as to creditors, of which the company was ignorant when it consented to the transfer; and this is so, although the assignee was the local agent of the company.[3] But the insurer is liable if the insured while insane sets fire to the property insured.[4]

§ 2091. Remedy of Insurer or Insured against Third Party Causing Loss — Subrogation. — The insurer has a right of subrogation to the rights of the insured against third parties who may be liable to the insured for the loss. The contract of insurance is treated as an indemnity, and the insurer as a surety who is entitled to all the remedies and securities of the assured, and to stand in his place.[5] Thus where a house was destroyed by a mob, and the insurers paid the loss, a suit against the hundred which were primarily responsible was maintained in the name of the insured, but for the benefit of the insurers.[6]

[1] Henderson *v.* Ins. Co. 10 Rob. (La.) 164; 43 Am. Dec. 176.
[2] New York Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591.
[3] Phœnix Ins. Co. *v.* Willis, 70 Tex. 12; 8 Am. St. Rep. 566.
[4] Karow *v.* Ins. Co., 57 Wis. 56; 46 Am. Rep. 17.
[5] May on Insurance, sec. 454; Rockingham *v.* Ins. Co., 39 Me. 253; 63 Am. Dec. 618.
[6] Mason *v.* Sainsbury, 3 Doug. 61.

So where the underwriters have paid a loss occasioned by sparks from a locomotive, they may recover from the railroad company the amount thus paid, in a suit in the name of the owner of the property destroyed, which action the owner cannot control;[1] so where the loss is entailed by the negligence of a common carrier, whereby the goods intrusted to his care are destroyed by fire.[2] Where the insured has conveyed the property insured, the right of the insurer to be subrogated to the securities of the insured for the payment of the purchase-money cannot arise until there is a recovery of the insurance, if at all.[3] An action will not lie by an insurance company which has paid a loss on a life insured by it (the death of the insured being caused by the negligence of the railroad) against the railroad for the amount which it has been forced to pay through its negligence.[4] A mortgagee has no interest in an insurance policy issued to the mortgagor for his own benefit, and cannot be subrogated to the latter's rights.[5] Where a person, without the knowledge or consent of the insured, procured a policy of insurance to be canceled, under a mistake, as he alleged, of the object of the insurance, he was held to have substituted himself for the insurers, and to be liable to the insured for the amount of the policy.[6] One who effected insurance covering his own goods and goods stored with him, and collected the insurance-money, is liable to the owner of such stored goods for his share,

[1] Hart *v.* R. R. Co., 13 Met. 99; 46 Am. Dec. 719; Monmouth Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107; Connecticut Fire Ins. Co. *v.* R. R. Co., 73 N. Y. 399; Brighthope R. R. Co. *v.* Rogers, 76 Va. 443. An insurance company which had paid for the loss of a hotel by fire is entitled to an injunction to restrain the insured from settlement or collection of his claim in suit against a railroad company for setting the hotel on fire, without subrogation, etc.: Hartford Ins. Co. *v.* Pennell, 2 Ill. App. 609.

[2] Hall *v.* Ins. Co., 13 Wall. 367; Gales *v.* Hailman, 11 Pa. St. 515; Georgia Ins. Co. *v.* Dawson, 2 Gill, 365. See Title Bailments—Carriers.

[3] Morrison *v.* Ins. Co., 18 Mo. 262; 59 Am. Dec. 299.

[4] Mobile Ins. Co. *v.* Brame, 95 U. S. 754; Connecticut Mut. Ins. Co. *v.* R. R. Co., 25 Conn. 565; 65 Am. Dec. 571.

[5] Ryan *v.* Adamson, 57 Iowa, 30.

[6] Gray *v.* Murray, 3 Johns. Ch. 167.

although he did not request or know of the insurance, and did not ratify it before the payment of the loss.[1] If a mortgagor, intending to comply with a stipulation that he shall effect insurance for the mortgagee's benefit, takes out a policy accordingly from a company supposed to be solvent, but which proves, after a fire on the mortgaged property, to be insolvent, this does not entitle the mortgagee to insist that he shall be indemnified from the proceeds of another policy taken out by the mortgagor for his own benefit.[2]

ILLUSTRATIONS.—Premises were held under a lease containing a covenant to repair, under which the tenant was liable to repair injury by gas. An explosion of gas damaged the premises. The tenant recovered compensation from the party who caused the explosion, and repaired the premises. The landlord had received payment under a fire policy, and the insurer, on discovering that the premises had been repaired, sued for the return of the money so paid. *Held*, that the plaintiff was entitled to recover: *Darrell* v. *Tibbitts*, L. R. 5 Q. B. Div. 560. Plaintiff's buildings were burned by the negligence of the defendant. *Held*, that the plaintiff was entitled to recover of defendant their entire value, notwithstanding the fact that the insurer of the building had paid plaintiff the amount of the insurance: *Weber* v. *Morris and Essex R. R. Co.*, 35 N. J. L. 409; 10 Am. Rep. 253. In a policy issued to the owner, loss payable to mortgagee, it was conditioned that the acts of the owner should not forfeit the policy as to the mortgagee, and that, in case of loss and payment to the mortgagee, the company should be subrogated to his rights. The policy was forfeited as to the owner by his alienation. A loss occurring, the company paid the mortgagee, was subrogated to the mortgage, and brought action to foreclose the same. *Held*, that as the owner had forfeited the policy as to him, he was not entitled to have the insurance money applied on the mortgage: *Springfield Fire Ins. Co.* v. *Allen*, 43 N. Y. 389; 3 Am. Rep. 711. The assured has an executory contract for sale of the mortgaged premises at the time of the loss. *Held*, that the insurance company, on payment of the loss, could not be subrogated to the rights of the insured, *pro tanto*, under the contract of sale: *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421; 3 Am. Rep. 149. A took an insurance policy on his buildings; then he agreed to sell the land and

[1] Snow *v.* Carr, 61 Ala. 363; 32 Am. Rep. 3.

[2] Nordyke and Marmon Co. *v.* Gery, 112 Ind. 535; 2 Am. St. Rep. 219.

buildings to B, who was to give a mortgage back. The deed to B was delivered and recorded, and the mortgage was executed, except that B's wife had not signed it. It was left in A's hands until this could be done, when the policy was to be assigned by A to B. Before these things were done the buildings burned. *Held*, that the insurance company, on paying to A the amount of the loss, could not insist on an assignment of the mortgage: *Nelson* v. *Bound Brook Mut. Fire Ins. Co.*, 43 N. J. Eq. 256; 3 Am. St. Rep. 308.

§ 2092. **Remedies of Insured against Insurer.** — Outside the ordinary suit on the policy, where there has been a loss before the policy was actually delivered, but after the contract was made, the insured may resort to equity to compel the issuance to him of a policy, which court, besides decreeing specific performance, will decree payment of the loss;[1] or the insured, on proving the contract, may recover at law without the issuance of the policy.[2] Where a contract was made to issue a policy of fire insurance which was not fulfilled, it was held that the plaintiff might recover the same damages as if suing on the policy as agreed upon.[3]

Where the insured finds that the policy, by mistake or fraud, does not express the real agreement, he may apply to equity to have it reformed.[4] Evidence showing that the insurer and insured meant to make a certain contract,

[1] Baile *v.* St. Joseph Ins. Co., 10 Ins. Law J. 663; 13 Cent. L. J. 233; Rhodes *v.* Railway Passengers' Ins. Co., 5 Lans. 71; Union Mutual Ins. Co. *v.* Com. Mut. Mar. Ins. Co., 2 Curt. 524; affirmed 19 How. 318; Fried *v.* Royal Ins. Co., 50 N. Y. 243; Franklin Fire Ins. Co. *v.* Hewitt, 3 B. Mon. 231.

[2] Perkins *v.* Washington Ins. Co., 4 Cow. 645; Kentucky Mutual Ins. Co. *v.* Jenks, 9 Ind. 96; Hamilton *v.* Lycoming Ins. Co., 5 Pa. St. 339; Whittaker *v.* Farmers' Union Ins. Co., 29 Barb. 312; City of Davenport *v.* Peoria Mar. & Fire Ins. Co., 17 Iowa, 276; Hallock *v.* Commercial Ins. Co., 27 N. J. L. 645; 26 N. J. L. 268; Sussex County Mutual Ins. Co. *v.* Woodruff; 26 N. J. L. 541; Sheldon *v.* Conn. Mutual Life Ins. Co., 25 Conn. 207; 65 Am. Dec. 565; Gerrish *v.* German Ins. Co., 55 N. H. 335.

[3] Humphry *v.* Ins. Co., 15 Blatchf. 35.

[4] Oliver *v.* Ins. Co., 2 Curt. 277; Phœnix Ins. Co. *v.* Hoffheimer, 46 Miss. 645; Phœnix Ins. Co. *v.* Gunee, 1 Paige, 278; Hammel *v.* Ins. Co., 50 Wis. 240; Stout *v.* Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Longhurst *v.* Ins. Co., 19 Iowa, 364; Neville *v.* Ins. Co., 19 Ohio, 452; New York Ice Co. *v.* Ins. Co., 23 N. Y. 357; Parsons *v.* Hosmer, 2 Root, 1; 1 Am. Dec. 58; Keith *v.* Ins. Co., 52 Ill. 518; 4 Am. Rep. 624; Pierce *v.* Ins. Co., 50 N. H. 297; 9 Am. Rep. 235.

but by misconception of the effect of the language, used terms in the policy which defeated their intention, makes a proper case for its reformation.[1] This is essential in those states where the courts of law will not permit the contract as expressed in the policy to be varied by parol.[2] But in most states the courts of law will apply the doctrines of waiver and estoppel, or allow proof of mistake, so as to enable the plaintiff to maintain his action for indemnity, and not drive him to a court of equity.[3] So a court of equity may enjoin the insurer from setting up a fraudulent or grossly unjust defense.[4] To sustain a suit for reformation of the policy, the plaintiff's evidence must be clear, and it must appear that the mistake was mutual, or that the mistake of one was caused by the fraud of the other.[5] Equity will not interfere after a suit at law has been brought and has failed.[6] So equity will compel the renewal of a policy the surrender of which has been obtained unfairly,[7] as well as the surrender of a policy so obtained;[8] or a suit may be brought for damages for breach of the contract to continue the policy according to its terms; as where one company turns over its policies to another, and suspends business.[9] The declaration by an

[1] Maher v. Ins. Co., 67 N. Y. 283.

[2] Holmes v. Ins. Co., 10 Met. 211; 43 Am. Dec. 428; Barrett v. Ins. Co.; 7 Cush. 175; Cheviot v. Barker, 2 Johns. 346; 3 Am. Dec. 437.

[3] Wilson v. Ins. Co., 4 R. I. 141; Gerrish v. Ins. Co., 55 N. H. 355.

[4] Woodbury v. Ins. Co., 31 Conn. 518.

[5] Nat. Ins. Co. v. Crane, 16 Md. 260; 77 Am. Dec. 289; Suydam v. Columbus Ins. Co., 18 Ohio, 459; Cooper v. Farmers' Mutual Fire Ins. Co., 50 Pa. St. 299; 88 Am. Dec. 544; Tusson v. Atlantic Mutual Ins. Co., 40 Mo. 33; Van Tuyl v. Westchester Fire Ins. Co., 55 N. Y. 657; Salms v. Rutgers Fire Ins. Co., 8 Bosw. 578; Moliere v. Penn. etc. Ins. Co., 5 Rawle, 343; 28 Am. Dec. 675; Bryce v. Lorillard Fire Ins. Co., 55 N. Y. 240; 14 Am. Rep. 249; Snell v. Atlantic Fire Ins. Co., 98 U. S. 85; Hay v. Star Fire Ins. Co., 13 Hun, 496; Hearne v. Marine Ins. Co., 20 Wall. 490; Patterson v. Ben Franklin Ins. Co., 81½ Pa. St. 454; Mead v. Westchester Fire Ins. Co., 64 N. Y. 453. Application for a policy of insurance may be reformed so as to make it conform to the representation of facts made to the insurer's agent, if the insured was misled into signing an application containing a wrong statement by the action of such agent: Harris v. Ins. Co., 18 Ohio, 116; 51 Am. Dec. 448.

[6] Washburn v. Ins. Co., 114 Mass. 175; Steinbach v. Ins. Co., 12 Hun, 640.

[7] Tabor v. Mich. Mutual Life Ins. 44 Mich. 324.

[8] Fletcher v. Ætna Life Ins. Co., 4 Ins. Law J. 236.

[9] Fischer v. Hope Mutual Ins. Co., 69 N. Y. 161.

insurance company that a life policy was void (on the ground that the insured had become of intemperate habits), and a refusal to receive further premiums, does not make the policy presently payable. The policy-holder has a threefold remedy: 1. To treat the policy as rescinded, and sue for its present value; 2. To continue to tender premiums, and, on the death of the insured, sue for the sum insured; 3. To go into equity, and ask to have the policy decreed in force.[1]

An action at law to recover back the premiums paid will lie when the policy was void *ab initio*, or the risk has never attached, there having been no fraud on the part of the plaintiff.[2] So where he was induced to accept a policy through fraudulent representations.[3] So if the insured, after alienation, has the option to surrender his policy and take up his deposit note, he may recover back so much of the premiums paid as may not be required for the payment of losses up to the time of the surrender.[4] So he may recover back premiums paid on a policy improperly canceled, or a sum sufficient to procure new insurance at the former rate.[5] So where premiums are paid after forfeiture of the policy, in the belief that the forfeiture has been waived.[6] So where the premium was to cover two risks, and never attached to one, that portion may be recovered back.[7] But the premium cannot be recovered where the risk once attaches;[8] or where the contract was an illegal one;[9] or where the policy was obtained by or is void for fraud.[10]

[1] Day *v.* Connecticut General Life Ins. Co., 45 Conn. 480; 29 Am. Rep. 693.

[2] Clark *v.* Ins. Co., 2 Woodb. & M. 472; Rochester Ins. Co. *v.* Martin, 13 Minn. 59; Foster *v.* Ins. Co., 11 Pick. 85; Mulvey *v.* Ins. Co., 28 U. C. Q. B. 424; Delavigne *v.* Ins. Co., 1 Johns. Ch. 310; Mutual Ass. Co. *v.* Mahon, 5 Call, 517.

[3] Martin *v.* Ins. Co., 4 Ins. L. J. 899; Boland *v.* Whitman, 33 Ind. 64; U. S. Ins. Co. *v.* Wright, 33 Ohio St. 533.

[4] Sullivan *v.* Ins. Co., 2 Mass. 318.

[5] Braswell *v.* Ins. Co., 75 N. C. 8; McCall *v.* Ins. Co., 9 W. Va. 237; 27 Am. Rep. 558.

[6] McKee *v.* Ins. Co., 28 Mo. 383; 75 Am. Dec. 129.

[7] Bunyon on Insurance, 95.

[8] Fulton *v.* Ins. Co., 7 Ohio, 325; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Bermon *v.* Woodbridge, Doug. 781.

[9] May on Insurance, sec. 567.

[10] Friesmouth *v.* Ins. Co., 10 Cush. 587; Hoyt *v.* Gilman, 8 Mass. 336; Himely *v.* Ins. Co., 1 Mill. Const. 153; 12 Am. Dec. 623.

Where a life company, without cause, has declared one of its policies to have lapsed and become void by reason of the policy-holder's default, and refuses to have any further dealings with the policy-holder, a right of action accrues to the policy-holder in equity to have the policy adjudged and decreed to be in life and full force. The policy-holder need not wait until a claim or right of action against the company has accrued under the policy by reason of the death of the person whose life is insured thereby.[1]

An insolvent life company is liable to policy-holders in damages for breach of contract; they become creditors for the value of the policies at the date of the dissolution of the company, and death claims maturing before the dissolution are not superior to the rights of living policy-holders.[2] A policy of life insurance by which the insurance company agrees to pay a sum certain to the insured on a future day, or on his death before that day, to another, upon condition that the insured shall pay to it a certain sum yearly, is violated by the company when it transfers all its assets to another company and ceases to do business. Such violation of the contract during its term gives the policy-holder the right to rescind, and sue for and recover the whole amount of premiums paid, with interest, as money had and received for his benefit.[3]

Where a company, by its agent, fraudulently represents to the executor of the insured, whose mental faculties are impaired, that it has discovered evidence sufficient to avoid the policy, and will contest and defeat it, and thus procures a settlement for a sum grossly inadequate, the settlement may be set aside, and the balance due recovered.[4] When an insurer adjusts a loss, and indorses the adjustment on the policy, this is an admission upon

[1] Hayner v. American Popular Life Ins. Co., 36 N. Y. Sup. Ct. 211.
[2] People v. Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522.
[3] Meade v. Ins. Co., 51 How. Pr. 1.
[4] McLean v. Assurance Society, 100 Ind. 127; 50 Am. Dec. 779.

which the insured may recover without further proof.[1] The agreement by a fire company to pay a certain sum in compromise of a claim for loss, when made after an opportunity to investigate, and without fraud or deception on the part of the insured, cannot be defeated by proof of a subsequently discovered breach of warranty of the policy.[2]

ILLUSTRATIONS.—The owners of a warehouse, being indebted to the plaintiff, agreed to insure the same against fire for his benefit, and accordingly agreed with the defendant for such insurance in their name, with loss payable to the plaintiff, but by mistake the plaintiff's name was written in the policy as the assured and owner of the property; a loss occurred within the period of the risk, and after proof of the loss by the owners, and adjustment by the defendant, the former assigned the policy and their rights to the plaintiff. *Held*, that equity would reform the policy: *Spare* v. *Ins. Co.*, 9 Saw. 342. The application called for insurance on a "grist-mill," but the policy, by mistake of the clerk, when issued, insured a mill-house. The insurer read over the policy before he left the office. *Held*, that equity would correct the mistake: *Phœnix Ins. Co.* v. *Gurnee*, 1 Paige, 278; 19 Am. Dec. 431. One doing business as agent for the complainant, in selling goods for the latter, insured the goods against loss by fire, in his name as "agent." The policy expired, and a new one was issued, precisely like the first, except that it was in the name of the agent, but not as "agent." The insurance company knew, or might have known, at the times the property was insured, that the agent was doing business as agent, and not on his own account. *Held*, that a court of equity would reform the policy, by inserting the word "agent," and obliging the insurance company to pay the loss under it to the principal: *Phœnix etc. Ins. Co.* v. *Hoffheimer*, 46 Miss. 645. A life insurance company refused to receive the premium on one of its policies from a holder, on the ground that it had become forfeited by a breach of one of its conditions by the person whose life was insured. The holder, without rescinding the contract, brought an action against the company on an implied promise to receive the premiums and keep the policy in force. *Held*, that the law did not imply such a promise, and that the action could not be maintained: *Day* v. *Connecticut General Life Ins. Co.*, 45 Conn. 480; 29 Am. Rep.

[1] Illinois Mutual Fire Ins. Co. *v.* Archdeacon, 82 Ill. 236; 25 Am. Rep. 313.

[2] Stache *v.* St. Paul Fire and Marine Ins. Co., 49 Wis. 89; 35 Am. Rep 772.

693. A policy-holder, on the breaking out of the war, was compelled thereby to suspend the payment of the annual premiums as required by the policy, but on the termination of the war, tendered the whole amount due. The insurers refusing to accept, the insured brought suit to compel acceptance and to have the policy declared valid, or to compel the return of premiums theretofore paid. *Held*, that the action would lie: *Cohen* v. *Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522. A policy of fire insurance was issued on buildings by a company whose charter declared that whenever any buildings insured should be alienated, the policy should thereupon be void, "provided, however, that the grantee or alienee having the policy assigned may have the same ratified and confirmed . . . . upon application to the directors, and with their consent, within thirty days next after such alienation." The buildings covered by this policy were conveyed, and the policy was assigned by the assured. A loss by fire occurred on the eighth day after the alienation, whereupon the company were immediately informed of the loss, and an application was made by the assignee for a ratification. The company refused, arbitrarily, and without cause. On a bill brought in chancery praying for relief, *held*, that the assignee was entitled to recover of the company for the loss, the same as if they had ratified the assignment: *Boynton* v. *Farmers' Mutual Fire Ins. Co.*, 43 Vt. 256; 5 Am. Rep. 276. The defendant advertised and represented that its patrons could be insured at half the expense of insuring in other companies, by paying half the premiums in cash and giving notes for the other half, the dividends always paying the notes. The dividends never paid the notes, but generally fell far short, as the managers knew. The plaintiff procured an endowment policy for five hundred dollars, payable in five years, paying half cash and giving notes for the other half. Only one small dividend was made during the term. At the end of the five years the plaintiff demanded the five hundred dollars, but the defendant refused to pay more than the difference after deducting the amount due on the notes. *Held*, that an action for fraud was maintainable; that the plaintiff was not estopped by the delay; and that the measure of recovery would be the money paid and interest: *Rohrschneider* v. *Ins. Co.*, 76 N. Y. 216; 32 Am. Rep. 290.

§ 2093. Remedies against Officers and Agents of Company. — An action of deceit for damages will lie by a party who has been induced to insure in a worthless company against the officers of the company who have made themselves, or have permitted to be made, false state-

ments as to the condition of the company.[1] So an action may lie against an officer personally who has assured the plaintiff that he was "insured all right," when in fact he was not.[2]

§ 2094. Remedies of Insurer against Insured.—Equity will compel the surrender of a policy wrongfully obtained or delivered under a mistake of the facts induced by the misrepresentation or concealment of the assured,[3] even where it has been assigned for value without notice of the fraud.[4] And equity will restrain by injunction a suit on such a policy,[5] if the fraud cannot be set up in the action at law, and no loss has occurred.[6] If a loss be paid under a mistake of facts pertaining to the loss, as distinguished from facts inducing the contract, which, if known to the insurers, would have enabled them to successfully resist the claim, they may recover back the amount so paid on redelivery of the policy.[7] But they cannot, in the absence of fraud upon them, reopen and try a case upon a ground which might have been presented and tried when the claim was made under the policy for the loss; as, for instance, that the policy was void for misrepresentation of which they were aware at the time of payment of the loss, or might have been upon due inquiry.[8]

[1] Salmon *v.* Richardson, 30 Conn. 360; 79 Am. Dec. 255; Tebbetts *v.* Ins. Co., 3 Allen, 569.

[2] Christie *v.* Ins. Co., 3 Ct. Sess. Cas. (Scotch) 360.

[3] Com. Ins. Co. *v.* McLoon, 14 Allen, 351; Imperial Ins. Co. *v.* Gunning, 81 Ill. 236. But the insurer must offer to return all he has received under the contract: Harris *v.* Ins. Co., 64 N. Y. 196.

[4] British etc. Soc. *v.* R. R. Co., 20 L. T., N. S., 422.

[5] National Ins. Co. *v.* Egan, 20 U. C. Chan. 469.

[6] Phœnix Ins. Co. *v.* Bailey, 17 Wall. 616; Home Ins. Co. *v.* Stanchfield, 2 Abb. 6; Globe Ins. Co. *v.* Reals, 50 How. Pr. 237.

[7] Columbus Ins. Co. *v.* Walsh, 18 Mo. 229; Mutual Life Ins. Co. *v.* Wager, 27 Barb. 354; Hartford Live Stock Ins. Co. *v.* Matthews, 102 Mass. 221; North Western Ins. Co. *v.* Elliott, 7 Saw. 17; North British etc. Ins. Co. *v.* Stewart, 3 Bigelow's Life and Acc. Ins. Cas. 510; Berkshire Mutual Fire Ins. Co. *v.* Sturgis, 13 Gray, 177; McConnell *v.* Delaware Ins. Co., 18 Ill. 228; Trefz *v.* Ins. Co., 8 Fed. Rep. 177; 104 U. S. 197.

[8] Mutual Ins. Co. *v.* Wager, 27 Barb. 354; National etc. Ins. Co. *v.* Muich, 53 N. Y. 144; American Ins. Co. *v.* Crawford, 89 Ill. 62; Eagan *v.* Ins. Co., 10 W. Va. 583; Smith *v.* Ins. Co., 62 N. Y. 85.

When one who has sustained a loss by fire, occasioned by the fault of a railroad company, receives payment for such loss from an insurance company in which he was insured, and also a gross sum in satisfaction of damages from a railroad company, he holds so much of this sum as would be necessary to reimburse the insurance company in trust for such company, which may recover the same by a suit in equity.[1]

Where insurance is on the installment plan, and the policy is to be void so long as there is any default in the advance payment of an installment, the company cannot recover on a note given for successive installments of the premium.[2]

ILLUSTRATIONS. — After an insurance company had adjusted and promised to pay a loss, it discovered that the insured had misrepresented his title to the property in question, by means of which the policy, according to its terms, was avoided. *Held*, that the company might have its promise and the policy canceled: *American Ins. Co.* v. *Barnett*, 73 Mo. 364; 39 Am. Rep. 517.

[1] Monmouth etc. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

[2] American Ins. Co. *v.* Story, 41 Mich. 385.

CHAPTER XCIX.

FIRE INSURANCE.

§ 2095. Insured must have interest in property — Who have and have not "interest."
§ 2096. Title — Applicant need not set out.
§ 2097. Unless required by policy.
§ 2098. Construction of different words and phrases as to title.
§ 2099. Encumbrance — What is and what is not an.
§ 2100. Overvaluation — Overinsurance.
§ 2101. Conditions and stipulations in policy — Increase of risk.
§ 2102. What is and what is not an "increase of risk."
§ 2103. "Alterations" — Repairs.
§ 2104. Occupancy of premises — "Vacant and unoccupied."
§ 2105. Other prohibitions as to use of premises.
§ 2106. Customary use of insured premises impliedly allowed.
§ 2107. Alienation — In general.
§ 2108. What is and what is not an "alienation."
§ 2109. "Transfer" — "Change of title."
§ 2110. Levy of execution.
§ 2111. What property is covered by risk — Construction of words and phrases in policies as to.
§ 2112. Property "contained in" a building.
§ 2113. Loss or damage by fire — What is within the term — Explosions.
§ 2114. "Invasion" — "Mobs" — "Usurped power."
§ 2115. Fallen buildings.
§ 2116. Amount of recovery.
§ 2117. Consequential damages or losses not recoverable.
§ 2118. Right of insurer to rebuild or replace the property.
§ 2119. Fire policies not assignable.
§ 2120. Consent of insurer.

§ 2095. Insured must have Interest in Property — Who have and have not "Interest." — In England, in early times, a policy of insurance in the nature of a wager — that is, the insured not having any interest in the thing insured — was valid.[1] But the courts at the present day, almost without exception, as well as the statutes of many of the states, declare that to the validity of a policy of insurance it is essential that the insured

[1] Lucena v. Crawford, 5 Bos. & P. 322.

shall have an interest in the subject-matter,[1] and this interest must exist both at the time the insurance is effected and at the time of the loss.[2] What the extent of that interest must be is not very clear from the cases. Mr. May states the rule as follows: "While the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition."[3] Whoever has such title that if the property were lost without insurance a loss would fall on him, has an insurable interest.[4] An insurable interest may exist without any legal or equitable title to the property in the insured.[5] Proof that the insured was in possession of the premises, claiming and occupying it as owner, is, in the absence of evidence to the contrary, *prima facie* evidence of an insurable interest.[6] Thus the following have been held to have an insurable interest in the property insured, viz.:

[1] May on Insurance, sec. 75; Atwell *v.* Miller, 11 Md. 348; 69 Am. Dec. 206; Bersch *v.* Ins. Co., 28 Ind. 64; Peabody *v.* Ins. Co., 20 Barb. 337; Freeman *v.* Ins. Co., 38 Barb. 247; Tallman *v.* Ins. Co., 29 How. Pr. 71; Fowler *v.* Ins. Co., 26 N. Y. 422; Sweeney *v.* Ins. Co., 20 Pa. St. 337. A policy taken by a husband on his wife's chattels is void: Agricultural Ins. Co. *v.* Montague, 38 Mich. 548; 31 Am. Rep. 326; Randall *v.* Ins. Co., 81 Me. 373.

[2] Chisman *v.* Ins. Co., 16 Or. 283.

[3] May on Insurance, sec. 76; Eastern R. R. Co. *v.* Ins. Co., 98 Mass. 420; Ins. Co. *v.* Chase, 5 Wall. 513; Lycoming Ins. Co. *v.* Jackson, 83 Ill. 303; 25 Am. Rep. 386; Rockford Ins. Co. *v.* Nelson, 65 Ill. 419; Merrett *v.* Ins. Co., 42 Iowa, 13; Williams *v.* Ins. Co., 107 Mass. 379; 9 Am. Rep. 41; Herkimer *v.* Rice, 27 N. Y. 163; McDonald *v.* Black, 20 Ohio, 185; 55 Am. Dec. 448; Warren *v.* Ins. Co., 31 Iowa, 464; 7 Am. Rep. 160; Agricultural Ins. Co. *v.* Clancey, 9 Ill. App. 137. If one procures a policy on property belonging to himself and to others, his fraud vitiates the policy: Monaghan *v.* Ins. Co., 53 Mich. 238.

[4] Lycoming Fire Ins. Co. *v.* Jackson, 83 Ill. 302; 25 Am. Rep. 386.

[5] Carter *v.* Humboldt Ins. Co., 12 Iowa, 287.

[6] Franklin Fire Ins. Co. *v.* Chicago Ice Co., 36 Md. 102; 11 Am. Rep. 469.

A creditor;[1] a mortgagor, even after the equity has been foreclosed, the mortgage remaining unpaid, and his right to redeem being in existence;[2] a pledgor of goods as collateral;[3] a person having a lien on property;[4] one in possession of a building under a contract of purchase;[5] a mortgagee in the property mortgaged;[6] executors and administrators in the property under their charge;[7] trustees in property under their care;[8] sheriffs in property attached;[9] captors of property;[10] the owner of a leasehold estate;[11] a husband as tenant by the curtesy;[12] the assignee of a bond for a deed of real estate;[13] the assignee of a mortgage;[14] a consignee in goods consigned to him to the

[1] Rohrbach *v.* Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451. A judgment creditor has an insurable interest in the property of his debtor; but he cannot recover from the insurer upon an injury thereto for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be satisfied: Spare *v.* Ins. Co., 8 Saw. 618. But it has been held that a judgment creditor's lien being a general one, he has no insurable interest in specific property of the debtor: Grevemeyer *v.* Ins. Co., 62 Pa. St. 340; 1 Am. Rep. 420.

[2] Buffalo Steam Works *v.* Ins. Co., 17 N. Y. 401; Strong *v.* Ins. Co., 10 Pick. 40; 20 Am. Dec. 507; Mechler *v.* Ins. Co., 38 Wis. 665; Walsh *v.* Ins. Co., 127 Mass. 383; Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302; 25 Am. Rep. 386.

[3] May on Insurance, sec. 82.

[4] Carter *v.* Ins. Co., 12 Iowa, 284; Stout *v.* Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Bell *v.* Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[5] Ramsay *v.* Phœnix Ins. Co., 2 Fed. Rep. 429; Tuckerman *v.* Ins. Co., 9 R. I. 414; Franklin Ins. Co. *v.* Martin, 40 N. J. L. 568; 29 Am. Rep. 271; Ayres *v.* Ins. Co., 17 Iowa, 176; Smith *v.* Ins. Co., 6 Cush. 448; Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25; Southern Ins. Co. *v.* Lewis, 42 Ga. 587; Tyler *v.* Ins. Co., 16 Wend. 385; Gilman *v.* Ins. Co., 81 Me. 488.

[6] Bell *v.* Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542; Carpenter *v.* Ins. Co., 16 Pet. 475; Addison *v.* Ins. Co., 7 B. Mon. 470; Keller *v.* Ins. Co., 7 La. 29; Traders' Ins. Co. *v.* Robert, 9 Wend. 404; Foster *v.* Van Reed, 70 N. Y. 19; 26 Am. Rep. 544; Fox *v.* Ins. Co., 52 Me. 533; Haley *v.* Ins. Co., 120 Mass. 292.

[7] Phelps *v.* Ins. Co., 9 Bosw. 404; Herkimer *v.* Rice, 27 N. Y. 163. Where the personal estate of deceased is insufficient to pay the debts, the administrator may insure the real estate; he has, under these circumstances at least, an insurable interest: Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368.

[8] Ins. Co. *v.* Chase, 5 Wall. 509; Babson *v.* Ins. Co., 4 Ins. Law J. 50; Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25; 10 Pet. 510; Herkimer *v.* Rice, 27 N. Y. 163.

[9] White *v.* Madison, 26 N. Y. 117.

[10] Stockdale *v.* Dunlop, 6 Mees. & W. 224; Protection Ins. Co. *v.* Hall, 15 B. Mon. 411.

[11] Niblo *v.* Ins. Co., 1 Sand. 551; Fletcher *v.* Ins. Co., 18 Pick. 419; Laurent *v.* Ins. Co., 1 Hall, 41.

[12] Franklin Ins. Co. *v.* Drake, 2 B. Mon. 47; Harris *v.* Ins. Co., 50 Pa. St. 341; Abbott *v.* Ins. Co., 30 Me. 414; Curry *v.* Ins. Co., 10 Pick. 535; 20 Am. Dec. 547; Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543; 46 Am. Rep. 792.

[13] Sayres *v.* Ins. Co., 17 Iowa, 176.

[14] Excelsior *v.* Ins. Co., 55 N. Y. 343; 14 Am. Rep. 271.

extent of his expected commissions and profits,[1] or, where he is instructed by the principal to insure, to the full value;[2] common carriers;[3] warehousemen;[4] a partner in the partnership stock.[5]

A stockholder in a private corporation has an insurable interest in the corporate property.[6] Where a contractor for a building is entitled to a lien, which lien is subject, however, to a prior mortgage, such interest in the equity of redemption is an insurable interest.[7] A firm of merchants who furnish a dealer with goods towards his stock, relying for payment on the success of his business, have an insurable interest in his stock.[8] The vendor in a contract of sale of a factory and machinery, who retains the legal title until payment of the purchase price, has an insurable interest in the machinery as well as in the buildings.[9] A wife holding property in her own name, donated to her by her father during marriage, has an insurable interest in it.[10] The interest of sureties in a distiller's bond, given under the internal revenue laws, in the whisky manufactured and in store, by reason of their liability for the government tax, is an insurable

[1] Shaw *v.* Ins. Co., 49 Mo. 578; 8 Am. Rep. 150; Ætna Ins. Co. *v.* Jackson, 16 B. Mon. 242.

[2] Shaw *v.* Ins. Co., 49 Mo. 578; 8 Am. Rep. 150; Hough *v.* Ins. Co., 36 Md. 432.

[3] Savage *v.* Ins. Co., 36 N. Y. 655; Eastern R. R. Co. *v.* Ins. Co., 98 Mass. 420; Carter *v.* Ins. Co., 12 Iowa, 287; Chase *v.* Ins. Co., 12 Barb. 595.

[4] Waters *v.* Ass. Co., 5 El. & B. 870; Eastern R. R. Co. *v.* Ins. Co., 98 Mass. 420; Carter *v.* Ins. Co., 12 Iowa, 287.

[5] Manhattan Ins. Co. *v.* Webster, 59 Pa. St. 227; 98 Am. Dec. 332. A general partner may insure and make proofs of loss in his own name, without disclosing the fact that there is a special partner: Clement *v.* British American Assurance Co., 141 Mass. 298. A sealed fire insurance policy issued to a firm was continued under the covenants thereof, from year to year, by renewal receipts not under seal. When the last of these receipts was given the firm had undergone a change by the admission of a new member. Held, that for a loss sustained during the life of this receipt the company was not liable in *assumpsit*, nor could the new member be joined as a copartner: Firemen's Ins. Co. *v.* Floss, 67 Md. 403; 1 Am. St. Rep. 398.

[6] Seaman *v.* Enterprise Fire and Marine Ins. Co., 18 Fed. Rep. 250; 5 McCrary, 558. *Contra*, Riggs *v.* Ins. Co., 51 N. Y. Sup. Ct. 466.

[7] Royal Ins. Co. *v.* Stinson, 103 U. S. 25.

[8] Roos *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 409.

[9] Wood *v.* North Western Ins. Co., 46 N. Y. 421.

[10] Breard *v.* Mechanics' etc. Ins. Co., 29 La. Ann. 764.

interest.[1] A mechanic has an insurable interest in work already done upon a house at the time the insurance is effected, payment for which is to be made upon the completion of the house.[2] The head of a family whose property has been set apart as homestead has still an insurable interest therein.[3] But a turnpike company has no insurable interest in a public county bridge on the line of its road, but free to all travel, even though the company directly contributed to the cost of the erection and maintenance of the bridge.[4]

ILLUSTRATIONS. — The lessee of a plantation builds a gin-house thereon, under an agreement that his lessor shall buy the gin-house at the close of the lease, at a price to be then agreed on. *Held*, that the lessee has an insurable interest therein so as to recover on a loss occurring during the lease: *Allen* v. *Ins. Co.*, 36 La. Ann. 767. A deed of trust gave the trustee a right to insure the property at the expense of the grantor, making the cost of insurance an additional charge upon the premises, and provided that in case of loss the money should be used to rebuild, and the trustee insured his own interest in the property, the insurer contracting for subrogation. *Held*, that the contract would be enforced, though the mortgaged premises were not worth the amount of the debt less the insurance: *Dick* v. *Ins. Co.*, 10 Mo. App. 376. A husband erects a dwelling on his wife's lots, and with her occupies it as a mutual homestead, and as her agent effects an insurance for their mutual benefit, though in his own name, and the insurer, aware of these facts, issues the policy and receives the premium. *Held*, that the husband may recover on the policy in case of loss by an action in his own name: *Insurance Co.* v. *McLanathan*, 11 Kan. 533. Plaintiff's wife, two days after their marriage, and in consideration of her indebtedness to him before their marriage, executed to him this paper: "I do hereby certify that I owe to J. R. [the husband] the sum of seven hundred dollars, and also twenty-five dollars for each and every month from July 14, 1863, and for every month he may live with me henceforth, without any deduction whatever, which amount shall be a lien upon my property." The insured premises were the wife's, and she died before the

[1] Insurance Companies *v.* Thompson, 95 U. S. 547.

[2] Protection Ins. Co. *v.* Hall, 15 B. Mon. 411; Franklin etc. Ins. Co. *v.* Coates, 14 Md. 285.

[3] German-American Ins. Co. *v.* Davidson, 67 Ga. 11.

[4] Farmers' Mut. Ins. Co. *v.* Turnpike Co., 122 Pa. St. 37.

fire. *Held*, that plaintiff had an insurable interest: *Rohrbach* v. *Ætna Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451. S. sold to T. an insured mill for certain land, the two deeds to be left with a third person in escrow till T. should clear the land of a mortgage. S. clandestinely got the deed of the land recorded, and at the foreclosure sale bought the land, and then conveyed it to a stranger. The mill was destroyed by fire, but the insured refused to pay S. the loss, he not then being the owner. *Held*, that S. had an insurable interest to the extent of the mortgage, and could recover *pro tanto: People's Ins. Co.* v. *Strachle*, 2 Cin. Rep. 186. L. erected a building upon B.'s land, under a parol contract that B. would make him a title to the land when certain conditions had been performed. L. effected an insurance upon the building, which was destroyed by fire while he was performing the conditions of his contract with B., but before he had completed them. *Held*, that L. had an insurable interest in the premises: *Southern Ins. etc. Co.* v. *Lewis*, 42 Ga. 587. Lessees of a farm, who had agreed in the lease to carry none of the hay therefrom, gave a bill of sale of hay grown thereon to a third person, who took possession. *Held*, that no title passed to him, and he had no insurable interest, although he intended to carry on the farm, and not carry away the hay: *Heald* v. *Ins. Co.*, 111 Mass. 38. Plaintiffs, brokers in petroleum and its products, effected an insurance in the defendants' company upon "carbon oil, and packages containing the same, their own, or held in trust on commission, or sold but not removed, contained in bonded warehouse." Subsequently part of the property was sold. The purchasers were informed by the plaintiffs that the oil was covered by insurance until removed, and no new insurance was effected upon it. Upon a total loss by fire, *held*, that the risk followed the property in the hands of the purchasers, and that an action could be maintained by the plaintiffs upon the policy as trustees of the purchasers: *Waring* v. *Ins. Co.*, 45 N. Y. 607; 6 Am. Rep. 146. A vendor, after articles of agreement for the sale of a house and lot before conveyance, effected an insurance upon the house for $1,000. At the time of insurance there was due of the purchase-money to the vendor $2,300, which was reduced by subsequent payments so that at the time of the loss, which was an actual total one, there was due only $1,192. When the insurance was effected the company were informed of all material facts. In an action against the insurance company, the vendor recovered the sum of $1,080.50, which was insufficient to cover his loss. The defense was, that the lot was of itself sufficient security for the unpaid purchase-money, and that therefore the plaintiff had no insurable interest in the premises. Judgment was rendered on the verdict. *Held*, that there was no error: *Ins. Co.* v. *Updegraff*, 21 Pa. St. 513. A

mortgagor conveyed the mortgaged premises to S., and assigned to him a fire insurance policy thereon with the assent of the insurers. A foreclosure suit was commenced, and compromised by an agreement that the mortgagee should have a decree for the amount claimed, and that the defendants should have two years to redeem. The premises were sold under the decree, which allowed but the statutory fifteen months to redeem, and purchased by the mortgagee. Fourteen months and eight days after the sale, and sixteen months after the decree, the premises were injured by fire. *Held*, that S. had at the time of the fire an insurable interest, and could recover upon the policy: *Stephens* v. *Ins. Co.*, 43 Ill. 327. Plaintiff conveyed lands to R. upon a verbal promise by R. to reconvey to plaintiff a life estate in the land. Plaintiff remained in possession. *Held*, that plaintiff had an insurable interest in the buildings on the land even before any reconveyance of the life estate: *Redfield* v. *Holland Purchase Ins. Co.*, 56 N. Y. 354; 15 Am. Rep. 424. L. and S., the mortgagees of certain premises, assigned the mortgage and indorsed the mortgage notes to plaintiff, and procured the premises to be insured in their names as mortgagees, loss, if any, payable to plaintiff. Some of the notes were not paid at maturity; the others had not matured when loss occurred. *Held*, that L. and S. had an insurable interest, and that plaintiff could recover: *Williams* v. *Roger Williams Ins. Co.*, 107 Mass. 377; 9 Am. Rep. 41. Lumber furnished by the owner of a house was sent to the shop of the carpenter to be worked up for use, and while there was destroyed by fire. *Held*, that the carpenter had no interest in the proceeds of an insurance obtained by the owner upon the lumber for his own benefit: *Eichelberger* v. *Miller*, 20 Md. 332.

§ 2096. Title — Applicant need not Set out. — The insured in his application need not, unless specifically called for by the conditions of insurance, set out the nature of his title to the property. It is sufficient that he have an insurable interest.[1] A mortgagee may insure generally on the property without disclosing his interest, unless inquired of respecting it.[2] Where a policy declared

[1] May on Insurance, secs. 284, 285; Morrison *v.* Ins. Co., 18 Mo. 262; 59 Am. Dec. 299.

[2] King *v.* Ins. Co., 7 Cush. 1; 54 Am. Dec. 683. But a mortgagee insuring a special interest must disclose the fact that he holds prior mortgages on the property; for by insuring a limited interest without disclosing facts which might affect its apparent solidity, he induces the company to take a risk on terms which would otherwise have been declined: Smith *v.* Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546.

that it should be invalidated by any omission to make known a material fact respecting the condition, situation, value, or occupancy of the property, and the assured was not asked, by the printed form of application, or otherwise, whether there were encumbrances on the property, it was held that this mere omission to volunteer a statement of the fact that there was a lien on the property to a large amount for taxes, or to disclose that he had entered into an oral executory contract to lease the property, would not invalidate the policy.[1] Where a party has possession of the property at the time of the insurance and of the loss, he is entitled to recover the entire amount insured, notwithstanding there may be a question as to the validity of his title.[2]

§ 2097. **Unless Required by Policy.**—Where, however, the applicant is required to set out his true title, a failure to do so accurately will amount to a misrepresentation or concealment, and avoid the policy.[3] Mr. May[4] gives the following cases where the title is not properly described: "Where the insured describes the property as his when he has only a bond for a deed;[5] or is a stockholder in a corporation which owns the property;[6] or is only a tenant by the curtesy;[7] or a lessee with or without an agreement for purchase;[8] or the assignee of a lessee with right to purchase;[9] or a mortgagee;[10] or has only an im-

[1] Alkan *v.* Ins. Co., 53 Wis. 136.

[2] Frierson *v.* Brenham, 5 La. Ann. 540; 52 Am. Dec. 603.

[3] May on Insurance, sec. 287; Phillips *v.* Ins. Co., 20 Ohio, 174. A clause avoiding the policy if the "interest of the assured in the property" is not truly stated must be construed as referring to the substantial ownership, and not to the bare legal title: De Armand *v.* Home Ins. Co., 28 Fed. Rep. 603.

[4] May on Insurance, sec. 287.

[5] Smith *v.* Bowditch Mut. Ins. Co., 6 Cush. 448; Brown *v.* Williams, 28 Me. 262; Falis *v.* Conway Mut. Fire Ins. Co., 7 Allen, 46; Birmingham *v.* Empire Ins. Co., 24 Barb. 457.

[6] Phillips *v.* King's County Mut. Ins. Co., 20 Ohio, 174; Abbott *v.* Shawmut Mut. Fire Ins. Co., 3 Allen, 213.

[7] Leathers *v.* Ins. Co., 24 N. H. 259; Eminence Mut. Ins. Co. *v.* Jesse, 1 Met. (Ky.) 523.

[8] Shaw *v.* St. Lawrence County Mut. Ins. Co., 11 U. C. Q. B. 73; Marshall *v.* Colum. Mut. Ins. Co., 27 N. H. 157.

[9] Walroth *v.* St. Lawrence County Mut. Ins. Co., 10 U. C. Q. B. 525.

[10] Jenkins *v.* Quincy Mut. Fire Ins. Co., 7 Gray, 370; Brown *v.* Gore Dist. Mut. Ins. Co., 10 U. C. Q. B. 383.

perfect tax title;[1] or, for the purpose of defrauding his creditors, has conveyed away his estate, without consideration, to another, who promises to reconvey upon request;[2] or is the owner of only one of seven parcels of the property insured."[3] But the requirement may be waived by the insurer by treating the policy as valid after he learns that the true nature of the interest has not been stated.[4]

§ 2098. Construction of Different Words and Phrases as to Title. — A trustee is not the holder of an "absolute title,"[5] nor is a life estate an "absolute" interest;[6] a mortgagor is the holder of an "absolute interest";[7] a married woman is the "absolute owner" of property which she acquired before coverture.[8] A condition that any interest in the property insured not absolute or less than a perfect title must be represented and expressed in the policy is not broken by the existence of a lien for purchase-money reserved in the deed of the premises.[9] Where a stockholder in a corporation held property of the corporation as security for advances, and insured it as his own, this was held a breach of a condition that the interest must be stated, and that if the assured was not the absolute owner the policy should be void.[10] The answer, "Deed," in an application for fire insurance, to the question, "What is your title to or interest in the property?" is not a warranty of a grant in fee of a freehold estate, but is consistent with any interest originating in a deed.[11] Where, to the question, "What is your title to or interest in the property to be insured?" an applicant

[1] Pinkham *v.* Morang, 40 Me. 587.
[2] Treadway *v.* Hamilton Mut. Ins. Co., 29 Conn. 68.
[3] Day *v.* Charter Oak Fire and Marine Ins. Co., 51 Me. 91.
[4] Ins. Co. *v.* McLanathan, 11 Kan. 533.
[5] Murphrey *v.* Ins. Co., 5 Ins. Law J. 297.
[6] Davis *v.* Iowa State Ins. Co., 67 Iowa, 494.
[7] Washington Fire Ins. Co. *v.* Kelly, 32 Md. 421; 3 Am. Rep. 149.
[8] Com. Ins. Co. *v.* Spankneble, 52 Ill. 53; 4 Am. Rep. 582.
[9] Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732.
[10] McCormick *v.* Ins. Co., 66 Cal. 361.
[11] Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452; 29 Am. Rep. 184.

answered, "Fee-simple," it was held that the fact that the wife of a former owner of the property who was still alive had a contingent right of dower in the premises was not a breach of the warranty.[1]

An outstanding mortgage, paid, but not discharged of record, is a breach of a condition that the party has a "good and perfect unencumbered title."[2] One in possession of real estate under a valid contract for conveyance has an insurable interest, and in the absence of any requirement to disclose the true state of the title, may properly describe the premises as "his."[3] A policy on goods in the name of one person is not avoided by the fact that they were purchased in the names of himself and another with the latter's consent, the goods in fact being the sole property of the former.[4] On an application by one for insurance on real estate, which he describes as "his property," the company is not chargeable with notice of the state of the title as disclosed by the land records.[5] In a fire policy, the use of the phrase "as interest may appear" authorizes the insured in case of loss to show what his interest was. If it appears that, although not the owner, he had an insurable interest, there is no breach of a condition forfeiting the policy in case the interest is not truly stated.[6] The recovery of a judgment against the assured is not a "lien" on his property.[7] One who describes property as "my house" does not warrant his title to the realty to be an unencumbered fee-simple title.[8] The description is sufficient where the applicant is in possession under a valid contract to purchase and has

[1] Southern Mut. Ins. Co. *v.* Kloeber, 31 Gratt. 739; Virginia Fire Ins. Co. *v.* Kloeber, 31 Gratt. 749.

[2] Warner *v.* Ins. Co., 21 Conn. 444.

[3] Franklin Fire Ins. Co. *v.* Martin, 40 N. J. L. 568; 29 Am. Rep. 271. A policy insured plaintiff "on his two buildings." He did not own the buildings, but had an interest in them, and was in possession of them. Held, not a warranty of ownership: Rohrbach *v.* Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451.

[4] Gould *v.* York etc. Ins. Co., 47 Me. 403; 74 Am. Dec. 494.

[5] Mutual Ins. Co. *v.* Deale, 18 Md. 26; 79 Am. Dec. 673.

[6] Dakin *v.* Ins. Co., 77 N. Y. 600.

[7] Steen *v.* Ins. Co., 61 How. Pr. 144.

[8] Mutual Ins. Co. *v.* Deale, 18 Md. 26; 79 Am. Dec. 674.

paid part of the consideration, but has received no conveyance.[1] Property may properly be described by the insurer as his house, though his title is equitable only; as when he has erected the house on premises which he held under a parol agreement for their purchase; and this is true, though the policy contains a condition that if the interest of the assured is not absolute it must be so stated to the insurer and expressed in the policy.[2] Where one holding under a bond for a deed represents himself as the owner, this is a misrepresentation which will avoid a policy in a mutual insurance company.[3] But where the insured is in a condition to enforce specific performance of a contract to convey the land whereon it stands, he may represent himself as the owner in fee-simple.[4] So a purchaser at sheriff's sale may truly declare himself to be the owner of the property, although the sheriff's deed has not, at the time of such declaration, been acknowledged.[5] A warranty of ownership of the premises is not broken by the encumbrance of a mortgage.[6]

A mortgagor of chattels falls within the phrase "sole and unconditional owner,"[7] and so does one who has given a trust deed on the property;[8] so does one who has a purchaser's sole equitable interest in land, under a contract of purchase which he could have enforced specifically,[9] even although the purchase-money remains unpaid.[10] But the holder of an equity to redeem property of his sold under execution does not;[11] nor does a mortgagee;[12]

[1] Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; 30 Am. Dec. 90.

[2] Hough *v.* Ins. Co., 29 Conn. 10; 76 Am. Dec. 581.

[3] Merrill *v.* Ins. Co., 48 Me. 285.

[4] East Texas Ins. Co. *v.* Dyches, 56 Tex. 565.

[5] Susquehanna Mut. Fire Ins. Co. *v.* Staats, 102 Pa. St. 529.

[6] Carson *v.* Jersey City Fire Ins. Co., 43 N. J. L. 300; 39 Am. Rep. 584.

[7] May on Insurance, sec. 286; Hubbard *v.* Ins. Co., 33 Iowa, 325; 11 Am. Rep. 125.

[8] Manhattan Ins. Co. *v.* Weill, 28 Gratt. 389; 26 Am. Rep. 364; Quarrier *v.* Ins. Co., 10 W. Va. 507; 27 Am. Rep. 582.

[9] Johannes *v.* Standard Fire Office, 70 Wis. 196; 5 Am. St. Rep. 159.

[10] Imperial Fire Ins. Co. *v.* Dunham, 117 Pa. St. 460; 2 Am. St. Rep. 686; Elliott *v.* Ashland Mut. Fire Ins. Co., 117 Pa. St. 548; 2 Am. St. 703.

[11] Reaper Ins. Co. *v.* Brennan, 58 Ill. 158; 11 Am. Rep. 54.

[12] Waller *v.* Assur. Co., 64 Iowa, 101.

nor an owner of a life estate;[1] nor a lessee or bailee;[2] nor a surviving partner.[3]

One who has paid the purchase-money and is in possession of the property, on which he has erected improvements, is within the phrase "true title and interest."[4] Property which has been put into another's hands to defraud creditors is not held in trust within a condition in an insurance policy requiring property held in trust to be insured as such.[5]

ILLUSTRATIONS.—A fire policy contained a clause, "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise this policy shall be void." The insured represented himself to be the owner, and the policy did not express the fact that his minor child, of whom he was the natural tutor, owned seven eighths. *Held*, that the policy was avoided: *Adema* v. *Ins. Co.*, 36 La. Ann. 660. B, while in possession of certain premises under a contract of purchase, applied for insurance as "owner," and obtained a policy forfeitable if his interest is other than "the entire, unconditional, and sole ownership." *Held*, that the policy was not invalidated by the fact that the contract of purchase was forfeitable in case B failed to perform, and that at the time of procuring insurance B was in default, the vendor not having declared the contract forfeited: *Pelton* v. *Ins. Co.*, 77 N. Y. 605. L., holding furniture which she bought of S., under an express agreement that the title should remain in S. until the price be paid, took a policy "on her household furniture, ... loss, if any, payable to S., as his interest may

[1] Garver *v.* Ins. Co., 69 Iowa, 202.

[2] Mount Leonard Milling Co. *v.* Ins. Co., 25 Mo. App. 259.

[3] Crescent Ins. Co. *v.* Camp, 71 Tex. 503.

[4] Chase *v.* Ins. Co., 22 Barb. 527; Bonham *v.* Ins. Co., 25 Iowa, 328. A policy is not avoided on the ground of violation of a by-law requiring the true title of the insured in the property to be expressed in the application for the insurance, where the insured is a mortgagee in possession, and the application is for insurance "on dwelling-house," and states in reply to a question as to encumbrances, "First mortgage to M. W. [the name of the applicant] entered October, 1855"; and in reply to a question whether the property is insured, states, "Not on first mortgagee's interest"; and the application contains no direct question as to the title of the applicant; for there is no misstatement of the applicant's interest, and it is the duty of the company to require fuller statements in this regard, if the answers given are not sufficiently full: Wyman *v.* People's Ins. Co., 1 Allen, 301; 79 Am. Dec. 737.

[5] Ayres *v.* Ins. Co., 17 Iowa, 176; 85 Am. Dec. 553.

appear"; and "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, ... it must be so expressed in the written part of this policy, otherwise the policy shall be void." *Held*, that the policy was void: *Lasher* v. *Ins. Co.*, 18 Hun, 98. M. conveyed property worth $3,500 to secure a debt of $1,500, taking back a lease for eight years, at a rent of $105 per annum, with the privilege of purchasing during the term on payment of $1,500. He procured a policy of insurance upon his interest as "lessee," the company having notice of his right of redemption. Two months before the end of the term, and before he had elected to purchase, the premises were destroyed by fire. *Held*, that the policy covered his right to purchase: *Creighton* v. *Homestead Fire Ins. Co.*, 17 Hun, 78. A person in possession of premises under a contract of purchase, having paid only part of the purchase-money, the rest not being due, obtained a policy of fire insurance on the premises, and in his written application, which was made a part of the policy, answered the questions propounded as follows: Q. "Is the property owned and operated by the applicant?" A. "Yes." Q. "Is any other person interested in the property? If so, state the interest." A. "No." Q. "Encumbrance, — is there any on the property?" A. "Held by contract." *Held*, that the answers were substantially true, and that the policy was not avoided for false representations: *Lorillard Fire Ins. Co.* v. *McCulloch*, 21 Ohio St. 176; 8 Am. Rep. 52. A policy of insurance on a building was conditioned to be void unless "the interest of the assured, whether as owner, lessee, or otherwise, in the property shall be truly stated in the policy." The building was built by the assured upon land leased by them for a term of years, and under a provision that at the expiration of their lease the building should be delivered up to the lessor. The policy described the building as "their two-story brick building situated on leased land," and in the proof of loss which was sworn to they stated that the building belonged to them, and that no one else had any interest in it. *Held*, that the policy was not avoided for insufficient description of interest. *Fowle* v. *Springfield Ins. Co.*, 122 Mass. 191; 23 Am. Rep. 308.

§ 2099. Encumbrance—What is and What is not an. —Statements as to the amount of encumbrances on the property are material, and if false, will avoid the policy.[1]

[1] Friesmuth *v.* Ins. Co., 10 Cush. 588; Schumitsch *v.* Ins. Co., 48 Wis. 26; Richardson *v.* Ins. Co., 46 Me. 394; 74 Am. Dec. 459; Patten *v.* Ins. Co., 38 N. H. 338; Gahagan *v.* Ins. Co., 43 N. H. 176; Clark *v.* Ins. Co., 6 Cush. 342; 53 Am. Dec. 44.

Where a general statement is given, and the policy is issued on this, it will be valid, even though the specific amounts were called for, but not given.[1] But where the number and amount of the encumbrances are stated, they must be stated correctly.[2] A mortgage is an encumbrance;[3] so is a mechanic's lien;[4] a tax lien;[5] a seizure under execution.[6] An invalid mortgage is not an encumbrance;[7] nor a mortgage paid, but not discharged of record;[8] nor is a bond for the conveyance of the premises insured upon the payment of the purchase-money at a specified time, although the forfeiture on account of the expiration of the time has been waived, if, in fact, the money has not been paid;[9] nor a bond by the grantee in a deed to support the grantor, given as a part of the consideration for the conveyance;[10] nor a vendor's lien;[11] nor a judgment.[12] An omission to mention a lien or a conditional sale, possession remaining in the vendor, is not a breach of a covenant to state if the ownership is other than entire.[13] If an insurance policy on real and personal property is conditioned to be void if the property shall be mortgaged, and the real estate is mortgaged, the policy is void, unless

[1] Nichols *v.* Ins. Co., 1 Allen, 63; Wyman *v.* Ins. Co., 1 Allen, 301; 79 Am. Dec. 737; Dohn *v.* Ins. Co., 5 Lans. 275.

[2] Towne *v.* Ins. Co., 7 Allen, 51; Smith *v.* Ins. Co., 25 Barb. 497; Lowell *v.* Ins. Co., 8 Cush. 127; Hayward *v.* Ins. Co., 10 Cush. 444; Jacobs *v.* Ins. Co., 7 Allen, 132; Battles *v.* Ins. Co., 41 Me. 208.

[3] Masters *v.* Ins. Co., 11 Barb. 624; Treadway *v.* Ins. Co., 29 Conn. 68; Hutchins *v.* Ins. Co., 11 Ohio St. 477; Packard *v.* Ins. Co., 2 Gray, 334. A mortgage executed by husband and wife of land owned by the husband, on which there was a creamery building owned by the wife, to a mortgagee, without notice that the building was not appurtenant to the land, is an encumbrance on the building: Mallory *v.* Farmers' Ins. Co., 65 Iowa, 450.

[4] May on Insurance, sec. 291; Redmond *v.* Ins. Co., 51 Wis. 293; 37 Am. Rep. 830. *Contra*, Green *v.* Ins. Co., 82 N. Y. 517.

[5] Wilbur *v.* Ins. Co., 10 Cush. 446.

[6] Brown *v.* Ins. Co., 41 Pa. St. 187.

[7] Watertown Ins. Co. *v.* Sewing Machine Co., 41 Mich. 131; 32 Am. Rep. 146; Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302; 25 Am. Rep. 386.

[8] Hawkes *v.* Ins. Co., 11 Wis. 188; Merrill *v.* Ins. Co., 73 N. Y. 452; Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302; 25 Am. Rep. 386.

[9] Newhall *v.* Union Mut. Fire Ins. Co., 52 Me. 180.

[10] Mason *v.* Agr. etc. Ass. Co., 18 U. C. C. P. 19.

[11] Dohn *v.* Farmers' Ins. Co., 5 Lans. 275.

[12] Miller *v.* Germania Ins. Co., 6 Ins. Law J. 873; Baley *v.* Ins. Co., 80 N. Y. 21; 36 Am. Rep. 570.

[13] Carrigan *v.* Lycoming Fire Ins. Co., 53 Vt. 418; 38 Am. Rep. 687.

the properties are insured for separate sums, and the risk on the personalty is not affected by the mortgage.[1]

ILLUSTRATIONS.—In an application the answer as to encumbrances was, "Yes; twenty-five hundred dollars." There was a mortgage on the premises for twenty-five hundred dollars, and two months' interest unpaid. *Held*, that there was no breach of the condition as to false representation: *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410; 8 Abb. N. C. 315. A policy of fire insurance was conditioned to be void in case of any false representation of the condition or occupancy of the property material to the risk. In the application it was asked: "Is the property encumbered? If so, state to what amount, and the value of the premises." This was answered: "Yes; mortgage, two thousand dollars; ten thousand dollars." The mortgage made by the insured was for $3,200, and $240 accrued interest was also due on it. The policy made the application part of the contract. *Held*, that the policy was avoided: *Byers* v. *Farmers' Ins. Co.*, 35 Ohio St. 606; 35 Am. Rep. 623. A bought certain premises, giving a mortgage back, and his grantor agreeing to pay an existing mortgage for a less amount. A insured the premises, only disclosing the larger mortgage. *Held*, that, as he could deduct the amount of the lesser mortgage from that due under the larger one, there was no such concealment of an encumbrance as to avoid the policy: *Ring* v. *Ins. Co.*, 54 Vt. 434.

§ 2100. Over-valuation—Over-insurance.—Over-valuation of the property insured is often provided against in the policy. But the rule seems to be settled, that, whether the policy mentions over-valuation as a ground of forfeiture or not, simple over-valuation standing alone will not avoid the policy. To accomplish this the over-valuation must be so gross as to raise the presumption of fraud in the applicant.[2] Where under the terms of a policy an

[1] McGowan *v.* People's Mut. Fire Ins. Co., 54 Vt. 211; 41 Am. Rep. 843. For one premium an insurance company insured plaintiff for eight hundred dollars on his house, and seven hundred dollars on his furniture. Not intending fraud, plaintiff misstated his interest in the realty. Held, that this did not affect the insurance on the personalty: Schuster *v.* Ins. Co., 102 N. Y. 260.

[2] Sturm *v.* Ins. Co., 63 N. Y. 77; Franklin Ins. Co. *v.* Vaughan, 92 U. S. 516; Wilbur *v.* Ins. Co., 10 Cush. 446; Protection Ins. Co. *v.* Hall, 15 B. Mon. 411; Leach *v.* Ins. Co., 58 N. H. 245; Carpenter *v.* American Ins. Co., 1 Story, 57; Bobbitt *v.* Liverpool etc. Ins. Co., 66 N. C. 70; 8 Am. Rep. 494; Catron *v.* Tennessee Ins. Co., 6 Humph. 176; Carpenter *v.* Ins. Co., 16 Pet. 495; Gerhauser *v.* North British

insurance company is liable for two thirds of the value of the property at the time of the loss, the valuation of the property on the application is not a fact material to the risk, and an over-valuation in the application will not defeat the right of the insured to recover.[1] In an open policy of insurance an over-valuation of the property insured is immaterial.[2] The fact that the assured was an ignorant German, and did not understand English, is no excuse for his rating his house at double its value in effecting insurance on it.[3]

ILLUSTRATIONS. — An application for fire insurance contained a valuation of the lands and buildings. The valuation was excessive. The application concluded as follows: "The applicant hereby covenants and agrees that the foregoing valuation, description, and survey are true and correct, and they are submitted as his warranty and the basis of the desired insurance." The only reference in the policy to the application was that the insurance was "on the following property as described in application." *Held*, that this only adopted that portion of the application describing the property, and that there was no warranty as to the value: *Owens* v. *Ins. Co.*, 56 N. Y. 565. A policy of fire insurance upon buildings contained a stipulation "that the aggregate amount insured in this and other companies . . . . shall not exceed two thirds of the estimated cash value." The insurance was for $1,300 and the estimated cash value according to the policy was $1,950; subsequently improvements were made and an additional insurance of $1,000 was effected in another company. The buildings were destroyed by fire, and their value at the time of the fire was $4,200. In an action on the policy, *held*, that the "estimated cash value" was that at the time of the first insurance, and that the first policy was void for over-insurance: *Elliott* v. *Ins.* Co., 66 Pa. St. 22; 5 Am. Rep. 323.

§ 2101. Conditions and Stipulations in Policy — Increase of Risk. — The provision that if the situation or

etc. Ins. Co., 7 Nev. 174; Continental Ins. Co. *v.* Ware, 9 Ins. Law J. 519; Williams *v.* Phœnix Ins. Co., 61 Me. 67; Bonham *v.* Ins. Co., 25 Iowa, 328; Citizens' etc. Ins. Co. *v.* Short, 62 Ind. 316; Boutelle *v.* Ins. Co., 51 Vt. 4; 31 Am. Rep. 666; Lynchburg Ins. Co. *v.* West, 76 Va. 575; 44 Am. Rep. 177; Helbing *v.* Ins. Co., 54 Cal. 156; 35 Am. Rep. 72; Behrens *v.* Ins. Co., 64 Iowa, 19; Borden *v.* Ins. Co., 18 Pick. 523; 29 Am. Dec. 614.

[1] Bonham *v.* Ins. Co., 25 Iowa, 328.

[2] Aurora Ins. Co. *v.* Johnson, 46 Ind. 315.

[3] Nassauer *v.* Susquehanna Mutual Fire Ins. Co., 109 Pa. St. 507.

circumstances affecting the risk upon the property insured shall be altered or changed, with the consent of the insured, so as to increase the risk, the policy shall be void, binds the assured, not only not to make any alteration or change in the structure or use of the property which will increase the risk, but prohibits him from introducing any practice, custom, or mode of conducting his business which would materially increase the risk, and also from discontinuing any precaution represented in the application to have been adopted and practiced with a view to diminish the risk.[1] The insured is bound to disclose a change made in the insured property after the issuance of the policy, whether material or not, if he would have been bound to disclose such a condition of the property in answer to the interrogatories had it existed at the time of making the application for the insurance, where the by-laws of the company, which are made a part of the policy, provide that if, subsequent to the making of the application, any new fact shall exist by a change of any fact disclosed in the application, or the erection or alteration of any building, which increases the risk, or which it would have been necessary to state had it existed at the time the application was made, the policy shall be void, unless written notice thereof shall be given the directors, and their written consent obtained.[2] A provision requiring that if the circumstances affecting the risk shall be altered by the assured so as to increase the risk, without the consent of the underwriters, the policy shall be void, binds the assured, not only to make no alteration in the use of the property which will increase the risk, but also from the discontinuance of any precaution represented in the application to be adopted with a view to diminish the risk, and a failure to substantially comply with such provision will release the under-

[1] May on Insurance, sec. 218; Dittmer v. Ins. Co., 23 La. Ann. 458; 8 Am. Rep. 600.

[2] Calvert v. Hamilton Ins. Co., 1 Allen, 308; 79 Am. Dec. 744.

writers.[1] Where premises are insured by the owner, and his tenant increases the risk without consent of the insurers, and a loss occurs while the risk is so increased, the ignorance of the owner that the risk has been increased is no defense to a condition for forfeiture.[2] Knowledge of the agent of a mortgagee for whose benefit a building is being insured, that the owner of the building is doing that which increases the hazard, is knowledge of the mortgagee, within a provision of the policy avoiding it, in case of increase of hazard not communicated to the company.[3]

But this provision covers only a change produced by the act of the insured; it does not extend to a change occasioned by accident.[4] Where a policy stipulates that it shall become void in case of an increase of risk within the control or knowledge of the insured, changes made without his consent by a tenant will not avoid a risk.[5] A provision that the policy should cease and be of no force so long as the building should be used for any one of specified extrahazardous occupations will not release the insurers for a loss by fire after such hazardous occupation has been discontinued.[6] Where by its terms the insured was bound to give notice to the company of increase of risk, and the company was to have the option thereupon to terminate the insurance, and the insured did increase the risk, but failed to notify the company thereof, and the insured property was subsequently destroyed, but not by reason of such increased risk, the liability of the company on the policy still continued, as it could not be certainly assumed that the company, if notified, would have terminated the insurance.[7]

[1] Houghton *v.* Ins. Co., 8 Met. 114; 41 Am. Dec. 490.
[2] Long *v.* Beeber, 106 Pa. St. 466; 51 Am. Rep. 532.
[3] Cole *v.* Ins. Co., 99 N. Y. 36.
[4] Breuner *v.* Ins. Co., 51 Cal. 101; 21 Am. Rep. 703.
[5] Merrill *v.* Ins. Co., 23 Fed. Rep. 245.
[6] Lounsbury *v.* Ins. Co., 8 Conn. 459; 21 Am. Dec. 686.
[7] Joyce *v.* Maine Ins. Co., 45 Me. 168; 71 Am. Dec. 536.

ILLUSTRATIONS. — A clause in a policy of insurance provided that if the risk was increased by any means the policy should be void and of no effect. *Held*, that the policy became inoperative only while the increased risk was in existence; and when it terminated, the liability of the company recommenced: *Schmidt* v. *Ins. Co.*, 41 Ill. 296. An application for insurance represented that one stove was used in the building insured, and another stove was subsequently put in and used without notice; and the by-laws of the defendant company provided that "if the risk shall be increased by the insured or others by any change of the circumstances disclosed by the application," etc., "the policy shall be void." *Held*, incumbent on the defendant company to show that the addition of the second stove increased the risk, if they would avoid the insurance: *Newhall* v. *Ins. Co.*, 52 Me. 180.

§ 2102. What is and What is not an Increase of Risk. — The following have been held an increase of risk, viz.: The erection of new buildings;[1] the introduction of new machinery.[2] But the customary use of property like that insured is not an increase of risk which will avoid the policy;[3] nor are ordinary repairs.[4] A policy of insurance on a house represented to be occupied as a dwelling is not avoided by its subsequent use as a boarding-house.[5]

ILLUSTRATIONS. — Before the issuing of a policy of fire insurance, a dummy-engine had been used near the insured building as often as its use was required. *Held*, that its subsequent use when required, although its use increased the risk, did not make void the policy under a provision therein contained that "if the situation or circumstances affecting the risk shall be so altered or changed as to increase the risk," the policy should be void: *Commonwealth* v. *Ins. Co.*, 112 Mass. 136; 17 Am. Rep. 72. A policy contained a condition avoiding it in case the premises "shall be occupied or used so as to increase the risk." At the time of the insurance there was a planer in the mill, which was used occasionally to plane lumber cut in the mill. And this use was continued after the policy was issued. *Held*, that the condition only prohibited a new and different use from that to which the property was applied when the policy was issued by

[1] Murdock *v.* Ins. Co., 2 N. Y. 210; Francis *v.* Ins. Co., 25 N. J. L. 78.
[2] Reid *v.* Ins. Co., 11 U. C. Q. B. 345.
[3] May on Insurance, sec. 219.
[4] Townsend *v.* Ins. Co., 18 N. Y. 168; Lyman *v.* Ins. Co., 14 Allen, 229.
[5] Planters' Insurance Company *v.* Sorrels, 1 Baxt. 352; 25 Am. Rep. 780.

which the risk is increased, and that, in the absence of warranty against such use, or fraud or concealment, it was immaterial that defendant did not know of the use of the planer when the policy was issued; *Whitney* v. *Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116. A policy of insurance described the building as occupied, "Second story, storage, cigar manufactory, and manufacture of tinware," and was voidable by any change in the "situation, occupation, use, or condition of the premises," without the consent of the company indorsed, etc. *Held*, that the policy was not avoided by renting without such consent a part of the second floor to a committee, of whom one of the company's agents was a member, for a political club-room: *Miller* v. *Ins. Co.*, 18 Hun, 525. A policy of insurance was procured upon merchandise in the storehouse of the assured, and another upon their factory near by. The first provided that "if the risk be increased by any means whatever within the control of the assured," it should be void; but there was no limitation as to the time the factory should run. Such a limitation prohibiting night-work was contained in the second policy, but was subsequently removed by the written consent of the insurers. *Held*, that removing the limitation was not an increase of the risk within the meaning of the former policy: *North Berwick Co.* v. *Ins. Co.*, 52 Me. 336.

§ 2103. **Alterations — Repairs.** — Without any express agreement or condition on the subject, an alteration which is material, and which will increase the risk, will avoid the policy.[1] But an alteration which does not increase the risk, and which is not prohibited by the policy, will not affect it.[2] Where alterations and additions made upon insured buildings are of the same general character as the original building, and not such as would have called for a higher rate of premium than before, such additions do not tend to increase the risk.[3] Under a provision that alterations or repairs made in and about the insured premises must be at the risk of the party insured, such repairs or alterations do not *per se* avoid the contract, but only place upon the insured party the hazard of their

[1] May on Insurance, sec. 223.

[2] Stetson *v.* Ins. Co., 4 Mass. 330; 3 Am. Dec. 217; Jolly *v.* Ins. Co., 1 Har. & G. 295; 18 Am. Dec. 288; Merriam *v.* Ins. Co., 21 Pick. 162; 32 Am. Dec. 252.

[3] Schenck *v.* Ins. Co., 24 N. J. L. 447.

increasing the liability of the insurer.[1] A policy is not made void by a change of tenants if nothing is said therein on the subject.[2] But where it is agreed that certain specified alterations shall avoid the policy, the question of materiality to the risk becomes irrelevant, and the only thing to be determined is, whether or not the particular act falls within the language of the prohibition.[3] The erection of a small addition to a house and store insured against fire, and the use of the same as a stable for a cow and to keep hay in, being one of the articles designated in the policy as "extrahazardous," is a material addition to the risk.[4] The occupation of a portion of an unused flour-mill by the owner for some three months, engaged in coopering, as the demand served, is "an appropriation to other purposes" within the meaning of a policy.[5] Where a policy of insurance gave permission to the insured "to make additions, alterations, and repairs," it was held that a new warehouse erected forty feet away from the main building is neither an addition, an alteration, nor repairs, although connected with the main building by a bridge and an underground passage used for pipes.[6] It is no excuse for a violation of a covenant against alteration that the alteration was made by a tenant of the insured without his knowledge or authority.[7]

ILLUSTRATIONS. — A policy was to be avoided if the premises "shall be occupied or used so as to increase the risk, or if the risk be increased . . . . by any means whatever within the control of the assured"; but the insured had permission "to make alterations and repairs incidental to the business." An artesian well was being sunk on the premises, when a vein of gas was

[1] Girard Fire Ins. Co. v. Stephenson, 37 Pa. St. 293; 78 Am. Dec. 424.

[2] Gates v. Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360.

[3] Lee v. Ins. Co., 3 Gray, 583.

[4] Francis v. Ins. Co., 25 N. J. L. 78.

[5] Harris v. Ins. Co., 4 Ohio St. 285.

[6] Peoria Sugar Ref. Co. v. Ins. Co., 24 Fed. Rep. 773.

[7] Diehl v. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302. But the alteration of the premises by a tenant is not an alteration by the "proprietor" within the meaning of the prohibition in the charter of the insurance company unless the proprietor authorized or adopted it: Padelford v. Providence Ins. Co., 8 R. I. 102; 67 Am. Dec. 496.

struck, which, coming in contact with a gas-jet near by, caused an explosion and set fire to the building. *Held*, that it was a question for the jury whether an artesian well was useful in plaintiff's business, and commonly used at the time the policy was taken out; if so, and if it did not materially increase the risk, it would not avoid the policy: *Crane* v. *City Ins. Co.*, 2 Flip. 576. The building insured was described as a "two-story frame dwelling-house, on west side of King's Highway, near present terminus of Lindell Avenue, St. Louis, Missouri." After insurance, and before destruction, it was moved two hundred feet north. The same description was as applicable after as before its removal. *Held*, that the effect of the removal upon the risk was not a question of law, but of fact; there being no condition or covenant in the policy that the building should remain where it was: *Griswold* v. *American Central Ins. Co.*, 1 Mo. App. 97. A policy authorized "necessary alterations and repairs," and by another clause provided that consent should be requisite to an alteration, addition, or enlargement. *Held*, that an addition twelve feet wide and two hundred feet long not consented to avoided the policy: *Frost's Detroit Lumber etc. Works* v. *Ins. Co.*, 37 Minn. 300; 5 Am. St. Rep. 846. Defendant issued a policy upon the dwelling-house of R., plaintiff's testator. The policy contained a condition that work in altering or repairing the premises would vitiate the policy unless permission therefor was indorsed on the policy; five days, however, were allowed each year "for incidental repairs" on dwelling-houses, without notice or indorsement. Plaintiffs procured a carpenter's and mechanic's risk for two months, and during that time made extensive repairs. Work had ceased for about two weeks, and the two months had expired, when plaintiffs commenced the further repair of putting on new sidings, the old having become decayed. This work had been in progress three days when the building was destroyed by fire, the work of an incendiary. In an action upon the policy, *held*, that the work being done was embraced in the term "incidental repairs," and did not forfeit the policy: *Rann* v. *Ins. Co.*, 59 N. Y. 387.

§ 2104. Occupancy of Premises—"Vacant and Unoccupied."—Where the property is described as a dwelling-house, this is not a representation that it is occupied, or will continue to be so;[1] nor does the fact that a house described as occupied becomes afterwards unoccupied

[1] Browning *v.* Ins. Co., 71 N. Y. 508; Ins. Co. *v.* Douglass, 58 Pa. St. 419; 27 Am. Rep. 86; Cumberland Valley 98 Am. Dec. 298.

vitiate the policy.[1] But where the policy provides that if the premises become vacant or unoccupied the insurer shall be notified, or shall not be liable, or the policy shall become void, such want of notice or non-occupation will avoid the policy;[2] and it is immaterial that the assured may have striven diligently to keep them occupied.[3] Such a provision is to be construed in view of the situation and character of the property insured and the ordinary incidents and contingencies affecting the use to which it and other property of like character similarly situated is subject.[4] A dwelling-house is unoccupied if it remains vacant for three months without the consent of the insurer, and is then let to a tenant who has simply placed in it implements for cleaning it.[5] So there is a breach of the condition where there is a temporary vacancy of four or five days, caused by a change of tenants.[6] So where the occupant moves out with his family, taking part of his furniture and all the wearing apparel of his family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months.[7] So where the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing

[1] Diehl *v.* Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302. But it must have been occupied at the time: Alexander *v.* Ins. Co., 66 N. Y. 464; 23 Am. Rep. 76.

[2] Bennett *v.* Ins. Co., 51 Conn. 504. Where a policy requires notice to be given if the insured premises become vacant, a failure of the insured for six weeks to give such notice is inexcusable neglect which will relieve the company from liability in case of loss by fire occurring within the period of the vacancy. Such notice must be given in a reasonable time. But a company will not be discharged if no notice is given of a temporary interruption of continuous possession incidental to a change of tenants: Alston *v.* Old North State Ins. Co., 80 N. C. 326. The breach, by the insured, of a condition that if the premises become vacant for a certain period the policy shall be void does not, in the absence of fraud, affect the contract of insurance, unless the risk is thereby materially increased: Cannell *v.* Phœnix Ins. Co., 59 Me. 582.

[3] Niagara Fire Ins. Co. *v.* Drda, 19 Ill. App. 70.

[4] Whitney *v.* Ins. Co., 72 N. Y. 117; 28 Am. Rep. 116.

[5] Litch *v.* North British and Mercantile Ins. Co., 136 Mass. 491.

[6] Ridge *v.* Ins. Co., 9 Lea, 507.

[7] Sleeper *v.* New Hamphire Fire Ins. Co., 56 N. H. 401.

hay and farming tools;[1] or by the absence of the one who resided in the house, without notice to the company for six weeks, although he frequently returned and looked after the house and the property therein, would avoid the policy.[2] By moving his furniture into a house preparatory to moving in himself, one does not occupy it.[3] The condition is broken, though the tenant removes during the term without his landlord's knowledge.[4] The following have been held not to fall with the phrase "vacant or unoccupied": A temporary absence of the occupants with intention to return;[5] or their going away to visit a sick relative, another person at their request visiting the house daily to look after it;[6] or leaving a summer house in the fall with intent of returning in the spring;[7] or where a person repairing a building slept in it nightly;[8] or the absence of the insured from Wednesday until the next Monday to attend a funeral, during which interval there was no occupant of the house;[9] or leaving a dwelling-house in charge of the owner's servants, with all its furniture, beds, etc., and the clothing of the owner and his family;[10] or a temporary discontinuance of the active use of a saw-mill, arising from interruption incident to the business, —as here, derangement of the machinery, causing delay until low water for repairs;[11] or a temporary stoppage of a mill, occasioned by the prevalence of yellow fever.[12] A grain-elevator which, although not used as such, is used

[1] Ashworth *v.* Builders' Mutual Fire Ins. Co., 112 Mass. 422, 17 Am. Rep. 117.

[2] Paine *v.* Ins. Co., 5 Thomp. & C. 619.

[3] Barry *v.* Ins. Co., 35 Hun, 601.

[4] Farmers' Ins. Co. *v.* Wells, 42 Ohio St. 519; McClure *v.* Ins. Co., 90 Pa. St. 277; 35 Am. Rep. 656.

[5] Hermann *v.* Ins. Co., 81 N. Y. 184; 37 Am. Rep. 488; Stupetzki *v.* Ins. Co., 43 Mich. 373; 38 Am. Rep. 195; Cummins *v.* Ins. Co., 67 N. Y. 260; 23 Am. Rep. 111.

[6] Stupetzki *v.* Ins. Co., 43 Mich. 373; 38 Am. Rep. 195.

[7] Hermann *v.* Ins. Co., 81 N. Y. 184; 37 Am. Rep. 488. And see Phœnix Ins. Co. *v.* Tucker, 92 Ill. 64; 34 Am. Rep. 106.

[8] Hartford Ins. Co. *v.* Smith, 3 Cal. 422.

[9] Franklin Ins. Co. *v.* Kepler, 95 Pa. St. 492.

[10] Herrman *v.* Merchants' Ins. Co., 44 N. Y. Sup. Ct. 444; 81 N. Y. 184; 37 Am. Rep. 488.

[11] Whitney *v.* Ins. Co., 72 N. Y. 117; 28 Am. Rep. 116.

[12] Poss *v.* Assur. Co., 7 Lea, 704; 40 Am. Rep. 68.

as a place of deposit for the papers of the insured, and about which men are constantly, is not "vacant."[1] A "ten-tenement frame block" is not unoccupied while two of the tenements are in actual use and occupation as residences.[2]

The provision will be waived by the insurer insuring the premises knowing them to be vacant,[3] or by calling for proofs without raising the objection as to vacancy.[4] In a policy describing the insured premises as "occupied by a tenant," a provision that if they should become unoccupied without the indorsed consent of the company the policy should be void was held to be waived by the agent's answer, "All right," when informed that the tenant had gone out, and they had been rented to another, who was going in.[5] Where an insurance company adopted a by-law providing that policies should become void after buildings insured should have been vacant for twenty days, it was held that this by-law could have no effect upon a policy previously issued in which was no such stipulation.[6]

ILLUSTRATIONS. — A policy insured a dwelling-house, occupied to the knowledge of the insurer only as a summer residence, with its out-buildings and farm-house, etc., all on the same farm, together with the furniture and personal property in the same, with a condition that the policy should be void if "the above-mentioned premises become vacant or unoccupied, and so remain for more than thirty days," without consent. At the issuing of the policy, the plaintiff was living in the dwelling-house, but he left it in November, with the furniture, in charge of his farmer, who occupied the farm-house. The farmer's family aired the dwelling-house weekly, and the plaintiff and his wife visited it once a fortnight. The next April the dwelling-house and some of its out-buildings were burned. No con-

[1] Williams *v.* Ins. Co., 24 Fed. Rep. 625.

[2] Harrington *v.* Fitchburg Mutual Fire Ins. Co., 124 Mass. 126.

[3] Short *v.* Ins. Co., 90 N. Y. 16; 43 N. Y. 138; Williams *v.* Ins. Co., 50 Iowa, 561; Garland *v.* Ins. Co., 9 Ill. App. 571; 108 Ill. 220.

[4] Gans *v.* St. Paul Fire and Marine Ins. Co., 43 Wis. 108; 28 Am. Rep. 535.

[5] Becker *v.* Farmers' Mutual Fire Ins. Co., 48 Mich. 610.

[6] Palmer *v.* St. Paul Fire and Marine Ins. Co., 44 Wis. 201.

sent had been obtained. *Held*, that the insurance was forfeited: *Herrman* v. *Adriatic Fire Insurance Company*, 85 N. Y. 162; 39 Am. Rep. 644. A policy was issued on premises described as a school-house. There was the usual condition against vacancy. The school was discontinued, and the building was subsequently occupied as a dwelling until April, and was then vacant until the 14th of October, when it was burned while unoccupied. *Held*, that the insurance was forfeited: *American Ins. Co.* v. *Foster*, 92 Ill. 334; 34 Am. Rep. 134. A policy warranted that a family should live in the house throughout the year. In an action on the policy it appeared that at the time of the fire, and for some time previous, the premises were occupied only by two workmen, who ate and worked elsewhere during the day, but kept their trunks and clothing in the house, and slept there at night. *Held*, that this was not a compliance with the warranty: *Poor* v. *Humboldt Ins. Co.*, 125 Mass. 274; 28 Am. Rep. 228. A house insured as a family residence occupied by a tenant, with condition of avoidance if unoccupied for thirty days, or if so used as to increase the risk, was abandoned by the owner and tenant for more than thirty days, during which time it was occupied by a person without authority, paying no rent, and having no family, and by him used as a retail liquor store. *Held*, that both conditions were violated: *Western Ass. Co.* v. *McPike*, 62 Miss. 740. A policy of insurance contained a condition that the same should be void in case the premises should become vacated by the removal of the owner or occupant for more than thirty days without notice to the company and its consent indorsed on the policy, and the premises were vacated January 12th thereafter, and so remained until February 13th, when they were destroyed by fire. *Held*, that the assured could not recover: *Hartford Fire Ins. Co.* v. *Webster*, 69 Ill. 392. A dwelling-house, granary, and barn on a farm were insured. The policy provided that it should be void if the buildings became vacant or unoccupied, and remained so without consent, etc. The tenant left, and for some time the premises were vacant. Then the owner permitted farm-laborers to occupy them. They were not continuously there. The owner explained the situation to the agent of the insurance company, and he indorsed on the policy, "It is understood that the buildings are now occupied for dwelling and farm purposes." *Held*, that the buildings were not occupied within the meaning of the policy: *Fitzgerald* v. *Connecticut Fire Ins. Co.*, 64 Wis. 463. The tenant occupying the house at the time of its insurance left it at six o'clock, P. M., taking all his furniture, and it was burned at two o'clock next morning. *Held*, that the policy was avoided under a clause, "if the dwelling-house hereby insured shall cease to be occupied as such," etc.: *Bennett* v. *Agricultural Ins. Co.*, 50 Conn. 420.

A summer dwelling-house was insured against fire, and it was provided that it was "not to be left unoccupied any portion of the year." At the time the policy was issued, S., an employee of the former owner, with his family, occupied four rooms in one wing. In March of that year the plaintiff employed H., a gardener, to take charge of the place, who was to take S.'s quarters when he moved out. S. moved out on the 5th of April. On March 22d, H. went to the place alone, in consequence of his wife's sickness, and took board at a neighbor's, and continued there, having charge of the place and the keys of the house after S. moved out. On April 19th, the house was destroyed by fire. *Held*, that the policy was avoided: *Sonneborn* v. *Insurance Company*, 44 N. J. L. 220; 43 Am. Rep. 365. The agent of an insurance company consented to a transfer of the policy, with knowledge that the house was vacant. The policy provided for its becoming void if the house should become vacant, and should "so remain." After the transfer, the house remained vacant for many months. *Held*, that no recovery could be had on the policy: *North America Ins. Co.* v. *Garland*, 108 Ill. 220. A building was insured simply as "occupied," by a policy conditioned that it should be void in case "any change be made as to tenants or occupancy," or if it should be used for other purposes than those for which it was used when insured, or if it should be used for carrying on any business which would increase the hazard, the company not being notified and assenting. The house became unoccupied, and the company was not notified, and it was unoccupied when burned. *Held*, that the policy was not avoided: *Somerset County Mutual Fire Ins. Co.* v. *Usaw*, 112 Pa. St. 80; 56 Am. Rep. 307. A family left their house on a visit a week or two before a fire. The head of the family slept in it once or twice during the time, and everything was left there as usual. *Held*, that the house was not vacant or unoccupied so as to invalidate an insurance policy: *Johnson* v. *New York Bowery Fire Ins. Co.*, 39 Hun, 410. A house occupied by a tenant was insured. He moved out, and the landlord moved his things in, and began to prepare the house for his own occupancy; but in a few days, while away on a business trip, and before he had slept in the house, it was burned. *Held*, that it did not become vacant in such a sense as to avoid the policy: *Shackelton* v. *Sun Fire Office*, 55 Mich. 288; 54 Am. Rep. 379. The tenant moved out September 26th, and the property was burned on the night of October 1st following. The owner, who lived a mile and a half distant, spent a part of each intervening day in examining and cleaning the house; but did not stay there at night; and her father, who worked near, left an ax and grub-hoe in the house at night. Otherwise the house was unoccupied. *Held*, that there was a breach of the condition of

the policy that the building should not be left "vacant or unoccupied," and that no recovery could be had thereon: *Feshe* v. *Ins. Co.*, 74 Iowa, 676.

§ 2105. Other Prohibitions as to Use of Premises.— The assured who allows in his house a grocery in which articles denominated hazardous in the memorandum are sold, in violation of the policy, cannot recover.[1] A policy containing a proviso that the policy shall be void if the building be used for an unlawful purpose is avoided by the storage of whisky therein, and the sale thereof by retail without a license, although done without the policy-holder's knowledge.[2] A policy voidable upon the use of the building for any "hazardous" business, including in such category "sail-makers" and "confectionery," is avoided by carrying into the loft a sail-maker's stock and tools, although without commencing work, and by keeping confectionery in glass jars on a shelf in a barber's shop in the building insured.[3]

Acts done in an insured building which do not change its nature and character, although out of the ordinary and appropriate use thereof, do not vacate the policy, unless such acts are fraudulent or grossly careless, and are also the cause of the loss.[4] It is not a violation of a policy that a house insured as a dwelling-house was afterwards occupied as a boarding-house, if boarding-houses are not in the enumeration of prohibited occupations.[5] A warranty that insured premises are "occupied as a boarding-house" is not broken by their occupancy in part as a bar-room and billiard-room, where such occupancy is not forbidden and does not increase the risk.[6] Keeping a bar-room for the purpose of retailing liquors to the boarders and others does not constitute the keeper a tav-

[1] Davern v. Ins. Co., 7 La. Ann. 344.
[2] Kelly v. Ins. Co., 97 Mass. 284.
[3] Wetherell v. Ins. Co., 82 Mass. 276.
[4] Billings v. Ins. Co., 20 Conn. 139; 50 Am. Dec. 277.
[5] Rafferty v. Ins. Co., 18 N. J. L. 480; 38 Am. Dec. 525.
[6] Martin v. State Ins. Co., 44 N. J. L. 485; 43 Am. Rep. 397.

ern-keeper within a provision in a policy against carrying on that occupation.[1] Where a policy insuring a mill declares that the policy shall be void if the mill is run extra hours, but fixes no hours within which the mill may run, it cannot be declared void merely because it appears that sometimes the mill was run at night.[2] A condition that the policy is void while the building is appropriated to hazardous vocations specified is not violated by a merely temporary exercise of one of the prohibited trades in the building.[3] So where its terms prohibit the building insured from being "appropriated, applied, or used" for the purpose of keeping therein any of the articles denominated hazardous, a casual deposit of such articles in the building is not a violation of the prohibition.[4] A policy containing clauses which forbid the keeping by the insured upon his premises of "hazardous" articles, but which has indorsed upon it by the company permission to keep one barrel of benzine or turpentine in tin cans," is not violated by the introduction of a quantity of benzine in a wooden barrel upon the premises, for the purpose of immediately emptying the same into a tin can.[5] Insurance on licensed pool and billiard tables is not avoided by the using of the tables a short time after the license has run out, no harm resulting to the insurance company; nor does such illegal use prevent the policy from being good after another license has been obtained.[6]

Where the policy is to be void if the assured shall keep petroleum on the premises, the keeping of a barrel for lighting purposes avoids it;[7] but not the taking into a manufactory of a small amount of petroleum to clean the

[1] Rafferty *v.* Ins. Co., 18 N. J. L. 480; 38 Am. Dec. 525.

[2] German etc. Ins. Co. *v.* Steiger, 109 Ill. 254.

[3] Gates *v.* Madison County Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360.

[4] Hynds *v.* Ins. Co., 11 N. Y. 554.

[5] Maryland Fire Ins. Co. *v.* Whiteford, 31 Md. 219; 1 Am. Rep. 45.

[6] Hinckley *v.* Germania Fire Ins. Co., 140 Mass. 38; 54 Am. Rep. 445.

[7] Birmingham Ins. Co. *v.* Kroegher, 83 Pa. St. 64; 24 Am. Rep. 147; Cerf *v.* Home Ins. Co., 44 Cal. 320; 13 Am. Rep. 165; holding also that a permission to keep kerosene for lighting "dwellings" did not extend to keeping it in a store, although the owner slept there.

machinery with.[1] A stipulation against "keeping or using camphene, spirit-gas, burning-fluid, or chemical oils" is not violated by the use of a fluid for illuminating purposes not in its nature like camphene or spirit-gas; for instance, a light coal-oil.[2] A clause prohibiting the generating or evaporating within the building, or contiguous thereto, of any substance for burning-gas, or the use of gasoline for lighting, is not infringed by the manufacture of gas from gasoline fifty feet from the building, and the use of it for lighting the building, it not appearing that gas and gasoline are substantially the same.[3]

Placing gunpowder in a building to blow it up is not a "storing" of it in the building;[4] nor is merely keeping it on the premises, neither for sale or on storage, a breach of a condition against keeping gunpowder "for sale or on storage."[5] Keeping a small quantity of petroleum for medicinal purposes is not "storing" it;[6] nor is keeping oil and liquors by a grocer for the purposes of retail;[7] nor is keeping liquors for use of the family, or for the purpose of selling to boarders or others.[8] Although a clause prohibiting the storing or use upon the insured premises of "petroleum, rock, or earth oil" prohibits the storing or use of kerosene oil, yet there being in the policy another clause prohibiting the lighting of the premises by means of certain named inflammable substances, not including kerosene, the lighting the building with kerosene, and keeping on hand therein a reasonable quantity for that purpose, will not avoid the policy.[9]

Keeping fire-works on insured premises is not a violation of a prohibition against keeping gunpowder on

[1] Mears *v.* Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647.
[2] Wheeler *v.* Ins. Co., 6 Mo. App. 235.
[3] Arkell *v.* Ins. Co., 69 N. Y. 191; 25 Am. Rep. 168.
[4] City Fire Ins. Co. *v.* Corlies, 21 Wend. 367; 34 Am. Dec. 258.
[5] Hartford etc. Ins. Co. *v.* Harmer, 2 Ohio St. 452; 59 Am. Dec. 684.
[6] Williams *v.* Ins. Co., 54 N. Y. 569; 13 Am. Rep. 620.
[7] Langdon *v.* Ins. Co., 1 Hall, 226.
[8] Rafferty *v.* Ins. Co., 18 N. J. L. 480; 38 Am. Dec. 525.
[9] Buchanan *v.* Ins. Co., 61 N. Y. 26.

them.[1] A clause vitiating the policy if gunpowder, or "other articles subject to legal restriction," should be kept on the premises insured in greater quantities or in a different manner than the law provided, refers only to articles of an intrinsically dangerous nature, as rendering the property more liable to destruction, and not to liquors.[2]

A policy on a "machine-shop, a watchman kept on the premises," does not require a watchman to be kept there constantly, but only at such times as men of ordinary care and skill in like business keep a watchman on their premises; and in an action on such a policy, evidence of the usage, in this respect, of similar establishments is admissible.[3] But a requirement that a night-watchman should be kept in a quartz-mill is not complied with by employing a watchman who worked during the day and slept at night in a house so far away that from it he could not even see the mill.[4]

A policy on a mill, containing a provision for a forfeiture in case of smoking, or carrying open lights on the premises, is not forfeited by such acts done without the owner's consent, he using the care and diligence of a man of prudence.[5] A policy on the machinery in a silk factory, which provides that it shall be of no effect while the premises shall be used for storing "cotton in bales," "rags," or "wool," or for a "cotton-mill," "woolen-mill," or other "manufacturing establishment or trade requiring the use of heat," is not avoided by using one room for weaving a few pieces of stuff from woolen and linen thread and cotton, spun elsewhere, and kept in the room.[6] Where a policy of fire insurance prohibits the keeping of "hay

[1] Tischler *v.* California Farmers' Mut. Fire Ins. Co., 66 Cal. 178.
[2] Niagara etc. Ins. Co. *v.* De Graff, 12 Mich. 124.
[3] Crocker *v.* People's Ins. Co., 8 Cush. 79.
[4] Wenzel *v.* Commercial Ins. Co., 67 Cal. 438.
[5] Insurance Co. *v.* McDowell, 50 Ill. 120; 99 Am. Dec. 497.
[6] Vogel *v.* Ins. Co., 9 Gray, 23.

pressed in bales" upon the premises insured, the keeping of large quantities of loose, unbaled hay on the premises avoided it.[1]

ILLUSTRATIONS. — A policy insured a "three-story brick, gravel-roof, hotel building, occupied by the assured, and known as the Tremont House, situated on lots 9 and 12," and it granted permission "to light the premises with gasoline," but provided that "no gasoline should be stored on the premises." *Held*, that the word "premises" means the building insured, and the assured was not prohibited from depositing gasoline, provided for use in the hotel, in reasonable quantities, on his own lots outside of the hotel: *Northwestern Mut. Ins. Co.* v. *Germania Fire Ins. Co.*, 40 Wis. 446. A policy had a stipulation that in the event of the building insured being used for certain specified hazardous purposes, the policy should, for the time being, be suspended; and it was shown that such stipulation was being violated at the time of the fire. *Held*, no defense that it appeared that the agent of the company who procured the policy was cognizant of such use at the time the policy was taken out: *Dewees* v. *Manhattan Ins. Co.*, 35 N. J. L. 366. A fire policy was voidable if the premises be so used as to increase the risk, without assent, etc., and allowed naphtha to be used, but with no fire except in a small stove in the office. *Held*, that the placing of a stove, without consent, in the finishing-room, where was much naphtha gas, avoided the policy: *Daniels* v. *Equitable Fire Ins. Co.*, 50 Conn. 551. By a written clause in a policy of insurance against fire, the privilege was granted to use the premises for certain purposes specified, "and for other extrahazardous purposes." In a classification of hazards annexed to the policy, the purposes specifically privileged in the written clause were classed, not as "extrahazardous," but as "specially hazardous." *Held*, that the words "other extrahazardous purposes" mean purposes of the same class as those specified, and that the premises might be used for any of the purposes classed as "specially hazardous" without infringing the policy: *Reynolds* v. *Commerce etc. Ins. Co.*, 47 N. Y. 597. The business carried on upon the uninsured premises was described as the manufacture of bath-tubs. On adjoining premises the insured also conducted the business of sawing and planing lumber, and the shavings therefrom were carried by a tube to feed the boiler furnace on the insured premises. *Held*, that this did not amount to a carrying on of the business of sawing and planing lumber on the insured premises: *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396; 27 Am. Rep. 60. A policy upon

[1] Dittmer v. Germania Ins. Co., 23 La. Ann. 458; 8 Am. Rep. 600.

a quantity of merchandise contained a condition that if the risk should be increased by any means whatever within the control of the assured the policy should be void. In an action upon the policy, it appeared that the assured, for several months before the fire, kept, in a room where the merchandise was, a jug containing crude petroleum, which he used himself for medicinal purposes. It also appeared that the petroleum was not the cause of and had nothing to do with the fire, but evidence was given tending to show that its presence was dangerous, and tended to increase the risk. The court refused to charge that if the use of the petroleum increased the risk, the plaintiff could not recover. *Held*, error; that it was a question of fact for the jury whether the risk was actually and materially increased; and if so, it avoided the policy: *Williams* v. *Ins. Co.*, 57 N. Y. 274. An application by a town for insurance on a school-house stated, in answer to an interrogatory, that the ashes were taken up in metallic vessels which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults, and concluded with a memorandum that "if ashes were allowed to remain in wood, the insurers will not assume the risk," and was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground at a distance from the building; but the boy employed by the school committee to take charge of the building for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the schoolhouse. *Held*, that the insurers were discharged: *Worcester* v. *Worcester Ins. Co.*, 9 Gray, 27. A policy provided that the insurers should not be liable for loss occasioned by the use of kerosene oil as a light in any barn or out-building. The insured took a kerosene lamp to his barn to catch fowls, and while there the lamp was upset and the barn destroyed. *Held*, that if the fire was occasioned by the use of the kerosene rather than of any other burning-fluid, the policy was avoided, the condition not being restricted to an habitual use of the oil in the barn: *Matson* v. *Farm Buildings Ins. Co.*, 73 N. Y. 310; 29 Am. Rep. 149. A policy on a stock of goods was conditioned to be void if "refined coal or earth oils are kept for sale, stored, or used on the premises, without written consent." On the application the agent inspected the premises, and saw and was informed that kerosene was used for lighting them. *Held*, that such use of kerosene did not avoid the policy: *Bennett* v. *North British etc. Ins. Co.*, 81 N. Y. 273; 37 Am. Rep. 501. A policy on an ice-house contained a condition, entitled "builder's risk," that "the working of carpenters, roofers, etc., in building, alter-

ing, or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it." The assured, in an action on the policy, testified that the "ice-house was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year around, and was constantly making repairs and keeping the building in thorough condition." *Held*, that the facts did not vitiate the policy: *Franklin Ins. Co.* v. *Ice Co.*, 36 Md. 102; 11 Am. Rep. 469.

§ 2106. **Customary Use of Insured Premises Impliedly Allowed.** — Where a certain trade, or occupation, or kind of business, or premises is insured, it is implied that the use of said premises customary to them or to the occupation insured shall be allowed, notwithstanding conflicting provisions in the policy.[1]

§ 2107. **Alienation — In General.** — The alienation of the property — that is, parting with his interest in it — nullifies any claim which the insured has. We have seen that, in order to affect a valid insurance, the applicant must have an insurable interest in it. An alienation of the property, if absolute, works a forfeiture, whether it is so stipulated in the policy or not, if the property is out of his possession at the time of the loss.[2] But the alienation, to work a forfeiture, must be by the party insured.[3] The alienation of a part of the property will affect the risk on the whole, the premium paid being for the entire risk.[4] But a sale by the insured of one of several distinct parcels of real estate covered by the policy, that part forming a distinct item, with a separate and distinct valuation, does not avoid the policy except *pro tanto*. As to the property still held by the insured at the time of the loss, he is

[1] See Lawson on Usages and Customs, secs. 108–133, where all the cases on this branch of the law are collected.

[2] May on Insurance, sec. 264; Morrison *v.* Insurance Co., 18 Mo. 262; 59 Am. Dec. 299; Hidden *v.* Ins. Co., 2 Cliff. 266; Gould *v.* Ins. Co., 76 Me. 298.

[3] Foster *v.* Ins. Co., 2 Gray, 416; Boynton *v.* Ins. Co., 16 Barb. 254; Bragg *v.* Ins. Co., 25 N. H. 289.

[4] May on Insurance, sec. 277; Plath *v.* Ins. Co., 23 Minn. 479; 23 Am. Rep. 697; Baldwin *v.* Ins. Co., 60 N. H. 422; 49 Am. Rep. 324.

entitled to recover according to the terms of the policy.[1] Nor does the assignment of part of a mortgage debt.[2] The alienation of a house vitiates the policy, both as to the house and the furniture in it.[3] So, also, the sale by a partner of his undivided interest avoids a policy containing a prohibition of such sale as to the interests of the other partners.[4] An alienation of one of two houses insured in one policy, but valued and insured separately, avoids the policy only as to the house so alienated, though the charter of the company provides that the "alienation of any property" shall avoid the "policy thereupon."[5] An alienation by a mortgagor of part of the premises, upon which he had effected insurance, after an assignment of the policy, with the consent of the insurers, to the mortgagee, who signed the premium note, will avoid the policy *in toto* as to the mortgagor's interest.[6] If the premium be entire, and likewise the deposit note, and the lien for the assessment on the same attach to all the separate parcels, the contract is entire, and if void at all, is void *in toto*, although several sums are designated as insured upon the several parcels. But if the several parcels are insured in several sums, each having its specific premium and deposit note, and for which a distinct lien can be asserted, then an alienation of one parcel is only an avoidance of the policy *pro tanto*.[7] The fact that the agent of an insurance company knew of an assignment of property insured, and did not object, does not prevent

[1] Clark *v.* Ins. Co., 6 Cush. 342; 53 Am. Dec. 44; Holbrook *v.* Ins. Co., 1 Curt. 193; Western Ins. Co. *v.* Riker, 10 Mich. 282; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Com. Ins. Co. *v.* Spankneble, 52 Ill. 53; 4 Am. Rep. 582; Wolfe *v.* Ins. Co., 39 N. Y. 49.

[2] A policy of insurance stipulated that it should become void upon an alienation of the property insured without the consent of the company. Held, that nothing less than a sale of the entire interest of the party insured would defeat the policy: Cowan *v.* Ins. Co., 40 Iowa, 551; 20 Am. Rep. 583; Rex *v.* Ins. Co., 2 Phila. 257.

[3] Barnes *v.* Ins. Co., 51 Me. 110; 81 Am. Dec. 562.

[4] Dix *v.* Ins. Co., 22 Ill. 272.

[5] Clark *v.* Ins. Co., 6 Cush. 342; 53 Am. Dec. 44.

[6] Boynton *v.* Ins. Co., 16 Barb. 254.

[7] Friesmuth *v.* Ins. Co., 10 Cush. 587.

the transfer from avoiding the policy.[1] But a consent given after a sale of the property and assignment of the policy saves the forfeiture.[2]

§ 2108. What is and What is not an Alienation.—A conveyance of the property by deed, whether of warranty, bargain and sale, or quitclaim, is an alienation,[3] even where there is a simultaneous mortgage back to the vendor for a portion of the purchase-money.[4] So is the assignment of the property under proceedings in bankruptcy or insolvency;[5] or a partition of the property;[6] or an absolute sale of it;[7] or a gift of the property,[8] unless the donor, or grantor, or vendor retain some interest in it, when, if he does, such interest will continue to be covered by the policy;[9] or a voluntary assignment for the benefit of creditors[10] or a sale by a tenant to his co-tenant;[11] or a dissolution of a partnership and a sale by one partner of his interest to the other.[12]

But a mere agreement to sell without the passing of the title is not an alienation;[13] nor is the customary sale of

[1] Ayres *v.* Ins. Co., 17 Iowa, 176; 85 Am. Dec. 553.

[2] Buchanan *v.* Ins. Co., 61 N. Y. 26.

[3] May on Insurance, sec. 264.

[4] Savage *v.* Ins. Co., 52 N. Y. 502; 11 Am. Rep. 741.

[5] Young *v.* Ins. Co., 14 Gray, 150; 74 Am. Dec. 673; Adams *v.* Ins. Co., 29 Me. 292; Phœnix Ins. Co. *v.* Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521; Hazard *v.* Ins. Co., 7 R. I. 429.

[6] Barnes *v.* Ins. Co., 51 Me. 110.

[7] Mt. Vernon M. Co. *v.* Ins. Co., 10 Ohio St. 347; Morrison *v.* Ins. Co., 18 Mo. 262; 59 Am. Dec. 299; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Hazard *v.* Ins. Co., 7 R. I. 429; Wilson *v.* Hill, 3 Met. 66; Smith *v.* Ins. Co., 120 Mass. 90; Home Ins. Co. *v.* Hauslein, 60 Ill. 521; Cowan *v.* Ins. Co., 40 Iowa, 551; 20 Am. Rep. 583; McCarty *v.* Ins. Co., 17 La. 365; Abbott *v.* Ins. Co., 30 Me. 414; Washington Ins. Co. *v.* Kelly, 32 Md. 421; 3 Am. Rep. 149.

[8] McCarty *v.* Ins. Co., 17 La. 365; Langdon *v.* Ins. Co., 22 Minn. 193. As a conveyance by the husband to his wife: Baldwin *v.* Ins. Co., 60 N. H. 164; even though the husband retains an interest in the land as tenant by the curtesy: Oakes *v.* Ins. Co., 131 Mass. 164.

[9] Hitchcock *v.* Ins. Co., 26 N. Y. 68; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 299; 80 Am. Dec. 573; Cowan *v.* Ins. Co., 40 Iowa, 551; 20 Am. Rep. 583; Hoffman *v.* Place, 32 N. Y. 405; Scanlon *v.* Ins. Co., 4 Biss. 511.

[10] Dey *v.* Ins. Co., 23 Barb. 623; Hazard *v.* Ins. Co., 7 R. I. 429; Young *v.* Ins. Co., 14 Gray, 150; 74 Am. Dec. 673.

[11] Buckley *v.* Ins. Co., 47 Pa. St. 404.

[12] Finley *v.* Ins. Co., 30 Pa. St. 311; 72 Am. Dec. 705.

[13] Masters *v.* Ins. Co., 11 Barb. 624; Springfield etc. Ins. Co. *v.* Allen, 43 N. Y. 389; 3 Am. Rep. 711; Boston and Salem Ice Co. *v.* Royal Ins. Co., 12 Allen, 381; 90 Am. Dec. 151; Norcross

a stock of goods in a store from time to time;[1] nor a void sale:[2] nor the transfer of the title by descent;[3] nor the transfer of the property by one without authority;[4] nor the levy of an execution;[5] nor a mortgage of the property,[6] whether it is realty or personalty;[7] nor a conditional sale or transfer;[8] nor a parol lease to another with resumption

v. Franklin Ins. Co., 17 Pa. St. 429; 55 Am. Dec. 571; Trumbull v. Portage Mut. Fire Ins. Co., 12 Ohio, 305; Hill v. Cumberland Valley Mut. Prot. Co., 30 Pa. St. 474; Gilbert v. North Am. Fire Ins. Co., 23 Wend. 43; 35 Am. Dec. 543; Perry Ins. Co. v. Stewart, 19 Pa. St. 45; Shotwell v. Jefferson Ins. Co., 5 Bosw. 247; Washington Ins. Co. v. Morrison, 11 Leigh, 354; Insurance Co. v. Kelley, 32 Md. 421; 3 Am. Rep. 149; Clinton v. Ins. Co., 45 N. Y. 454; Browning v. Ins. Co., 71 N. Y. 508; 27 Am. Rep. 867; Wheeling Ins. Co. v. Morrison, 11 Leigh, 354; 36 Am. Dec. 385. Vendor retaining possession of goods by agreement of parties, and holding policies of insurance which he had previously procured thereon as collateral security for the payment of the residue of the purchase-money, retains an insurable interest in the goods: Norcross v. Ins. Co., 17 Pa. St. 429; 55 Am. Dec. 571.

[1] Lane v. Ins. Co., 12 Me. 44; 28 Am. Dec. 151.

[2] School Dist. v. Ins. Co., 62 Me. 330; Pitney v. Ins. Co., 65 N. Y. 6.

[3] May on Insurance, sec. 266; Burbank v. Ins. Co., 24 N. H. 550; 57 Am. Dec. 300. *Aliter*, where the policy was to be void if the property changed, "whether by act of the parties or operation of law": Sherwood v. Ins. Co., 73 N. Y. 447; 29 Am. Rep. 180; Hine v. Woolworth, 93 N. Y. 75; 45 Am. Rep. 176.

[4] Com. Ins. Co. v. Spankneble, 52 Ill. 53; 4 Am. Rep. 582; Copeland v. Ins. Co., 6 Pick. 198.

[5] Clark v. Ins. Co., 6 Cush. 342; 53 Am. Dec. 44; Rice v. Tower, 1 Gray, 426; Ins. Co. v. Findley, 6 Whart. 483; 37 Am. Dec. 430; Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

[6] Shepard v. Union Mut. Fire Ins. Co., 38 N. H. 232; Folsom v. Belknap County Mut. Fire Ins. Co., 30 N. H. 231; Howard Ins. Co. v. Bruner, 23 Pa. St. 50; Jackson v. Ins. Co., 23 Pick. 418; 34 Am. Dec. 69; Conover v. Mut. Ins. Co. of Albany, 3 Denio, 254; 1 N. Y. 290; Pollard v. Somerset Mut. Fire Ins. Co., 42 Me. 221; Smith v. Monmouth Mut. Fire Ins. Co., 50 Me. 96; Dutton v. New England Mut. Fire Ins. Co., 29 N. H. 153; Rollins v. Columbian Mut. Fire Ins. Co., 5 N. H. 200; Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213; Com. Ins. Co. v. Spankneble, 52 Ill. 53; 4 Am. Rep. 582; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164; 5 Am. Rep. 115; Kelley v. Liverpool etc. Ins. Co., 1 Hann. 266; Van Deusen v. Ins. Co., 1 Rob. (N. Y.) 55; Tittmore v. Ins. Co., 20 Vt. 546; Lazorus v. Ins. Co., 5 Pick. 81; Rice v. Tower, 1 Gray, 426; Dolliver v. Ins. Co., 128 Mass. 315; 35 Am. Rep. 378; Smith v. Ins. Co., 50 Me. 96. *Contra*, Indiana Ins. Co. v. Coquellard, 2 Ind. 645; Indiana Ins. Co. v. Connor, 5 Ind. 170; Lossaman v. Ins. Co., 78 N. C. 145.

[7] Holbrook v. Ins. Co., 1 Curt. 193; Van Deusen v. Ins. Co., 1 Rob. (N. Y.) 55; Rice v. Tower, 1 Gray, 426; Phœnix etc. Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

[8] Tittmore v. Vermont Mut. Fire Ins. Co., 20 Vt. 546; Hodges v. Tenn. Marine and Fire Ins. Co., 8 N. Y. 416; Hitchcock v. North Western Ins. Co., 26 N. Y. 68; Folsom v. Ins. Co., 30 N. H. 231; Farmers' etc. Ins. Co. v. Graybill, 74 Pa. St. 17; Wheeling Ins. Co. v. Morrison, 11 Leigh, 354; 36 Am. Dec. 385; Chandler v. Ins. Co., 21 Minn. 85; 18 Am. Rep. 385; Jackson v. Ins. Co., 16 B. Mon. 242; Washington Ins. Co. v. Hayes, 17 Ohio St. 432; 93 Am. Dec. 628; Power v. Ins. Co., 19 La. 28; 36 Am. Dec. 665.

of possession before the loss;[1] nor a sale by one joint owner to another.[2] Where an entry of foreclosure on the property is declared by the policy to be an alienation, a notice of foreclosure served, certified, and recorded avoids the policy;[3] but not a decree in a foreclosure suit without further proceedings.[4]

ILLUSTRATIONS.—A man mortgaged and then insured; the property was then sold under a decree for the mortgage debt, then burned. *Held*, an alienation: *Mount Vernon etc. Co.* v. *Ins. Co.*, 10 Ohio St. 347. After the policy on the property was issued, the insured conveyed it in mortgage, and afterwards, by a deed recorded, released to another person his right of redemption, and took back a bond of defeasance, which he neglected to have recorded. *Held*, that the policy was void, and the lien of the mortgage upon the policy was defeated: *Tomlinson* v. *Monmouth Ins. Co.*, 47 Me. 232. Real estate of a decedent, the buildings on which were insured, was sold at orphans' court sale. Before confirmation the buildings were burned. *Held*, that the sale was not an alienation: *Farmers' Mut. Ins. Co.* v. *Graybill*, 74 Pa. St. 17. At the time of the fire the property had been bid in by the mortgagee at a mortgagee's sale, but the deed had not been delivered, and on account of the fire the mortgagee refused to accept a deed. *Held*, that there had not been a sale or alienation, and that the original owner had an insurable interest at the time of the fire: *Marts* v. *Cumberland Mut. Fire*

[1] Lane *v.* Ins. Co., 12 Me. 44; 28 Am. Dec. 150. A conveyance of an undivided half of the property insured, with a reservation of a term of seven years therein, and a reconveyance in mortgage of such half, is not such an alienation as will prevent a recovery for a loss occurring within the seven years, although the insured had also leased the premises for the same period: Stetson *v.* Ins. Co., 4 Mass. 330; 3 Am. Dec. 217.

[2] Hoffman *v.* Ætna Fire Ins. Co., 1 Rob. (N. Y.) 501; 32 N. Y. 405; 88 Am. Dec. 337; Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297; 9 Am. Rep. 235; Burnett *v.* Eufaula Home Ins. Co., 46 Ala. 11; 7 Am. Rep. 581; Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 412; Tallman *v.* Atlantic Ins. Co., 29 How. Pr. 71; Tillou *v.* Kingston Mut. Fire Ins. Co., 7 Barb. 570; Wilson *v.* Genessee County Mut. Ins. Co., 16 Barb. 511; West *v.* Citizens' Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294; Cowan *v.* Iowa St. Ins. Co., 40 Iowa, 551; 20 Am. Rep. 83. *Contra*, Dey *v.* Ins. Co., 23 Barb. 623. A sale by one copartner of his interest, and his withdrawal from the firm, has been held an alienation or a change of title or interest in a number of cases: Dix *v.* Ins. Co., 22 Ill. 272; Finley *v.* Ins. Co., 30 Pa. St. 311; 72 Am. Dec. 705; Hartford Ins. Co. *v.* Ross, 23 Ind. 179; 85 Am. Dec. 452; Keeler *v.* Ins. Co., 16 Wis. 523; 84 Am. Dec. 714. *Contra* in others, viz.: Burnett *v.* Ins. Co., 46 Ala. 11; 7 Am. Rep. 581; Pierce *v.* Ins. Co., 50 N. H. 297; 9 Am. Rep. 235; Dermani *v.* Ins. Co., 26 La. Ann. 69; 21 Am. Rep. 544; West *v.* Ins. Co., 27 Ohio St. 1; 22 Am. Rep. 294.

[3] McIntire *v.* Ins. Co., 102 Mass. 230; 3 Am. Rep. 458.

[4] Kane *v.* Ins. Co., 38 N. J. L. 441; 20 Am. Rep. 409.

Ins. Co., 44 N. J. L. 478. A merchant, having a policy of insurance on his stock of goods, transferred the goods to B, who immediately thereafter assigned the same to the merchant's wife. The merchant then, with the consent of the insurance company, transferred to his wife his interest in the policy. *Held*, that by the union of the ownership in the goods, and the interest in the policy in the same person, the policy had again become effectual: *Wolfe* v. *Ins. Co.*, 39 N. Y. 49.

§ 2109. "Transfer"—"Change of Title."—The words "transfer" or "change of title," which are frequently to be found in policies of insurance, are of wider import than the term "alienation."[1] Under these phrases the following have been held to fall, viz.: A conveyance absolute in form, but intended merely as a security for a debt;[2] a voluntary conveyance;[3] a conveyance by husband and wife, with a simultaneous reconveyance to the wife, to carry out the provisions of a will, devising the property to the wife;[4] a conveyance in fee with a mortgage back;[5] the conveyance of an equity of redemption.[6] So is a dis-

[1] In Western Mass. Ins. Co. *v.* Riker, 10 Mich. 279, the court say: "The words 'transfer' or 'change of title' are more comprehensive than the word 'sale,' which immediately precedes them. A sale is a parting with one's interest in a thing for a valuable consideration. This is what is generally understood by the word, and in every sale there is a transfer or change of title from the vendor to the vendee. But there may be a transfer or change of title without a sale. Should A convey a piece of property to B to hold in secret trust for him, there would be a transfer or change of title from A to B, but there would not be a sale of the property, or an actual parting with it, to B for a valuable consideration, although the conveyance on its face would import a sale from A to B. And if the trust, instead of being secret, appeared on the face of the conveyance, there would still be a change of title. The title would no longer be in A, but in B, his grantee. We think such a conveyance would clearly come within the condition of the policy and put an end to the insurance." So in Ayres *v.* Ins. Co., 17 Iowa, 186, 85 Am. Dec. 553, it is said: "The object of the insurance company by this clause is, that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the assured in the property of a nature calculated to have this effect is in violation of the policy. But if the real ownership remains the same,—if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire,—the policy is not violated."

[2] Western Mass. Ins. Co. *v.* Riker, 10 Mich. 279.

[3] Baldwin *v.* Ins. Co., 10 Ins. Law J. 32.

[4] Langdon *v.* Ins. Co., 22 Minn. 193.

[5] Savage *v.* Ins. Co., 52 N. Y. 502; 11 Am. Rep. 741. See Farmers' Ins. Co. *v.* Archer, 36 Ohio St. 608.

[6] Little *v.* Ins. Co., 5 Ins. Law J. 154.

solution of a partnership and a division of the property among the partners;[1] but not a mortgage;[2] nor a change of title by which the interest of the insured in the property is increased instead of diminished;[3] nor a demise of part of the premises insured;[4] nor a foreclosure under a mortgage, or a sale under execution, possession not having changed, nor the period for redemption expired;[5] nor the mere commencement of foreclosure proceedings;[6] nor the giving by the owner of goods in transit to a carrier of the benefit of his insurance;[7] nor a deed without any proof of its having been recorded or delivered;[8] nor a sale of an insured building, the grantor retaining by the deed a lien for fifty thousand dollars.[9] A temporary removal, leaving the house in charge of an agent for the time, is not a "change of possession";[10] nor a letting of an insured house to tenants;[11] but the change of sleeping apartments into a house of assignation and prostitution is a "change of occupancy."[12]

ILLUSTRATIONS.— A policy of fire insurance was issued on partnership property. One of the partners brought an action for a dissolution of the firm, and was appointed receiver of the

[1] Dreher *v.* Ins. Co., 18 Mo. 128. So is a sale by one partner to another of his interest: Hathaway *v.* Ins. Co., 64 Iowa, 229; 52 Am. Rep. 438. But see Keeney *v.* Ins. Co., 71 N. Y. 396; 27 Am. Rep. 60. There is no change of A's interest in a stock in trade insured because of an agreement that B shall share in the profits of the business, it not being the intention that B should have an interest in the stock in trade: London Assur. Co. *v.* Drennen, 116 U. S. 461.

[2] Byers *v.* Ins. Co., 35 Ohio St. 606; 35 Am. Rep. 623; Quarrier *v.* Ins. Co., 10 W. Va. 507; 27 Am. Rep. 582.

[3] Bragg *v.* Ins. Co., 25 N. H. 289; Heaton *v.* Ins. Co., 7 R. I. 502. Where a mortgagee of premises applies for an insurance, and subsequently becomes owner in fee, no new consideration is necessary to change the proposed insurance so as to apply to the absolute interest of the applicant: Fisk *v.* Cottenet, 44 N. Y. 538; 4 Am. Rep. 715.

[4] West Branch R. R. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573.

[5] Loy *v.* Ins. Co., 24 Minn. 315; 28 Am. Rep. 346; Hammel *v.* Ins. Co., 54 Wis. 72; 41 Am. Rep. 1. *Aliter*, where the conditions were "if any change take place in the title by legal process or judicial decree": Brunswick Sav. Inst. *v.* Ins. Co., 68 Me. 313; 37 Am. Rep. 56.

[6] Phœnix Ins. Co. *v.* Ins. Co., 101 Ind. 392.

[7] Jackson Co. *v.* Ins. Co., 139 Mass. 508; 52 Am. Rep. 728.

[8] Humphrey *v.* Ins. Co., 15 Blatchf. 35.

[9] Bates *v.* Commercial etc. Ins. Co., 1 Cin. Rep. 523.

[10] Shearman *v.* Ins. Co., 46 N. Y. 526; 7 Am. Rep. 380.

[11] Rumsey *v.* Phœnix Ins. Co., 17 Blatchf. 527.

[12] Indiana Ins. Co. *v.* Brehm, 88 Ind. 578.

property. Subsequently the dissolution was adjudged and a sale decreed. But before the sale was effected a loss by fire occurred. *Held*, that the policy was void on account of a "change of title or possession": *Keeney* v. *Home Ins. Co.*, 3 Thomp. & C. 478. S. and N., copartners, took out a fire policy voidable in case of any change of interest as owner or otherwise. They afterwards admitted K. to partnership, and before loss S. sold his interest to N. and K., taking a chattel mortgage to secure the whole purchase-money. *Held*, that the policy was avoided: *Card* v. *Phœnix Ins. Co.*, 4 Mo. App. 424. A policy was to be void if any change should take place "in the title or possession of the property, whether by legal process, or judicial decree, or voluntary transfer." The insured was declared a bankrupt in involuntary proceedings, and his property was assigned by the register to the assignee in bankruptcy. Afterwards the insured property was destroyed by fire. *Held*, that the policy had become void under the condition, even though the loss, if any, was by the terms of the policy payable to a mortgagee: *Perry* v. *Lorillard Fire Ins. Co.*, 61 N. Y. 214; 19 Am. Rep. 272. A policy provided that if the insured should make any other insurance on the property, or any part thereof, or if the property should be sold or transferred, or any change should take place in the title or possession thereof, without the company's consent, the policy should be void; and that when the property had been sold or otherwise disposed of so that all the interests on the part of the insured had ceased, the insurance on such property should terminate. *Held*, that the insurance on the entire property was not by these provisions forfeited by a sale of a portion of the property: *Quarrier* v. *Peabody Ins. Co.*, 10 W. Va. 507; 27 Am. Rep. 582. After a master's sale of property on a foreclosure of mortgage, the same being insured and destroyed by fire before a confirmation of the report of sale, *held*, that this did not destroy the interest of the assured, nor did it work a transfer of title: *McLaren* v. *Ins. Co.*, 1 Edm. Sel. Cas. 210. A policy contained a clause to the effect that if any transfer of the title or possession of the property was made without consent of the company, the policy should be void. The title of the property was transferred to plaintiff March 4th; a renewal was effected March 21st by the insured; on the 15th of April the policy was assigned to plaintiff, who on the same day informed the company's agent that the property and policy had been transferred to him, and received the company's written consent, signed by the agent. *Held*, that the renewal after the transfer was valid, and that the consent of defendants to the transfer waived the forfeiture: *Shearman* v. *Niagara Fire Ins. Co.*, 46 N. Y. 526; 7 Am. Rep.

380. Defendants, through an agent authorized to issue and renew policies and to receive premiums therefor, insured R. by a policy containing a condition of forfeiture in case of any transfer or change of title or possession of the insured property. R.'s title to the property vested in plaintiff, who notified the agent of the fact, and paid to him the premium and took a renewal receipt. A loss occurred. *Held*, that the condition was waived: *Miner* v. *Phœnix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479.

§ 2110. **Levy of Execution.**—An ordinary clause in policies provides that the insurance shall cease if the property is levied on or taken into custody or possession. But this, it has been held, does not include a technical levy without change of possession, or which does not divest the title;[1] nor a wrongful levy;[2] nor the issuance of an execution on a judgment for a mechanic's lien and notice of the sale of the property.[3]

§ 2111. **What Property is Covered by Risk—Construction of Words and Phrases in Policies.**—The well-settled rule that where it is doubtful what goods or buildings or places are covered by the policy, the doubt will be resolved against the insurers, and evidence will be admissible to resolve the doubt.[4]

§ 2112. **Property "Contained in" a Building.**—Where property is insured as "contained in" a certain building, or in a certain part of a building, the policy, in case of loss, will cover only such property as is at the time con-

[1] Com. Ins. Co. *v.* Berger, 42 Pa. St. 285; 82 Am. Dec. 504; Smith *v.* Farmers' Ins. Co., 89 Pa. St. 287; Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 598. Goods insured were levied on by the sheriff, who fastened up the windows of the house insured, and went out of town, taking the key. Held, that the insured might recover for their loss by fire while the sheriff was out of town: Franklin Ins. Co. *v.* Findlay, 6 Whart. 483; 37 Am. Dec. 430.

[2] Phila. Ins. Co. *v.* Mills, 44 Pa. St. 241; 84 Am. Dec. 437.

[3] Ins. Co. *v.* O'Maley, 82 Pa. St. 400; 22 Am. Rep. 769.

[4] Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Clark *v.* Firemen's Ins. Co., 18 La. Ann. 431; Burr *v.* Broadway Ins. Co., 16 N. Y. 267; Beatty *v.* Lycoming Ins. Co., 52 Pa. St. 516; Lycoming Ins. Co. *v.* Sailor, 67 Pa. St. 108; Neve *v.* Columbia Ins. Co., 2 McMull. 220; Whitmarsh *v.* Conway Fire Ins. Co., 16 Gray, 359; 77 Am. Dec. 414; Planters' Ins. Co. *v.* Engle, 52 Md. 468; Steele *v.* Franklin Fire Ins. Co., 17 Pa. St. 290.

tained in that building.[1] It will not cover the property while away from that place for repairs.[2] Statements of the place in which the property is situated, contained in the policy, are warranties which must be and continue true during the life of the policy. Consequently a removal unassented to by the insurer will work a forfeiture.[3] If household goods insured as goods contained in a dwelling-house are burned while in a barn on the premises, the insurer is not liable.[4]

But a customary and reasonable use of the property, having regard to its kind, is presumed to be permitted.[5] Thus a policy on goods in a store covers goods to the same amount, though not the goods which were in the store when the insurance was made.[6] Where "wearing apparel contained in" a certain house is insured, the insurer is liable for its destruction while being worn by the owner away from the house,[7] or while being in the store of a tailor or furrier being repaired.[8] Where a carriage "contained in a barn" is insured, the insurer is liable for a loss while the carriage is being used away from the farm or is at a shop for repairs.[9] A policy upon goods in a building, not limiting their situation therein, nor referring to any plan except to show the relative location of the building to other buildings, covers the goods in whatever part of the building they may be at the time of the loss, although partly in other stores therein than that in which they were at the time of the issuance of the policy.[10]

[1] Harris *v.* Ins. Co., 53 Iowa, 236; Bryce *v.* Ins. Co., 55 N. Y. 240; 14 Am. Rep. 249; Annapolis etc. R. R. Co. *v.* Ins. Co., 32 Md. 37; 3 Am. Rep. 112.

[2] Bradbury *v.* Fire Ins. Ass'n, 80 Me. 396; 6 Am. St. Rep. 219.

[3] Lyons *v.* Ins. Co., 14 R. I. 109; 43 Am. Rep. 34; Ludwig *v.* Ins. Co., 48 N. Y. 379; 8 Am. Rep. 556.

[4] English *v.* Franklin Fire Ins. Co., 55 Mich. 273; 54 Am. Rep. 377.

[5] Peterson *v.* Ins. Co., 24 Iowa, 494; 95 Am. Dec. 748.

[6] Lane *v.* Ins. Co., 12 Me. 44; 28 Am. Dec. 150.

[7] Longueville *v.* Ass. Co., 51 Iowa, 553; 33 Am. Rep. 146.

[8] Noyes *v.* Ins. Co., 64 Wis. 415; 54 Am. Rep. 631.

[9] Peterson *v.* Ins. Co., 24 Iowa, 494; 95 Am. Dec. 748; McCluer *v.* Ins. Co., 43 Iowa, 349; 22 Am. Rep. 249.

[10] Fair *v.* Ins. Co., 112 Mass. 320.

ILLUSTRATIONS.—A policy of insurance insured the plaintiff "five hundred dollars on brick pottery building," certain amounts on machinery, stock, etc., and finally, "fifty on office furniture, including safe, contained in said building, situate on D. street, near the F. railroad, in N." *Held*, that the words, "contained in said building, situate on D. street," etc., applied to the machinery and stock, as well as to the furniture, and that nothing was covered by the policy but the "pottery building" and its contents: *Hews* v. *Ins. Co.*, 126 Mass. 389. A's goods in his chambers of the "stone, brick, and iron building No. 117 Franklin Street" were insured. The entrance No. 117 led to chambers over Nos. 119, 123, and 131 Franklin Street, and Nos. 63 and 67 Federal Street, all these being in one building. A also hired chambers in an adjoining building. He connected these chambers with the others. *Held*, that the goods insured were those in the first-named building: *Sampson* v. *Security Ins. Co.*, 133 Mass. 49. A policy insured two barns, and certain articles "contained therein," and also a horse "in barn or in fields." *Held*, that the horse was insured, though in a barn not one of those specified: *Trade Ins. Co.* v. *Barracliff*, 45 N. J. L. 543. A policy upon thirty-six mules described them as "all contained in the two-story framed barn (thirty-six by one hundred feet), situate on section No. 19," etc. *Held*, not a warranty that the mules should remain in the barn, nor that the risk should cease if they were taken out of it: *Holbrook* v. *Ins. Co.*, 25 Minn. 229. Defendant issued to plaintiff a policy on goods "contained in the first story of the five-story brick building situate at No. 39 Center Street." Subsequently plaintiff moved his goods upstairs, and the agent of defendant received the renewed premium with knowledge of the change in location of the goods, giving a receipt in the words: "On stock . . . . 39 Center Street," etc. A loss occurred while the goods were located upstairs. *Held*, that plaintiff could recover: *Ludwig* v. *Jersey City Ins. Co.*, 48 N. Y. 379; 8 Am. Rep. 556.

§ 2113. Loss or Damage by "Fire"—What is within the Term—Explosions.—Damage by fire for which the insurers are liable includes not only damage caused by actual ignition, but also damage by heat or by the scorching of paint, the cracking of glass, the blistering of pictures and furniture, where the fire itself has not reached the articles;[1] so of damage by water in extinguishing the

[1] Scripture v. Lowell Ins. Co., 10 Cush. 356; 57 Am. Dec. 111; criticising and explaining Austin v. Drew, 6 Taunt. 436.

fire;[1] so of loss of the goods in removing them, by theft, or by mislaying them.[2] Damage caused to the goods by breakage in attempting to save or in removing them is within the loss.[3] But the removal must be necessary to save the goods;[4] and where they are removed from apprehension of fire, which was near at hand, but which did not after all reach the building, it has been held that there could be no recovery,— the removal not being reasonably necessary.[5] But where a prudent, uninsured person would hardly have omitted the precaution taken by the insured, as the store was in great danger from the fire, the company is liable for the damage done to the goods, and also for the expense incurred in removing them, though the store did not burn.[6] Loss by ignition resulting from lightning is covered by a policy insuring against danger by fire, or by fire from lightning. But loss by being torn to pieces by lightning, without combustion, is not.[7] A loss by spontaneous combustion is a loss by "fire";[8] so is damage by smoke;[9] so is a loss by an explosion causing a

[1] Lewis *v.* Ins. Co., 10 Gray, 159; Stanley *v.* Ins. Co., 3 Ex. 41; Talamon *v.* Ins. Co., 16 La Ann. 426; Griesk *v.* Ins. Co., 19 La. Ann. 297; Hillier *v.* Ins. Co., 3 Pa. St. 470; 45 Am. Dec. 656; Whitehurst *v.* Ins. Co., 6 Jones, 352; Babcock *v.* Ins. Co., 6 Barb. 637.

[2] Newmark *v.* Ins. Co., 30 Mo. 160; 77 Am. Dec. 608; Witherell *v.* Ins. Co., 49 Me. 200; Lieber *v.* Ins. Co., 6 Bush, 637; Lewis *v.* Ins. Co., 10 Gray, 159; Whitehurst *v.* Ins. Co., 6 Jones, 352; Case *v.* Ins. Co., 13 Ill. 676; Agnew *v.* Ins. Co., 3 Phila. 193; White *v.* Ins. Co., 57 Me. 91; 2 Am. Rep. 379; Tilton *v.* Ins. Co., 1 Bosw. 367; Brady *v.* Ins. Co., 11 Mich. 425; Independent Mutual Ins. Co. *v.* Agnew, 34 Pa. St. 96; 75 Am Dec. 638.

[3] Independent Mutual Ins. Co. *v.* Agnew, 34 Pa. St. 96; 75 Am. Dec. 638; White *v.* Ins. Co., 57 Me. 91; 2 Am. Rep. 22.

[4] Case *v.* Ins. Co., 13 Ill. 676; Brady *v.* Ins. Co., 11 Mich. 425.

[5] Hillier *v.* Ins. Co., 3 Pa. St. 470; 45 Am. Dec. 656.

[6] White *v.* Republic etc. Ins. Co., 57 Me. 91; 2 Am. Rep. 22; Balestracci *v.* Ins. Co., 34 La. Ann. 844.

[7] Babcock *v.* Ins. Co., 6 Barb. 637; 4 N. Y. 326; Kenniston *v.* Ins. Co., 14 N. H. 341; 40 Am. Dec. 193; Andrews *v.* Ins. Co., 37 Me. 256. In Spensley *v.* Ins. Co., 54 Wis. 433, it was held that a policy making the insurer liable for loss or damage by fire or lightning covered all known effects of lightning, and not merely those arising from combustion; e. g., tornado.

[8] May on Insurance, sec. 413.

[9] In Scripture *v.* Lowell Ins. Co., 10 Cush. 356, 57 Am. Dec. 111, the court say: "It is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vegetables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be

fire;[1] and so is a voluntary destruction of a building by exploding gunpowder by the authorities to prevent the spread of fire.[2] But a loss by concussion caused by an explosion is not within the risk.[3] A loss by the explosion of a steam-boiler not causing any fire is not a loss by fire.[4] Where the fire is caused by the explosion of a steam-boiler, and the policy provides against liability "for any loss occasioned by the explosion of a steam-boiler," the loss thereby is not recoverable under the terms of the policy.[5] So where the policy provided that the company should not be liable for loss "by fire which shall happen or arise by any explosion," nor for loss "by explosion of any kind," it was held that the insurers were not liable for damage by fire which originated from and was caused by the explosion of a steam-boiler used on the premises.[6] Nor, it has also been said, would they be liable under an exemption from loss "by fire which might occur by means of explosion," if the explosion sets in operation the fire which burns the insured property, though the fire may travel from the seat of explosion through other buildings continuously to the building burned.[7] A policy insuring against "loss or damage by fire," but providing that the company shall not be responsible for any "loss or damage occasioned by or resulting from any explosion whatever," is to be construed as if the excepting clause read "loss or damage by fire," and does not cover a loss

consumed, but the contents of the apartments to which the actual fire does not extend are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy?"

[1] Waters *v.* Ins. Co., 11 Pet. 213; City Fire Ins. Co. *v.* Corlies, 21 Wend. 367; 34 Am. Dec. 259; Greenwald *v.* Ins. Co., 3 Phila. 323; Scripture *v.* Lowell Ins. Co., 10 Cush. 356; 57 Am. Dec. 111; Perrin *v.* Ins. Co., 11 Ohio, 147; 38 Am. Dec. 728.

[2] City Fire Ins. Co. *v.* Corlies, 21 Wend. 367; 54 Am. Dec. 259; Pentz *v.* Ins. Co., 3 Edw. Ch. 343.

[3] Everett *v.* Ins. Co., 19 Com. B. 126; Caballerro *v.* Ins. Co., 15 La. Ann. 217.

[4] Millaudon *v.* Ins. Co., 4 La. Ann. 15; 50 Am. Dec. 550.

[5] St. John *v.* Ins. Co., 1 Duer, 371; 11 N. Y. 516.

[6] Hayward *v.* Ins. Co., 7 Bosw. 385; 2 Abb. App. 349.

[7] Ins. Co. *v.* Tweed, 7 Wall. 44. But see Com. Ins. Co. *v.* Robinson, 64 Ill. 264; 16 Am. Rep. 557.

happening from an explosion which takes place by reason of a column of an explosive mixture coming in contact with the flame of a gas-jet, whereby a fire is caused.[1]

Insurance against "fire" does not cover damage to an article in the process of manufacture by the careless use of the fire as an agent in the manufacture.[2]

ILLUSTRATIONS. — By a collision between steamboats, a fire was caused on one of them, and it sank, with the insured goods on board, before the goods were touched by the fire. *Held*, that if the injury to the goods could have been prevented but for the fire, an action on the policy was maintainable: *New York and Boston Dispatch Express Co.* v. *Ins. Co.*, 132 Mass. 377; 42 Am. Rep. 440. A policy on a theater was "not to cover any loss or damage by fire which may originate in the theater proper." A fire occurred without the wall of the theater, of such intensity as to heat the wall of the "theater proper" sufficiently to cause the interior of it to burn. *Held*, not to be a fire originating in the theater proper: *Sohier* v. *Ins. Co.*, 11 Allen, 336. A policy contained a condition that the company would not be liable "for damage to property by lightning, aside from fire, ... nor for damages occasioned by the explosion of a steam-boiler, nor for damages by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances." *Held*, not to exempt liability for damage by fire resulting from an explosion of gas, but to exempt damage occasioned by the explosive force of the gas without communicating fire to the insured property: *Boatman's Fire and Marine Ins. Co.* v. *Parker*, 23 Ohio St. 85; 13 Am. Rep. 228. A policy exempted "any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power, nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." *Held*, not to exempt from liability for losses by fire caused by explosion, but simply from liability for losses occasioned by the explosion itself: *Commercial Ins. Co.* v. *Robinson*, 64 Ill. 265; 16 Am. Rep. 557. A policy on sulphuric acid exempted the insurer from liability for loss by explosion, unless fire ensued. The building was blown down by a storm, and the chamber containing the acid was broken, and the acid was lost. The plaintiff claimed that the storm blew fire in contact with escaping gases and air, and created an explosion, which caused the loss. *Held*, that

[1] United Life Ins. Co. *v.* Foote, 22 Ohio St. 340; 10 Am. Rep. 735.

[2] Austin *v.* Drew, 6 Taunt. 436; explained in Scripture *v.* Lowell Ins. Co., 10 Cush. 356; 57 Am. Dec. 111.

in either case there was no liability under the policy: *Transatlantic Fire Insurance Company* v. *Dorsey*, 56 Md. 70; 40 Am. Rep. 403. A fire policy provided that the company would not be liable for loss caused by explosion, except for such fire as should result therefrom; nor would it be liable for that unless the privilege was given in the policy to keep the explosive substance. There was in the premises an explosive material known as flour-dust, which was necessarily present, and which exploded on being reached by fire, destroying and consuming the premises. *Held*, that the company was liable for the loss: *Washburn* v. *Miami Valley Ins. Co.*, 2 Flip. 664. A policy provided that the insurer should not be responsible for losses occasioned by explosion. There was an explosion, from which followed a fire. The fire was apparently extinguished, but it broke out again twice within forty-eight hours. *Held*, that the loss from the two last fires, as well as from the first fire, must be presumed to have resulted from the explosion: *Tanneret* v. *Merchants' Mut. Ins. Co.*, 34 La. Ann. 249; *Waldeck* v. *Ins. Co.*, 56 Wis. 96. A policy issued to an express company, insuring goods and merchandise in its care for transportation while on board cars or other conveyances, contained the provision: "That no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils." Goods in course of transportation by it were in an express freight-car, forming part of a train, which collided with another train, composed mainly of oil-cars loaded with petroleum. The petroleum burst into flames, which destroyed the freight-car and the goods. *Held*, that the loss was not covered by the policy: *Insurance Co.* v. *Express Co.*, 95 U. S. 227. The policy was upon certain machinery used for rectifying spirits. The policy contained a clause excepting the company from liability for losses "caused by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only." Vapors from the works came in contact with the flame of a lamp, and an explosion ensued, which nearly destroyed the building and machinery. A fire resulted, which occasioned some damage, but slight compared with that caused by the explosion. *Held*, that the insurer was not liable for the loss occasioned by the explosion: *Briggs* v. *Ins. Co.*, 53 N. Y. 446.

§ 2114. Invasion — Mobs — Usurped Power, etc. — "Invasion, or any military or usurped power," includes the burning of property by a United States military commander to prevent it from falling into the possession

of rebel forces.[1] A loss occasioned by "mobs or riots" does not include the burning of a bridge in time of war by the lawful authorities to prevent the advance of a hostile force.[2] Destruction by fire set by an ordinary mob is not a destruction by "usurped power"; which means only a destruction by persons usurping the power of government. Therefore, a destruction (though illegal) of property by the authorities of a municipal corporation to stay a conflagration is not within the phrase.[3]

ILLUSTRATIONS. — A policy exempted liability for fire caused by "invasion, insurrection, riot, civil commotion, or military or usurped power." A coal-breaker insured was burned by a party of men at night, who fired shots, and drove away the watchman. *Held*, a riot, without proof of a previous unlawful assembling, accompanied by force or violence: *Lycoming Fire Ins. Co.* v. *Schwenk*, 95 Pa. St. 89; 40 Am. Rep. 629. A policy on a state penitentiary contained an exception in the case of loss by fire caused by persons engaged in a riot, "or in notorious resistance to the authority of magistrates, or to any other lawful authority." *Held*, that the exception did not embrace the case of a fire caused by four or five convicts who combined secretly to escape by force, but who yielded as soon as they came in contact with an officer authorized to arrest them: *Straus* v. *Imperial Fire Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368.

§ 2115. **Fallen Buildings.**—Where the policy provides that if the building shall "fall," except as the result of a fire, the insurance shall cease, if the floors and roof fall in, leaving only the walls, and perhaps some of the stairs, this is a fallen building, and the risk is at an end.[4] But not where only about one quarter of the wall fell, leaving

[1] Ætna Ins. Co. *v.* Boon, 95 U. S. 117. See Portsmouth Ins. Co. *v.* Reynolds, 32 Va. 613.

[2] Harris *v.* Ins. Co., 50 Pa. St. 341. But see Ætna Ins. Co. *v.* Boon, 95 U. S. 117.

[3] City Fire Ins. Co. *v.* Corlies, 21 Wend. 367; 34 Am. Dec. 260.

[4] Huck *v.* Ins. Co., 127 Mass. 306; 34 Am. Rep. 373. It has been held that the provision, "If a building shall fall, except as the result of a fire, all insurance shall cease," applies rather to a case where the building falls by inherent defects, or by being undermined, or prostrated by a storm, than to a case where, by a sudden combustion of inflammable gas, an explosion takes place, by the force of which the building is made a heap of ruins: Dows *v.* Ins. Co., 127 Mass. 346; 34 Am. Rep. 384.

the rest of the building standing.[1] Such a provision in a policy must be construed, in case of an ambiguity, most strongly against the company; and where the building is destroyed, not by reason of inherent defects, but by an explosion within the building itself, a fire immediately ensuing, the company will be liable for the loss.[2] Where a fire has happened, and, shortly after it is extinguished, the walls of the burnt edifice, in consequence of being weakened by the fire, fall upon another building, crushing it in, the latter injury is covered by a policy against damage by fire.[3] Where the walls of a warehouse, from weakness or other cause not proceeding from fire, and without its agency, fell in upon themselves, becoming, with the goods contained therein, one mass of ruin, out of which fire proceeded, it was held that this was not a loss by fire.[4] But a building which has been shaken by a storm so as to lean over, and has been abandoned by its occupants, is not a fallen building.[5]

ILLUSTRATIONS. — A building became undermined, and fell, covering in its ruins certain chemicals, which took fire, which fire communicated with another building, a part of which, with the goods therein, had been involved in the crash, but a part also had remained standing with the goods undisturbed. *Held*, that an action to recover for damage by fire to the goods so remaining undisturbed would lie: *Lewis* v. *Ins. Co.*, 10 Gray, 159.

§ 2116. **Amount of Recovery.** — The law of marine insurance respecting salvage does not apply to fire insurance. The contract is one of indemnity; and the insured is therefore entitled to recover to the amount of his loss, if less than the sum insured, or the whole sum, if his loss exceeds that, without regard to the value of the property which may have been saved.[6] The insured is entitled to

[1] Breuner *v.* Ins. Co., 51 Cal. 101; 21 Am. Rep. 703.

[2] Dows *v.* Ins. Co., 127 Mass. 346; 34 Am. Rep. 384.

[3] Johnston *v.* Ins. Co., 7 Ct. Sess. Cas. 52.

[4] Nave *v.* Ins. Co., 37 Mo. 429; 90 Am. Dec. 394.

[5] Fireman's Ins. Co. *v.* Congregation, 80 Ill. 558.

[6] Liscom *v.* Ins. Co., 9 Met. 205; Mississippi Mutual Ins. Co. *v.* Ingram,

recover the value of the property destroyed. This is not the value of convenience nor of affection, nor the cost price; but its fair cash value in the market, to be determined by what similar property at the same time, and in the same or similar places, and under the like circumstances, would ordinarily bring in the general market, without regard to an extraordinary price, whether higher or lower, which might be obtained in special cases or under special circumstances.[1] Where a mortgagee insured had agreed to sell and assign certain mortgages, and had received certain payments from the assignee, before the loss by fire, he was held nevertheless to be entitled to recover from the insurers the actual loss, without deduction on account of these payments;[2] so where property has been taken for public use by the public authorities, or sold under a binding contract for a conveyance, no actual conveyance having been made;[3] so where one who holds a power of attorney to sell for advances made, though the legal title be in another;[4] so a mortgagor whose equity has been seized on execution recovers according to the value of the property lost, without reference to this circumstance.[5] Where the interest of a mortgagee in property is insured, he may recover the loss, though the mortgagor may have repaired it;[6] and that the property still held by the mortgagee is ample

34 Miss. 215; Nicolet *v.* Ins. Co., 3 La. 366; 23 Am. Dec. 458. If the building loses its identity and specific character by fire, although a large part of the walls, and some of the iron attached thereto, are left standing, it is a "total destruction" within the meaning of the policy: Williams *v.* Hartford Insurance Company, 54 Cal. 442; 35 Am. Rep. 77.

[1] May on Insurance, sec. 424; Mack *v.* Ins. Co., 9 Ins. Law J. 681; Wolf *v.* Ins. Co., 1 Sand. 124; 7 N. Y. 553; Equitable Ins. Co. *v.* Quinn, 11 S. C. 170; Fowler *v.* Ins. Co., 74 N. C. 89; Wynne *v.* Ins. Co., 71 N. C. 121. A fire insurance policy is a contract of indemnity: Millaudon *v.* Ins. Co., 9 La. 27; 29 Am. Dec. 432; Morrison *v.* Ins. Co., 18 Mo. 264; 59 Am. Dec. 299; Franklin Ins. Co. *v.* Hamill, 6 Gill, 87.

[2] Haley *v.* Mfrs. Fire Ins. Co., 120 Mass. 292.

[3] Collingridge *v.* Royal etc. Ins. Co., L. R. 3 Q. B. Div. 173; Clinton *v.* Hope Ins. Co., 45 N. Y. 454.

[4] Brugger *v.* State etc. Ins. Co., 5 Saw. 304.

[5] Strong *v.* Manufacturers' Ins. Co., 10 Pick. 40; 20 Am. Dec. 507.

[6] Foster *v.* Ins. Co., 2 Gray, 216.

security for the debt is no defense to the insurer.[1] A mortgagee insuring premises generally for his own benefit may recover in case of a loss before payment of the mortgage the entire sum insured, without assigning his mortgage interest, or any part of it, to the insurers.[2] So a mortgagee who has insured his mortgage interest at his own expense, and for his own indemnity, without any agreement with the mortgagor, need not first exhaust his remedy on his mortgage before he calls upon the insurer to make good damage to the property by fire; and he may recover the whole amount secured and unpaid upon the mortgage.[3] The mortgagee can recover only the amount due on the mortgage when the insurance was effected, and not subsequent advances.[4] A mortgagee of chattels insured by a policy payable to him as his interest may appear is entitled, in case of loss, to the insurance money to the amount of the mortgage debt in preference to other creditors, although the mortgage was not properly filed.[5] Where a leasehold is insured, the value of the unexpired term is the measure of damages.[6]

The policy may restrict the amount to be recovered for destroyed property to a certain proportion of its value.[7] Where the policy provides that the insurer shall be liable for no more than the sum insured in any case whatever, the insurers will be obliged to pay on a total loss the difference only between the amount insured and what they had already paid on the partial loss.[8] Under a condition

[1] Kernochan *v.* Ins. Co., 5 Duer, 1; 17 N. Y. 428; Rex *v.* Ins. Co., 2 Phila. 357.

[2] King *v.* Ins. Co., 7 Cush. 1; 54 Am. Dec. 683.

[3] Excelsior Fire Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343; 14 Am. Rep. 271.

[4] Ogder *v.* Ins. Co., 3 U. C. C. P. 497.

[5] Manson *v.* Phœnix Ins. Co., 64 Wis. 26; 54 Am. Rep. 573.

[6] Niblo *v.* Ins. Co., 1 Sand. 551.

[7] Borden *v.* Hingham Mutual Fire Ins. Co., 18 Pick. 523; 29 Am. Dec. 614; Fuller *v.* Boston Mutual Fire Ins. Co., 4 Met. 206; Holmes *v.* Charlestown Mutual Ins. Co., 10 Met. 211; 43 Am. Dec. 428; Phillips *v.* Merrimack Mutual Ins. Co., 10 Cush. 350; Brown *v.* Quincy Ins. Co., 105 Mass. 396; 7 Am. Rep. 538; Brinley *v.* National Ins. Co., 11 Met. 195; Huckins *v.* People's Mutual Fire Ins. Co., 11 Fost. 238.

[8] Curry *v.* Ins. Co., 10 Pick. 535; 20 Am. Dec. 548.

that the company shall not be liable for more than three fourths of the cash market value, the policy covering two classes for a stated sum, neither class, if deficient in value, can be supplemented by excessive loss on the other.[1] Where a policy provided that the insurers should pay all such loss not exceeding the sum insured as shall happen by fire, it was held that the assured might recover that sum on a partial loss exceeding that amount.[2] Where the policy provides for an apportionment of the loss and expenses of removal and protection of the goods during a fire, the proportion to be borne by each will be according to his interest. If, for example, the property is insured for one half its value, each will bear one half of such expense; if for three quarters, then the insurer pays three fourths and the insured one fourth.[3]

ILLUSTRATIONS. — Distilled liquors on which the internal revenue tax had not been paid were burned. *Held*, that as this entinguished the claim of the government, the insured could recover only the value of the property less the tax: *Security Ins. Co.* v. *Farrell*, 2 Ins. L. J. 302. An insurance company, authorized to insure not to exceed three fourths the value of property, insured a house for five hundred dollars and its furniture for five hundred dollars more. They were both destroyed by fire, and in an action on the policy the jury found the value of the house to be six hundred dollars, and of the furniture four hundred dollars; it was held the assured could only recover three fourths of such sum, or seven hundred and fifty dollars: *Post* v. *Ins. Co.*, 12 Met. 555; 46 Am. Dec. 702. A policy of reinsurance contained this clause: "Loss, if any, payable *pro rata* at the same time with the reinsured." The reinsurance was for half the amount originally insured. A loss occurred, less than the amount of the original insurance. *Held*, that the insurer, by virtue of the first part of this clause, was not bound to pay the full amount reinsured, but only one half the loss; that by the latter part of the clause actual payment by the reinsured upon its policy was not required to precede or to accompany payment by defendant, but it merely fixed the time for payment, to wit, the same time as was fixed for pay-

[1] Home Ins. Co. v. Adler, 71 Ala. 516.

[2] Mississippi etc. Ins. Co. v. Ingram, 34 Miss. 215.

[3] Peoria Ins. Co. v. Wilson, 5 Minn, 53; Welles v. Ins. Co., 6 Pick. 172.

ment by the reinsured: *Blackstone* v. *Ins. Co.*, 56 N. Y. 104. C. insured his homestead dwelling-house, for himself and his personal representatives, against loss by fire. Upon his death his widow was entitled by law to hold the premises for her life. The house was destroyed by fire after his death, and while the widow was so occupying it. *Held*, that the insurance money belonged to those beneficially interested in the property, and C.'s administrator would hold it as trustee for the widow, creditors, and heirs, and the widow was entitled to a life use of it: *Culbertson* v. *Cox*, 29 Minn. 309; 43 Am. Rep. 204. The owner of property insured received of the city part compensation for the destruction thereof, by order of the corporation, to prevent the spreading of a fire. *Held*, that the insurers were liable to the amount of the policy for the value of the property, less the amount recovered from the city, after deducting from the amount so recovered a proportionate share of the costs of the recovery: *Pentz* v. *Ins. Co.*, 9 Paige, 568. A obtained insurance on his house. B held A's agreement to convey the house to him on payment of a less amount than the insurance money. B, without A's knowledge or connivance, burned the house. *Held*, that A's recovery against the insurance company was not limited to the amount for which he had agreed to convey the house to B: *Grant* v. *Ins. Co.*, 76 Me. 514. The lessees of a colliery, whose lease required them to return the property in good order at the end of the term, effected an insurance on the coal-breaker, shafting, etc., "this to insure all their working interest." The slope fell in, and afterwards the breaker, shafting, etc., were burned. *Held*, that they could recover the value of the property, although by such falling in their working interest was of less value than the amount insured; and that their insurable interest was the value of the property they were bound to replace: *Imperial Fire Ins. Co.* v. *Murray*, 73 Pa. St. 13. A sold land, reserving the right to remove the buildings before a certain day. Afterwards he obtained insurance on them, and they were burned before the expiration of the time limited for their removal. *Held*, that he was entitled to recover from the insurance company their intrinsic cash value, without regard to the fact that they were to be removed: *Washington Mills Emery Mfg. Co.* v. *Weymouth and Braintree Mut. Fire Ins. Co.*, 135 Mass. 503. A statute provided that where real property within the state insured against fire should be totally destroyed by fire without criminal fault of the assured, the amount of insurance written in the policy "should be taken and deemed to be the true value of the property at the time of such loss, and the amount of the loss sustained," and the measure of damages. In a policy issued after the statute took effect,

the parties stipulated that the damages should be established "according to the true and actual cash marketable value" of the property when the loss happened. *Held*, that the amount written in the policy was conclusive as to the amount of damages, and on grounds of public policy could not be changed by such stipulation: *Reilly* v. *Franklin Ins. Co. of St. Louis*, 43 Wis. 449; 28 Am. Rep. 552.

§ 2117. **Consequential Damages or Losses not Recoverable.**—Remote or consequential damages are not recoverable; as, for example, such as are caused by an interruption of business, as the loss of custom to an inn,[1] or the loss of use to a grist-mill, or the profits of its business, or the expenses of keeping his employees while rebuilding, though in consequence of the fire no return can be had for the wages;[2] or prospective rent.[3] But prospective profit may be specially insured, and will then be recoverable.[4]

§ 2118. **Right of Insurer to Rebuild or Replace the Property.**— By special contract the insurer may have the right to rebuild or replace the property, and this right he may exercise at his election instead of paying the loss.[5] His election, however, must be made within a reasonable time.[6] The acceptance of an order to pay the loss to a third person is not an election not to rebuild.[7] And after the election is made, and while the work is going on, the right of action on the policy is suspended.[8] But if the rebuilding is delayed an unreasonable time, the policy may be sued on,[9] and the insured may recover the amount of

[1] Sun Office *v.* Wright, 3 Nev. & M. 819; In re Wright, 1 Ad. & E. 621.

[2] Menzies *v.* Ins. Co., 9 Ses. Cas. S. 694; Niblo *v.* Ins. Co., 1 Sand. 551.

[3] Leonarda *v.* Ins. Co., 2 Rob. (La.) 131.

[4] May on Insurance, sec. 423.

[5] Wallace *v.* Ins. Co., 4 La. 289; Com. Ins. Co. *v.* Sennett, 37 Pa. St. 205; 78 Am. Dec. 418. Where the insurance is for a gross amount for a certain period, the insurer may have to rebuild or repair twice, if there is a second loss within that period: Trull *v.* Ins. Co., 3 Cush. 263.

[6] Haskins *v.* Ins. Co., 5 Gray, 432. A month after proofs of loss were furnished has been held a reasonable time: Sutherland *v.* Ins. Co., 14 Ses. Cas. S. 775; Ins. Co. *v.* Hope, 58 Ill. 75; 11 Am. Rep. 48.

[7] Tolman *v.* Ins. Co., 1 Cush. 73.

[8] Beals *v.* Ins. Co., 36 Barb. 614; 36 N. Y. 522.

[9] Haskins *v.* Ins. Co., 5 Gray, 432; Home Ins. Co. *v.* Garfield, 60 Ill. 124; 14 Am. Rep. 27.

the policy and interest, and the rental value of the ground during the time of the delay.[1] On election to rebuild, the contract becomes one to rebuild, and the insurer is liable for the improper performance of it.[2] Where the policy provides that the company may rebuild on giving notice of their intention within thirty days after the receipt of proof of loss, notice of their intention so to do must be served within the thirty days specified; and in the absence of any provision in the policy to the contrary, delivery of proof of loss to the local agent is delivery to the company.[3] If the insurer only partly rebuilds or repairs, he is entitled to an allowance for what is done.[4] He is not liable for rent while he thus occupies the premises;[5] nor for their rent while he is repairing them.[6] The right to repair or replace the property destroyed is merely a privilege for their benefit which insurers may adopt or not as they think proper, and therefore the expense of repairing or replacing the property is not a proper rule for estimating the damages on a contract to measure the damages by the value of the property when the loss occurs.[7] It is no defense to the insurer that he was refused permission to rebuild by the authorities,[8] or that the insured before election removed the goods so that the amount to be restored could not be determined.[9] But if the insured refuses permission to rebuild, he loses his right of action.[10]

No equity attaches to damages recovered on a policy of fire insurance which authorizes the same to be used in replacing the building for the loss of which they were recovered.[11]

[1] Home Mut. Fire Ins. Co. *v.* Garfield, 60 Ill. 124; 14 Am. Rep. 27.

[2] Morrell *v.* Ins. Co., 33 N. Y. 429; 88 Am. Dec. 396.

[3] Ins. Co. of North America *v.* Hope, 58 Ill. 75; 11 Am. Rep. 48.

[4] Parker *v.* Ins. Co., 9 Gray, 152; Morrell *v.* Ins. Co., 33 N. Y. 429; 88 Am. Dec. 396.

[5] St. Paul's Ins. Co. *v.* Johnson, 77 Ill. 598.

[6] Baroness *v.* Phœnix Ass. Co., 2 Rob. (La.) 131; 38 Am. Dec. 205.

[7] Com. Ins. Co. *v.* Sennett, 37 Pa. St. 205; 78 Am. Dec. 418.

[8] Brady *v.* Ins. Co., 11 Mich. 425; Brown *v.* Ins. Co., 1 El. & E. 853.

[9] Ins. Co. *v.* Delevan, 8 Paige, 419.

[10] Beals *v.* Ins. Co., 36 Barb. 611; 36 N. Y. 522.

[11] Haxall *v.* Shippen, 10 Leigh, 536; 34 Am. Dec. 745.

ILLUSTRATIONS. — A policy provided that in case of loss the insurers might rebuild on giving notice of their election so to do within thirty days. *Held*, that although the required notice had not been given, the insurers might rebuild instead of paying the loss, if the assured consented, and notwithstanding his creditors' objection: *Stamps* v. *Commercial Fire Ins. Co.*, 77 N. C. 209; 24 Am. Rep. 443. An insurance company, which had the option of repairing in case of a partial loss to a wooden building insured by it, elected to repair rather than to pay. After the election, the city prohibited the erection of a wooden building, so that to repair, the company would have been obliged to use a more expensive material. *Held*, that this afforded no excuse for not repairing, and that the owner, having been obliged himself to repair with brick, could recover the cost, together with damages for the delay, including the rental value: *Philadelphia Fire Ass'n* v. *Rosenthal*, 108 Pa. St. 474.

§ 2119. **Fire Policies not Assignable.**—Though marine policies are transferable without the consent of the insurer, policies of fire insurance are not.[1] A policy of fire insurance is a personal contract with the assured, and does not pass to a purchaser of the property, unless assigned with the assent of the insurer.[2] A policy issued to the assured, "their executors, administrators, and assigns," may be assigned without a transfer of the property, and without the consent of the insurers.[3] Policies usually provide that they shall not be transferred or assigned without the consent of the insurer; but with the permission of the insurer, the assignment may be made in two ways; viz., by a regular assignment in the nature of a new contract between the assignee and the insurer, or by an order accepted by the insurer to pay the loss, if any, to the assignee.[4] If the policy was void or forfeited by reason of his acts while in the hands of the assured, it is equally void in the hands of the assignee, although the insurer consent to the assignment.[5] An assignment of a

[1] Ætna Ins. Co. *v.* Tyler, 16 Wend. 385; 30 Am. Dec. 90; Simeral *v.* Ins. Co., 18 Iowa, 319; Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25.

[2] Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; 30 Am. Dec. 90.

[3] Berson *v.* Builders' Ins. Co., 38 Cal. 541.

[4] Fogg *v.* Ins. Co., 10 Cush. 337.

[5] Citizens' Ins. Co. *v.* Doll, 35 Md. 89; 6 Am. Rep. 360; Ill. Mut. Ins. Co. *v.* Fix, 53 Ill. 151; 5 Am. Rep. 38.

policy as collateral security is such an "assignment" as will forfeit it if done without the consent of the insurer,[1] even though after the loss the assured pays the amount of the lien.[2] Merely making the policy payable in case of loss to the mortgagee is not an assignment of the contract of insurance so as to make a new contract between the insurer and the mortgagee. He is subject to all the conditions of the policy, and takes the risks growing out of the acts or conduct of the insured. The insurers are only bound to pay to the mortgagee what may be found due the insured in case of loss; and if he has a policy originally invalid, or by his conduct, by alienation or otherwise, has forfeited the right to recover, there is nothing to be paid the mortgagee, even though the assignment be consented to by the insurers.[3] An alienation of the property is not an assignment of the policy,[4] even where there is an agreement to assign the policy;[5] nor a mortgage of the property with an agreement to hold the policy for the mortgagee's benefit;[6] nor an unexecuted agreement to assign, whether by word of mouth or by writing;[7] nor is a general assignment of all personal property for the benefit of creditors;[8] nor is a designation in the policy of a certain person not interested in the property—a stranger—as payee in case of loss;[9] nor is

[1] Ferree *v.* Ins. Co., 8 Phila. 512; 67 Pa. St. 373; 5 Am. Rep. 436; Lynde *v.* Ins. Co., 139 Mass. 57. But in Ellis *v.* Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270, it is held that a deposit of a policy by way of pledge is not an assignment of it. And see True *v.* Ins. Co., 26 Fed. Rep. 83; Griffey *v.* Ins. Co., 100 N. Y. 417; 53 Am. Rep. 202.

[2] Ferree *v.* Ins. Co., 8 Phila. 512; 67 Pa. St. 373; 5 Am. Rep. 436.

[3] Loring *v.* Manufacturers' Ins. Co., 8 Gray, 28; Home Mut. Ins. Co. *v.* Hauslein, 60 Ill. 521; Grosvenor *v.* Atlantic Fire Insurance Co., 17 N. Y. 91; Traders' Ins. Co. *v.* Robert, 9 Wend. 404; Tillou *v.* Kingston Mut. Fire Ins. Co., 5 N. Y. 405; 7 Barb. 570; McClusky *v.* Providence Ins. Co., 126 Mass. 306; Baldwin *v.* Phœnix Ins. Co., 10 Ins. Law J. 34; Ill. Mut. Ins. Co. *v.* Fix, 53 Ill. 151; 5 Am. Rep. 38.

[4] Phillips *v.* Ins. Co., 10 Cush. 350; Stout *v.* Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Lahiff *v.* Ins. Co., 60 N. H. 75.

[5] Wheeling Ins. Co. *v.* Morrison, 1 Leigh, 354; 36 Am. Dec. 385; Pierce *v.* Ins. Co., 50 N. H. 297; 9 Am. Rep. 235.

[6] Prows *v.* Ins. Co., 2 Cin. Rep. 14.

[7] Cromwell *v.* Brooklyn Ins. Co., 39 Barb. 227; Smith *v.* Ins. Co., 50 Me. 96.

[8] People *v.* Beigler, Hill & D. 133; Lazarus *v.* Com. Ins. Co., 5 Pick. 76.

[9] Frink *v.* Hampden Ins. Co., 45 Barb. 384; Birdseye *v.* City Fire Ins. Co., 26 Conn. 165; People *v.* Beigler, Hill & D. 133; Mellen *v.* Ins. Co., 5 Duer, 101.

an indorsement on the back of the policy to that effect assented to by the insurers;[1] nor a general assignment in bankruptcy;[2] nor the sale and assigment by one partner to the others of his interest in the business and policy.[3]

An assignee with the insurer's consent of the interest of one to whom a policy is payable becomes entitled to whatever those originally insured may be entitled to receive in case of loss; but he does not acquire the full rights of an assignee of a chose in action, but recovers in the right of the parties insured, and not in his own, and is affected by subsequent acts of the insured.[4] The prohibition of an assignment without consent applies only to an assignment before the loss. An assignment after the loss is not the assignment of the policy, but the assignment of a claim or debt, a chose in action, which is always assignable in equity,—subject, of course, to such set-off as would be enforceable against the assignor.[5] An assignment of an insurance policy made before loss, but not delivered until afterwards, does not take effect until delivery, and then as an assignment of a money demand against the insurers.[6] A prohibition of an assignment after the loss is invalid and void as contrary to law.[7]

ILLUSTRATIONS.—A policy conditioned not to be assignable without the written consent of the insurer, and to be void in case of transfer by sale or otherwise without such consent, was issued

[1] Fogg *v.* Middlesex Mut. Fire Ins. Co., 10 Cush. 337.

[2] Fayette Ins. Co. *v.* Neel, 8 Ins. Law J. 265.

[3] West *v.* Co., 27 Ohio St. 1; 22 Am. Rep. 294.

[4] Hale *v.* Mechanics' Ins. Co., 6 Gray, 169; 66 Am. Dec. 410.

[5] Brichta *v.* New York Lafayette Ins. Co., 2 Hall, 372; Perry *v.* Merchants' Ins. Co., 25 Ala. 355; Mellen *v.* Hamilton Fire Ins. Co., 5 Duer, 101; 17 N. Y. 609; Hughes *v.* Mut. Fire Ins. Co., 9 U. C. Q. B. 387; Wilson *v.* Hill, 3 Met. 66; Sadler's Co. *v.* Badcock, 2 Atk. 554; Courtney *v.* New York City Ins. Co., 28 Barb. 116; Carter *v.* Humboldt Fire Ins. Co., 12 Iowa, 284; Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402; 40 Barb. 292; Green *v.* Republic Ins. Co., 10 Ins. Law J. 422; Archer *v.* Merchants' and Manufacturers' Ins. Co., 43 Mo. 43; Dogge *v.* North Western Ins. Co., 49 Wis. 501.

[6] Watertown Fire Ins. Co. *v.* Grover and Baker Sewing Machine Co., 41 Mich. 131; 32 Am. Rep. 146.

[7] Goit *v.* Nat. Prot. Ins. Co., 25 Barb. 189; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402; Spare *v.* Ins. Co., 17 Fed. Rep. 568; Walters *v.* Ins. Co., 1 Iowa, 404; 63 Am. Dec. 451; Alkan *v.* Ins. Co., 53 Wis. 136.

to a partnership of three persons; subsequently, during the term, one partner retired without assigning his interest in the policy, but selling his interest in the partnership to his copartners, who continued the business. A fire subsequently having destroyed the property insured, *held*, that the two remaining copartners could recover on the policy: *Texas Banking and Ins. Co.* v. *Cohen*, 47 Tex. 406; 26 Am. Rep. 298. A. B., having a policy issued by an insurance company on his property, payable, in case of loss, to a mortgagee, on which a total loss had occurred, executed and delivered to J. S., an attorney who held claims of M. N. and others against him, an order, by which he requested the company to pay to "J. S., attorney of M. N. and others," the balance due on the policy after paying the mortgagee; and in consideration thereof J. S. forebore to press the claims. The company, though having notice of this order, paid said balance to A. B. on his assurance that the order amounted to nothing. *Held*, that J. S. could maintain an action in the name of A. B. to recover the balance from the company: *Hall* v. *Dorchester Mut. Ins. Co.*, 111 Mass. 53; 15 Am. Rep. 1. A party took a policy of insurance upon liquors, groceries, etc., and the same day on which the policy was executed, permission was given to assign the policy to a third person. *Held*, that the party to whom the assignment was made was entitled to recover to the amount of the interest he had in the policy, notwithstanding the party to whom the policy was granted had deprived himself of his right to recover by acts of fraud: *Charleston Ins. Co. ads. Neve*, 2 McMull. 237.

§ 2120. **Consent of Insurer.**—The assent of the insurer to the transfer or assignment may be given, as a rule, by any of his agents. Thus the following have been held to have power to give such assent, viz.: The secretary of an insurance company;[1] an insurance agent;[2] and generally any officer of the company who has to the knowledge of the managers been in the habit of giving such consent.[3] An acknowledgment by an insurance company of notice of an assignment is not equivalent to a promise by the company to pay the assignee.[4] But an approval of an assignment of a policy by the agent, "for secretary," immediately

[1] New England Ins. Co. *v.* De Wolf, 8 Pick. 56; Buchanan *v.* Ins. Co., 61 N. Y. 26; Durar *v.* Ins. Co., 24 N. J. L. 171.

[2] Ins. Co. *v.* Stanton, 57 Ill. 354.

[3] Phillips *v.* Ins. Co., 10 Cush. 350; Topping *v.* Bickford, 4 Allen, 120.

[4] Pierce *v.* Ins. Co., 138 Mass. 151.

reported in addition to his monthly reports, is a sufficient compliance with a rule that the policy was to be void if assigned without the written approval of the secretary.[1]

ILLUSTRATIONS. — A policy provided that it should be void in case of assignment before loss without the consent of the company indorsed thereon. The secretary of the company told the insured that he could assign the policy without such consent. *Held*, that this waived the condition: *Stolle* v. *Ins. Co.*, 10 W. Va. 546; 27 Am. Rep. 593. An insurer refused to approve the assignment of a policy because it included insurance upon buildings which had been partially destroyed prior to the assignment, and the assignment was then amended, by consent of parties, to meet the insurer's objection. *Held*, that there was no breach of a condition in the policy that the assured should not assign without the insurer's approval. *Manley* v. *Insurance Co.*, 1 Lans. 20. A policy contained the covenant that if the property should be sold the insurance would cease unless the consent of the insurer to the sale was obtained in writing. The policy was indorsed by the insurer, "Payable, in case of loss, to" the plaintiff, and under that, by the insurer, "Consent is hereby given to the above indorsement." *Held*, that such indorsements did not imply either a knowledge or consent to the sale of the insured goods: *Bates* v. *Equitable Ins. Co.*, 10 Wall. 33.

[1] Farmers' Mut. Ins. Co. v. Taylor, 73 Pa. St. 343.

CHAPTER C.

LIFE INSURANCE.

§ 2121. Who may insure.
§ 2122. Insured may make any one the beneficiary.
§ 2123. Construction of words and phrases in application or policy as to health.
§ 2124. As to habits.
§ 2125. "Family physician" — "Usual medical attendant."
§ 2126. Representations as to age.
§ 2127. As to relationship.
§ 2128. As to occupation.
§ 2129. Deaths for which insurer not liable — In general.
§ 2130. Suicide — Effect of insanity.
§ 2131. "Death by the hands of justice."
§ 2132. "Death in the violation of the law."
§ 2133. Death while in military service — "War and rebellion" — "Belligerent forces."
§ 2134. Death resulting from intemperance.
§ 2135. Restrictions on residence and travel.
§ 2136. Amount of recovery.
§ 2137. Non-forfeiture policies.
§ 2138. Assignment of policy — Change of beneficiaries.
§ 2139. To person having no interest.

§ 2121. Who may Insure. — In the case of insurance on life, the danger of permitting mere wagers on the continuance of life, and the permitting of a legal means to obtain a large sum of money upon the commission of a great crime, has established the rule in nearly all the states that one person shall not be permitted to benefit as the party insuring the life of another in the continuance of whose life he has no interest at all. Upon this reason alone it is believed the objection to non-interest policies of life insurance is placed by the courts. "As the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; and that the only essential inquiry is, whether the object

of the contract is such as to obviate the objections to a mere wager upon the chances of human life."[1] And this interest, it is laid down by the text-writers, and also in many adjudged cases, must be a pecuniary one,[2] while on the other hand there are cases holding that mere relationship will be sufficient.[3] The claim, however, need not be a strictly legal claim; an equitable claim will suffice.[4] In a late case the rule is laid down, that to support a contract of insurance on the life of one person in favor of another, there must be a reasonable ground, founded in the relations of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance

[1] Hoar, J., in Forbes *v.* Ins. Co., 15 Gray, 254; 77 Am. Dec. 360; Stevens *v.* Warren, 101 Mass. 564; Franklin Ins. Co. *v.* Hazard, 41 Ind. 116; 13 Am. Rep. 313; Mo. Valley Ins. Co. *v.* Sturges, 18 Kan. 93; 26 Am. Rep. 761; Franklin Ins. Co. *v.* Sefton, 53 Ind. 380; Brockway *v.* Ins. Co., 9 Fed. Rep. 249; Fox *v.* Ins. Co., 4 Big. L. & Acc. Ins. Cas. 458; Mowry *v.* Home Ins. Co., 9 R. I. 346; Mut. Ben. Ins. Co. *v.* Hoyt, 46 Mich. 473. In Loomis *v.* Eagle etc. Ins. Co., 6 Gray, 398, Shaw, C. J., says: "All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the life of the *cestui que vie;* that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend upon the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have. One thing may be taken as settled: that every man has an interest in his own life to any amount at which he chooses to value it, and may insure it accordingly. We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law": Ruse *v.* Ins. Co., 23 N. Y. 516; Charter Oak Ins. Co. *v.* Brant, 47 Mo. 419; 4 Am. Rep. 328. But see Trenton etc. Ins. Co. *v.* Johnson, 24 N. J. L. 576.

[2] Bliss on Insurance, sec. 10; Angell on Insurance, secs. 298, 299; May on Insurance, sec. 104; Lewis *v.* Ins. Co., 39 Conn. 104; Singleton *v.* Ins. Co., 66 Mo. 63; 27 Am. Rep. 321; Charter Oak Ins. Co. *v.* Brant, 47 Mo. 419; 4 Am. Rep. 328.

[3] Ins. Co. *v.* Bailey, 13 Wall. 619; Grattan *v.* Ins. Co., 15 Hun, 76; Warnock *v.* Davis, 104 U. S. 775.

[4] Trenton Ins. Co. *v.* Johnson, 24 N. J. L. 586; Miller *v.* Ins. Co., 2 E. D. Smith, 292; Hoyt *v.* Ins. Co., 3 Bosw. 446.

of the life of the insured.[1] But it is only necessary that the interest should exist at the time of the policy being taken out or the contract being made; the fact that it afterwards ceases is not material.[2] Where there is, when the contract is made, an adequate insurable interest to support the policy, the insurer must pay the full amount of insurance according to the contract, without reference to the subsequent diminution or cessation of the insurable interest.[3]

A creditor has an insurable interest in the life of his debtor,[4] and this is so where the debt is one not enforceable; because the debtor, for example, is an infant,[5] or the debt is barred by limitation,[6] provided the debt be a legal one.[7] But where the debt is very small, and the insurance taken out very large in amount, the courts will regard the transaction as nothing more than a wager, and the creditor will not be allowed to recover beyond the amount of his debt.[8] "The life of a debtor may be insured in two ways: the debtor may insure to an amount beyond the debt for the benefit of his creditor, and payable in case of loss to the creditor, in trust, first to pay the debt, and then to pay the balance to such parties as the debtor may designate; or the creditor may insure the

[1] United Brethren Mut. Aid Soc. *v.* McDonald, 122 Pa. St. 324; 9 Am. St. Rep. 111.

[2] Conn. Mut. Ins. Co. *v.* Schaefer, 94 U. S. 457; Dalby *v.* Ins. Co., 15 Com. B. 365; Trenton etc. Ins. Co. *v.* Johnson, 24 N. J. L. 576; Hoyt *v.* Ins. Co., 3 Bosw. 446; Miller *v.* Ins. Co., 2 E. D. Smith, 294; Mowry *v.* Ins. Co., 9 R. I. 354; St. John *v.* Ins. Co., 13 N. Y. 31; 64 Am. Dec. 529; Olmstead *v.* Keyes, 85 N. Y. 598; Grattan *v.* Ins. Co., 15 Hun, 76; Sides *v.* Ins. Co., 16 Fed. Rep. 650; McKee *v.* Ins. Co., 28 Mo. 383; 75 Am. Dec. 129.

[3] Sides *v.* Knickerbocker Life Ins. Co., 16 Fed. Rep. 650.

[4] Rawls *v.* Am. Mut. Life Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280; Dalby *v.* India and London Life Ins. Co., 15 Com. B. 385; Brockway *v.* Mutual Benefit Life Ins. Co., 9 Fed. Rep. 249; Morrell *v.* Trenton Mutual Life and Fire Ins. Co., 10 Cush. 282; 59 Am. Dec. 92; American Life and Health Ins. Co. *v.* Robertshaw, 26 Pa. St. 189; McKenty *v.* Ins. Co., 3 Dill. 448; Succession of Hearing, 26 La. Ann. 326; or the debtor's wife: Henson *v.* Blackwell, 4 Hare, 434.

[5] May on Insurance, sec. 108.

[6] Rawls *v.* Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280; Mowry *v.* Ins. Co., 9 R. I. 346.

[7] Angell on Insurance, sec. 296.

[8] Cammack *v.* Lewis, 15 Wall. 643; Fox *v.* Ins. Co., 4 Big. L. & Acc. Ins. Cas. 458; Morrell *v.* Ins. Co., 10 Cush. 282.

life of his debtor to the amount of the debt payable to himself in case of loss."[1] An annuitant has an insurable interest in the life on which his annuity depends.[2] An assignee in bankruptcy has no interest in the life of the bankrupt, especially after the latter's discharge.[3] Joint obligors in a bond have an insurable interest in each others' lives.[4] So an insurer has such an interest in the life he insures as to give him a right to reinsure it.[5] A master who has the right to the services of a servant for a term has an insurable interest in his life.[6] So has a servant in the life of a master;[7] or a manager in the life of an actor engaged by him.[8] A partner who puts his money into a business has an insurable interest in the life of a partner who puts in as his capital his skill.[9] So a partner has an insurable interest in the life of his copartner, who, at the time of taking out the policy of insurance, is in default in the payment of his promised proportion of the capital of the concern.[10] A person who advances money to another for the prosecution of an enterprise in the profits of which both are to share has an interest in the life of the other.[11] A surety has an insurable interest in the life of his principal;[12] a tenant in the life of one whose estate is only a life estate.[13]

A child has an insurable interest in the life of a parent;[14]

[1] May on Insurance, sec. 109.

[2] Reynolds on Insurance, sec. 62; Gottlieb *v.* Cranch, 4 De Gex, M. & G. 446.

[3] In re McKinney, 15 Fed. Rep. 535.

[4] Branford *v.* Saunders, 25 Week. Rep. 650.

[5] Dalby *v.* Ins. Co., 15 Com. B. 385.

[6] Miller *v.* Ins. Co., 2 E. D. Smith, 268; Summers *v.* Trust Co., 13 La. Ann. 504; Woodfin *v.* Ins. .Co., 6 Jones, 558.

[7] May on Insurance, sec. 109; citing Hebdon *v.* West, 3 Best & S. 578.

[8] Bliss on Life Insurance, sec. 14.

[9] Valton *v.* Ins. Soc., 22 Barb. 9; affirmed 20 N. Y. 32; Conn. Mut. Ins. Co. *v.* Luchs, 108 U. S. 498.

[10] Conn. Mut. Ins. Co. *v.* Luchs, 108 U. S. 498.

[11] Bevin *v.* Ins. Co., 23 Conn. 244; Morrell *v.* Ins. Co., 10 Cush. 282; 59 Am. Dec. 92; Trenton Ins. Co. *v.* Johnson, 24 N. J. L. 576; Hoyt *v.* Ins. Co., 3 Bosw. 440; Miller *v.* Ins. Co., 2 E. D. Smith, 268.

[12] Lea *v.* Hinton, 5 De Gex, M. & G. 823. And he may recover the amount of the policy, even though no breach of the bond ever occurred: Scott *v.* Dickson, 108 Pa. St. 6; 56 Am. Rep. 192.

[13] Sides *v.* Ins. Co., 16 Fed. Rep. 650.

[14] Reserve Ins. Co. *v.* Kane, 81 Pa. St. 154; 22 Am. Rep. 741; Warnock *v.* Davis, 104 U. S. 775. *Contra*, Guardian

a mother in the life of a son;[1] the father in the life of a minor son of sufficient age to render services to him.[2] But it has been held that the rule as to father and son is different "where both parties are of mature age, and live apart in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other."[3] A husband has an insurable interest in the life of his wife;[4] a sister in the life of a brother.[5] A son-in-law has no insurable interest in the life of his mother-in-law;[6] nor a step-son in the life of his step-father or his father's father.[7] The wife has an insurable interest in the life of her husband,[8] even if they are subsequently divorced;[9] and a woman in the life of a

Ins. Co. *v.* Hogan, 80 Ill. 35; 22 Am. Rep. 180. A daughter has not an insurable interest in the life of her mother: Continental Ins. Co. *v.* Volger, 89 Ind. 572; 46 Am. Rep. 185.

[1] Reef *v.* Ins. Co., 17 Ins. Chron. 3.

[2] Loomis *v.* Ins. Co., 6 Gray, 396; Mitchell *v.* Ins. Co., 45 Me. 104; 71 Am. Dec. 529; Hoyt *v.* Ins. Co., 3 Bosw. 440; Williams *v.* Ins. Co., 31 Iowa, 541; Miller *v.* Ins. Co., 2 E. D. Smith, 268; Reserve Life Ins. Co. *v.* Kane, 81 Pa. St. 154; 22 Am. Rep. 741; Grattan *v.* Ins. Co., 15 Hun, 74.

[3] Guardian etc. Ins. Co. *v.* Hogan, 80 Ill. 35; 22 Am. Rep. 180.

[4] Bliss on Insurance, sec. 12; Com. Mut. Ins. Co. *v.* Schaefer, 94 U. S. 460; Currier *v.* Ins. Co., 57 Vt. 496; 52 Am. Rep. 134.

[5] Lord *v.* Dale, 12 Mass. 115; 7 Am. Dec. 38; Ætna Ins. Co. *v.* France, 94 U. S. 561.

[6] Rombach *v.* Ins. Co., 16 Rep. 780; 12 Ins. Law J. 268; 35 La. Ann. 233; 48 Am. Rep. 239.

[7] United Brethren Soc. *v.* McDonald, 122 Pa. St. 324; 9 Am. St. Rep. 111; Gilbert *v.* Moose, 13 Ins. Law. J. 297; 41 Leg. Int. 75.

[8] Barker *v.* Ins. Co., 43 N. Y. 283; St. John *v.* Ins. Co., 2 Duer, 419; Gambs *v.* Ins. Co., 50 Mo. 44; Thompson *v.* Ins. Co., 46 N. Y. 674; Equitable Ins. Co. *v.* Paterson, 41 Ga. 338; 5 Am. Rep. 535; McKee *v.* Ins. Co., 28 Mo. 383; 75 Am. Dec. 129; Holabird *v.* Ins. Co., 2 Dill. 166; Conn. Mut. Ins. Co. *v.* Schaefer, 94 U. S. 460; Charter Oak Ins. Co. *v.* Brant, 47 Mo. 419; 4 Am. Rep. 328. Under a statute permitting a wife to insure her husband's life for her benefit, he paying the premiums, and to hold the proceeds as against his creditors, the insurance may be on the "endowment" plan: Brummer *v.* Cohn, 86 N. Y. 11; 40 Am. Rep. 503. A statute authorizing any married woman to insure her husband's life for her sole use, free from claims of his creditors, to an amount purchasable by annual premiums not exceeding three hundred dollars paid by him, does not prohibit such insurance of a solvent husband's life to any amount; and if part of the premiums exceeding that sum are paid by him when solvent, and part when insolvent, the proceeds will be apportioned accordingly between the widow and the creditors: Pullis *v.* Robison, 73 Mo. 201; 39 Am. Rep. 497. Under a statute providing that "any married woman, by herself and in her name, or in the name of any third person with his assent as trustee, may cause to be insured for her sole use the life of her husband," a policy is valid, though taken out and kept up by the husband without the knowledge of the wife: Felrath *v.* Schonfield, 76 Ala. 199; 52 Am. Rep. 319.

[9] McKee *v.* Ins. Co., 28 Mo. 383; 75 Am. Dec. 129; Conn. Mut. Ins. Co. *v.* Schaefer, 94 U. S. 460.

man to whom she is betrothed.[1] So has a woman living unlawfully with a man as his wife.[2] One brother has not an insurable interest in the life of another merely on the ground of relationship;[3] nor an uncle in the life of a nephew.[4]

§ 2122. Insured may Make Any One the Beneficiary. — Where a person makes an insurance on his own life, he may make any one he pleases the beneficiary; and the latter is not obliged to show an interest in his life in order to recover.[5] Where a man obtains a policy of insurance on his own life, which is issued to him as "the assured," but which is declared to be for the benefit of a third party, such party can maintain an action on the policy without showing any insurable interest in himself.[6] A policy of insurance taken out by a grandfather in favor of his grandson, with whom he lives, is valid.[7] A man may insure his life for the benefit of a woman who agrees to furnish him with a home, and to pay the premiums on the policy, and to marry him if she can get a divorce.[8]

§ 2123. Construction of Words and Phrases in Application or Policy as to Health. — An applicant for life insurance, believing and affirming that he has not a certain

[1] Chisholm *v.* Ins. Co., 52 Mo. 213; 14 Am. Rep. 414.

[2] Equitable Life Ass. Soc. *v.* Paterson, 41 Ga. 338; 5 Am. Rep. 535. A and B lived together as husband and wife, and recognized each other as such in their intercourse with friends, for ten years, though no marriage ceremony had been performed; but in taking out a policy of insurance on his life for B's benefit, A had her name inserted as Mrs. B, instead of Mrs. A. In an action by B on the policy, held, that B was A's wife, and had an insurable interest in his life: Watson *v.* Centennial Mut. Life Ass'n, 21 Fed. Rep. 698. *Contra*, Holabird *v.* Ins. Co., 2 Dill. 166.

[3] Lewis *v.* Ins. Co., 39 Conn. 100; Bevin *v.* Ins. Co., 23 Conn. 244.

[4] Mowry *v.* Ins. Co., 9 R. I. 346; Singleton *v.* Ins. Co., 66 Mo. 63; 27 Am. Rep. 321.

[5] Campbell *v.* Ins. Co., 98 Mass. 381; Forbes *v.* Ins. Co., 15 Gray, 249; 77 Am. Dec. 360; Hogle *v.* Ins. Co., 6 Robt. 567; Valton *v.* Ins. Co., 20 N. Y. 32; Langdon *v.* Ins. Co., 14 Fed. Rep. 272; Prov. Ins. Co. *v.* Baum, 29 Ind. 236; Lemon *v.* Ins. Co., 38 Conn. 294; Fairchild *v.* Ins. Co., 51 Vt. 624.

[6] Campbell *v.* Ins. Co., 98 Mass. 381.

[7] Elkhart Mut. Aid etc. Ass'n *v.* Houghton, 103 Ind. 286; 53 Am. Rep. 514.

[8] Johnson *v.* Van Epps, 14 Ill. App. 201; 110 Ill. 551.

disease, so answers at his peril; his ignorance that his answer is erroneous will not render valid a policy providing for forfeiture in case any answer be found to be untrue.[1] But where one is asked if he has had any of certain enumerated "complaints," the list including pneumonia, spitting of blood, etc., and answers "No," it is of no importance that on one occasion he spat blood.[2] A temporary ailment is not within the words "disease of the liver or throat" in an application.[3] A "disorder tending to shorten life" is not one which may in some rare instances do so, but such a one as in the majority of cases will do so.[4] Fainting fits are not "epileptic or other fits."[5] A representation or statement that the applicant is in "good health" does not mean that he is in perfect physical health or condition; nor that the applicant has no infirmities. It means a state of health which does not presage disease or disorder, and though there may be slight troubles, yet they are not of a character to ordinarily result in death.[6] A tubercular affection of the lungs, or tubercles upon the lungs, or tubercles on the brain, or consumption, constitutes "local disease."[7] What is or is not a serious or severe illness or disease is a question, it is said, which must depend on opinion and the good faith and intelligence of the applicant. "It does not," says Mr. May,[8] "include the ordinary malarial diseases of the neighboring country, which yield readily to medical treatment, and when ended

[1] Powers *v.* North Eastern etc. Life Ass'n, 50 Vt. 630.

[2] Dreier *v.* Ins. Co., 24 Fed. Rep. 670.

[3] Cushman *v.* Ins. Co., 70 N. Y. 72.

[4] Watson *v.* Mainwaring, 4 Taunt. 763.

[5] Shilling *v.* Ins. Co., 1 Fost. & F. 116.

[6] Peacock *v.* Ins. Co., 20 N. Y. 293; Ross *v.* Bradshaw, 1 W. Black. 312; Willis *v.* Poole, 2 Park on Insurance, 650; Fahrenkrag *v.* Ins. Co., 68 Ill. 463; Grattan *v.* Ins. Co., 92 N. Y. 274; 44 Am. Rep. 372; Goucher *v.* Ass'n, 20 Fed. Rep. 596. A policy which had been forfeited by non-payment of the annual premium was renewed on the condition that the life assured was "now in good health." Held, that the same meaning was to be attached to these terms as in the original application, and that the effect was to extend the original representations with the same effect as if made at the time of renewal: Peacock *v.* Ins. Co., 20 N. Y. 293.

[7] Scoles *v.* Ins. Co., 42 Cal. 523.

[8] May on Insurance, sec. 296.

leave no permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury, and tend to shorten life, and which might be fairly regarded as likely to influence the insurers in determining whether they would insure."[1] One may have dyspepsia in its milder forms, and yet state with truth that his health is sound.[2] A mere single attack, and that slight, will not fall within the phrase "subject to or afflicted with disease," as to a particular disease.[3] Where the question was, whether the insured was subject to or at all affected by certain disorders enumerated, and including "diseases of the brain," and was "never sick," it was held that the answer must be taken to mean that the insured had never had any of the enumerated diseases so as to constitute an attack of sickness.[4]

ILLUSTRATIONS.—A applied to the agent of a life insurance company for a policy, and a medical examiner, to whom the application was submitted, declined to pass A, on the ground that he was not insurable. *Held*, that this rendered false an answer on a subsequent application to the question of whether an application had been made and with what result, "Yes, and always successful," and "Yes; accepted": *Edington* v. *Ætna Life Ins. Co.*, 100 N. Y. 536. To a question whether certain of his relatives had any hereditary disease, the insured answered: "No hereditary taint of any kind in family, on either side of the house, to my knowledge"; B, an uncle of A, had been insane for more than a year preceding his death, and had died in an insane asylum more than twenty years before the date of A's application. *Held*, that this was insufficient to prevent a recovery without, also, proof that B's insanity was hereditary, and that the facts were known to A when he answered the question: *Ins. Co.* v. *Gridley*, 100 U. S. 614. Where the question whether the applicant's parents, etc., had "been afflicted with consumption, scrofula, insanity, epilepsy, diseases of the heart,

[1] Holloman *v.* Ins. Co., 1 Wood, 674; Illinois etc. Soc. *v.* Winthrop, 85 Ill. 537; Goucher *v.* Ass'n, 20 Fed. Rep. 596. Where an applicant states in his application that he has never had any "serious" sickness, this is a mere expression of opinion as to the character of the sickness, and will not avoid the policy, although incorrect: Hogle *v.* Ins. Co., 6 Robt. 567.

[2] Morrison *v.* Ins. Co., 59 Wis. 162.

[3] May on Insurance, sec. 297; Fowkes *v.* Ins. Co., 3 Fost. & F. 440; Vose *v.* Ins. Co., 6 Cush. 42.

[4] Knickerbocker Ins. Co. *v.* Trefz, 104 U. S. 197.

or other hereditary disease," was answered in the negative, it was *held* that the words "other hereditary disease" confined the whole inquiry to those cases in which the specified diseases were of an hereditary character, and that although the applicant's mother had had three attacks of insanity from accidental and not hereditary causes, a negative answer constituted no breach of warranty: *Peasley* v. *Safety Deposit Life Ins. Co.*, 15 Hun, 227. One who has received an injury on the head in childhood, resulting in hardening of the brain, and a weakening of the mental powers in mature age, continuing and increasing till death, and necessitating confinement in an asylum for quiet and treatment, *held*, not afflicted with insanity within the meaning of an application for life insurance, it appearing that he knew what was going on, and it not appearing that he was subject to delusions or acted irrationally: *Newton* v. *Mutual Benefit Life Ins. Co.*, 76 N. Y. 426; 32 Am. Rep. 335.

§ 2124. **As to Habits.**—A warranty that the insured is of sober and temperate habits means that at the time of insurance, and for such a reasonable time prior thereto as would allow of a man evincing a habit, the insured was a temperate man. The question is not whether he was intemperate to such a degree as to injure his health. The insurers have a right to protect themselves by guarding against the risks of pernicious habits; and if one who stipulates for habitual sobriety and temperance is an habitual drunkard, he loses his protection under such a warranty, though his health may be good and his constitution unimpaired.[1] But if his habits in the usual, ordinary, and every-day routine of his life were temperate, his representations that he was and always had been a man of temperate habits are not untrue, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence.[2] If the answer is in fact untrue, the policy is void, though it was made in good faith, and with

[1] May on Insurance, sec. 299; Southcombe *v.* Merriman, Car. & M. 286; McGinley *v.* United States Life Ins. Co., 77 N. Y. 495; Fox *v.* Pennsylvania etc. Ins. Co., 4 Big. L. & Acc. Ins. Cas. 458; Furniss *v.* Mutual Life Ins. Co., 11 Rep. 98; Union Mut. Ins. Co. *v.* Reif, 36 Ohio St. 576; 38 Am. Rep. 613; Mut. Ben. Ins. Co. *v.* Holterhoff, 2 Cin. Rep. 379.

[2] Knickerbocker Ins. Co. *v.* Foley, 105 U. S. 350.

no intention to defraud.[1] But if it was true at the time it was made, the subsequent habits of the insured will be no bar to a recovery upon the policy.[2]

ILLUSTRATIONS.— A policy was issued, "upon the faith of the statements in the application," with a stipulation that if they "shall be found in any respect untrue" the policy should be void. *Held*, that although under the policy the answers to the questions contained in the application must be construed as warranties that they were true in every particular, yet a negative answer to the question, "Has the party ever met with an accidental or serious personal injury?" did not bar a recovery when the insured had actually met with an "accidental" injury, such injury, however, being slight, and not affecting the subsequent health or the longevity of the insured: *Wilkinson* v. *Connecticut Mut. Life Ins. Co.*, 30 Iowa, 119; 6 Am. Rep. 657; affirmed 13 Wall. 222. The applicant declared "that he does not now, nor will he, practice any pernicious habit that obviously tends to the shortening of life." The policy contained a condition "that if any of the statements or declarations made in the application shall be found in any respect untrue the policy shall be void." At the time of the application applicant's habits were correct and temperate; afterwards he took to excessive drinking, whereof he died. *Held*, that the policy was not avoided: *Knecht* v. *Mutual Life Ins. Co.*, 90 Pa. St. 118; 35 Am. Rep. 641. An applicant untruly represented to the general agent of the insurance company, and also to its medical examiner, that he was a married man, and the company, in defending an action on the policy, offered to show that the medical examiner would have recommended the rejection of the risk if the truth had been disclosed to him. *Held*, inadmissible: *Valton* v. *Ins. Co.*, 17 Abb. Pr. 268. A policy contained a provision that it should be void if the assured should become so far intemperate as to impair health or induce *delirium tremens*, or if his answer to the question of whether he had ever been addicted to the excessive or intemperate use of liquor, or if he used it often or daily, should be false. *Held*, that an instruction which declared the "habitual" use of liquor to be necessary to avoid the policy on the ground of a false answer to this question was not erroneous, and that if death was caused substantially by the excessive use of liquor, the policy was avoided, although the

[1] Hartwell *v.* Ins. Co., 33 La. Ann. 1353; 39 Am. Rep. 294. A policy is avoided if at the time of the application a well-defined functional disorder, such as Bright's disease, existed, and its existence was not disclosed: Continental Life Ins. Co. *v.* Yung, 113 Ind. 159; 3 Am. St. Rep. 630.

[2] Reichard *v.* Ins. Co., 31 Mo. 518.

assured had not had *delirium tremens*, and although he might not have indulged habitually for a long time: *Ætna Life Ins. Co.* v. *Davey*, 123 U. S. 739.

§ 2125. "Family Physician" — "Usual Medical Attendant." — The terms of the application, as a rule, require the applicant to name his family physician or usual medical attendant, in order that the insurer may refer to him as to the health, habits, etc., of the applicant. The latter, in such case, must truthfully answer such questions.[1] A physician not in practice who is present at the death of the party insured, as a friend and neighbor, and examines and prescribes for him, is not necessarily an "attending physician" within the meaning of that phrase as employed in the conditions of the policy. Who is an attending physician is a question for the jury.[2] "Family physician" is the medical man who is consulted and attends the family.[3] "Usual medical attendant" means the physician who has been accustomed to attend the applicant, and not one who has occasionally done so.[4] A question in an application, whether the applicant had employed or consulted, individually, a physician, refers to an employment or consultation with reference to the application for life insurance, and not to the consultation of a physician at any time during the life of the applicant.[5]

ILLUSTRATIONS. — An application for life insurance required the name and residence of the family physician, or of one usually employed or consulted. The answer was: "Refer to Dr. A. T. Mills, Corning, N. Y." *Held*, that the answer did not constitute a warranty: *Higgins* v. *Phœnix Mutual Life Ins. Co.*, 74 N. Y. 6. The assured had employed a particular physician upon several occasions previous to the time when the policy was issued, extending through a period of three years; that no other physician had been employed, and that the last occasion of his

[1] Scoles *v.* Ins. Co., 42 Cal. 523; Cushman *v.* Ins. Co., 70 N. Y. 72; Hutton *v.* Ass. Co., 1 Fost. & F. 735.

[2] Gibson *v.* Ins. Co., 37 N. Y. 580.

[3] Price *v.* Ins. Co. 17 Minn. 497; 10 Am. Rep. 166; Reid *v.* Ins. Co., 58 Mo. 421.

[4] Monk *v.* Ins. Co., 6 Rob. (N. Y.) 453; Huckman *v.* Fernie, 3 Mees. & W. 505; Everett *v.* Desborough, 5 Bing. 503.

[5] World Mut. Life Ins. Co. *v.* Schultz, 73 Ill. 586.

attendance had been less than two months previous to the date of the policy. *Held*, that such physician was the assured's "usual medical attendant," and that a representation that he had no such attendant would vitiate the policy: *Monk* v. *Ins. Co.*, 6 Rob. (N. Y.) 455.

§ 2126. **Representations as to Age.** — The age of the applicant is always material to the risk in determining the premium to be charged; hence an untrue statement as to his age will work a forfeiture.[1] But it has been held that statements in an application that the applicant was insured in another company, when he was not; that he was born in 1817, when he was in fact born in 1816; that his father died of old age, aged ninety-three years, when in fact he died of apoplexy at the age of eighty-two years; and that his mother died of old age, aged seventy-two years, when in fact she died of paralysis at the age of sixty-five years, — are immaterial, and if made in good faith, do not avoid the policy.[2]

§ 2127. **Relationship.** — So as to questions of relationship.[3] Thus it has been held, where the statements were warranties, that a representation that the person for whose benefit the policy was taken out was the wife of the applicant, when in fact she was not, was untrue, and worked a forfeiture.[4] But where one, representing himself to an insurance company to be a married man, effects an insurance on his own life for the benefit of his alleged wife, and as her agent, when in fact the marriage is void by reason of the reputed wife having a former lawful husband living at the time, and the policy contains a

[1] May on Insurance, sec. 305.

[2] Germania Ins. Co. *v.* Rudwig, 80 Ky. 223. But see Hartford Life Ins. Co. *v.* Gray, 91 Ill. 159.

[3] That the applicant stated himself to be a widower when asked if he was married, he being in fact married, constituted a material misrepresentation sufficient to avoid the policy: United etc. Aid Soc. *v.* White, 100 Pa. St. 12. So the averment of a married man, in an application for life insurance, that he is a single man, is a warranty: Jeffries *v.* Union Mut. Life Ins. Co., 1 McCrary, 114.

[4] Stannard *v.* Ins. Co., Bliss on Insurance, 164.

provision that any false statement by the assured shall invalidate it, it was held that the policy is not void by reason of the illegality of the last marriage, unless it appears that the said reputed husband and wife knew at the time the insurance was effected that at the time of their supposed marriage the lawful husband was living, and the marriage illegal, and failed to inform the company of the fact.[1]

§ 2128. **Occupation.** — An untrue statement in the application, which is made a part of the policy, as to occupation at the time the application is made, will avoid the policy. What is necessary to be stated is the occupation in which the insured is engaged at the time, and not the occupation in which he may have been generally engaged before that time.[2] If the statement of the present occupation is true, a subsequent change will not affect the policy, unless it so provides.[3]

ILLUSTRATIONS. — To an inquiry as to the occupation of an applicant for life insurance, he made answer that he was a laborer. As a matter of fact, he had not labored for several years. *Held*, that the answer avoided the policy: *United Brethren Mut. Aid Society* v. *White*, 100 Pa. St. 12. The applicant warranted that he was a "soda-water maker." In the medical examiner's certificate annexed, and signed by the applicant, he answered as to the effect of the occupation on the risk: "Out of doors most of the time, selling soda-water; in my opinion healthy occupation." He both made and peddled soda-water. *Held*, no breach of warranty: *Grattan* v. *Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617.

§ 2129. **Deaths for Which Insurer not Liable — In General.** — On grounds of public policy, a recovery will be denied when to allow a recovery would be contrary to public policy. Thus, even without a specific provision that the company shall not be liable if the insured die by his own hand or commit suicide, it has been laid down

[1] Equitable Soc. *v.* Paterson, 41 Ga. 338; 5 Am. Rep. 535.
[2] Hartman *v.* Ins. Co., 31 Pa. St. 466.
[3] Prov. Life Ins. Co. *v.* Fennell, 49 Ill. 180.

that where the death is caused by the suicide of the insured, the insurer is not liable on general principles.[1] The same conclusion has been reached in a case where the insured's death was in the execution of the sentence of a court for felony,[2] and where the death resulted from an illegal operation voluntarily submitted to by the insured to produce an abortion.[3] But though an insurance contract against suicide would be void on grounds of public policy, yet a clause that if the policy should be assigned *bona fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide* for valuable consideration, it might be enforced for the benefit of others, whatever be the means by which death is occasioned, is not illegal.[4] So where there is no condition in the policy forfeiting it for suicide, a policy on a husband's life for the benefit of his wife and children is not vitiated as to them by his suicide.[5] And a policy limiting the payment in cases of insane suicide to the legal reserve is valid, if not prohibited by law, and if the reserve is ascertainable.[6] A policy conditioned to be void if the insured should "die by his own hand or act, voluntary or otherwise," is not avoided by his innocently taking a fatal overdose of medicine while sane;[7] nor by taking poison by mistake

[1] Provided, of course, the party was not insane: See next section; Bliss on Insurance, 243; Bunyon on Insurance, 71; Hartman *v.* Ins. Co., 21 Pa. St. 466; Horn *v.* Ins. Co., 7 Jur., N. S., 673. But the defense of suicide must be sustained by clear proof: New York Ins. Co. *v.* Bangs, 103 U. S. 435; Moore *v.* Woolsey, 4 El. & B. 243, the court saying: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk. A stipulation that in either case, upon such an event, the policy should give a right of action would be void." Under a policy issued by a mutual company conditioned to be subject to any by-laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies when the insured should die by his own hand, sane or insane: Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436; 46 Am. Rep. 332.

[2] Amicable Soc. *v.* Bolland, 4 Bligh, 194.

[3] Hatch *v.* Ins. Co., 120 Mass. 550; 21 Am. Rep. 541.

[4] Moore *v.* Woolsey, 4 El. & B. 243.

[5] Fitch *v.* Ins. Co., 59 N. Y. 557; 17 Am. Rep. 372; Patrick *v.* Ins. Co., 67 Barb. 202; 4 Hun, 263.

[6] Frey *v.* Life Ins. Co., 56 Mich. 29.

[7] Penfold *v.* Universal Life Insurance Company, 85 N. Y. 317; 39 Am. Rep. 660. See Mut. Life Ins. Co. *v.* Lawrence, 8 Ill. App. 488.

while in a drunken condition; but death from laudanum, taken with intent to destroy life, though while in a drunken condition, would be dying "by his own hand."[1]

ILLUSTRATIONS. — One effected a policy of insurance upon his life, with the condition that if he died by his own hands the policy should be void, except to the extent of any interest which others may have acquired in it, and deposited the same with the insurers by way of collateral security for a loan from them to him. *Held*, that, notwithstanding the suicide of the insured, the policy was good to the extent of the debt for which it was held as security, and therefore that the debt was extinguished by the moneys which became payable under the policy: May on Insurance, sec. 324; citing 38 L. J., N. S., 53; *Solicitors' and General Life Ass. Co.* v. *Lamb*, 1 Hem. & M. 716; affirmed on appeal, 2 De Gex, J. & S. 251; 33 L. J., N. S., 426; *Dufaur* v. *Professional Life Ass. Co.*, 25 Beav. 599; 26 L. J., N. S., 817; *Jones* v. *Cosolidated Investment and Ass. Co.*, 27 Beav. 256; 28 L. J., N. S., 66.

§ 2130. Suicide — Effect of Insanity. — The policy ordinarily contains a provision that if the insured commit suicide or "die by his own hand," there shall be no recovery. These terms have given some trouble to the courts in determining the effect on such a provision of the insured taking his own life while insane. The English courts, it would seem, construe the words as not open to any exception, and hold that there can be no recovery where the death is caused by the act of the insured in taking his own life, even if he at the time was insane.[2] A few of the American courts hold that these conditions do not relieve the insurer from liability, where the insured in taking his life was, by reason of insanity, unable to understand what he was doing, but that if he was able to appreciate the physical act, — to understand that he was killing himself, — the fact that he did not appreciate its moral nature, and was unable to resist the impulse to

[1] Equitable Life Ins. Co. *v.* Paterson, 41 Ga. 338; 5 Am. Rep. 535.

[2] Borradaile *v.* Hunter, 5 Man. & G. 639; Schwabe *v.* Clift, 2 Car. & K. 134.

kill himself, does not prevent a forfeiture.[1] Other courts — the supreme court of the United States among them — adopt a more liberal rule, which is: "If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the insured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."[2] But what is known as the "sane or insane" clause — the provision that the policy shall be void if the insured "die by his own hand or by suicide, sane or insane" — will include a suicide, where he knows the physical nature and consequences of the act, and intends to destroy himself, though he does not — by reason of insanity — appreciate its moral quality.[3] Where, owing to uncontrollable physical and mental weakness, the assured takes an overdose of whisky, which kills him, this is not dying by his own hand, sane or insane.[4]

[1] Cooper *v.* Ins. Co., 102 Mass. 227; 3 Am. Rep. 451; Dean *v.* Ins. Co., 4 Allen, 96; Gay *v.* Ins. Co., 9 Blatchf. 142; Nimick *v.* Ins. Co., 3 Brewst. 502; St. Louis etc. Ins. Co. *v.* Graves, 6 Bush, 268; Knickerbocker etc. Ins. Co. *v.* Peters, 42 Md. 414; Riley *v.* Ins. Co., 25 Fed. Rep. 315.

[2] Breastead *v.* Ins. Co., 4 Hill, 73; 8 N. Y. 299; 59 Am. Dec. 482; Eastabrook *v.* Ins. Co., 54 Me. 224; Terry *v.* Ins. Co., 15 Wall. 580; Ins. Co. *v.* Rodel, 95 U. S. 232; Manhattan Ins. Co. *v.* Broughton, 109 U. S. 121; Phadenhauer *v.* Ins. Co., 7 Heisk. 567; 19 Am. Rep. 623; Phillips *v.* Ins. Co., 26 La. Ann. 404; 21 Am. Rep. 549; Van Zandt *v.* Ins. Co., 55 N. Y. 169; 14 Am. Rep. 215; Conn. etc. Ins. Co. *v.* Groome, 86 Pa. St. 92; 27 Am. Rep. 689; Schultz *v.* Ins. Co., 40 Ohio St. 217; 48 Am. Rep. 676; Accident Ins. Co. *v.* Crandall, 120 U. S. 527.

[3] Bigelow *v.* Ins. Co., 93 U. S. 284; Adkins *v.* Ins. Co., 70 Mo. 27; 35 Am. Rep. 410; Chapman *v.* Ins. Co., 6 Biss. 238.

[4] Northwestern Mut. Life Ins. Co. *v.* Hazelett, 105 Ind. 212; 55 Am. Rep. 192.

An insurance company may stipulate that if the insured kills himself when insane it will refund the premiums, or it may stipulate that it will pay the policy or refund the premiums at its option, in accordance with its judgment of the equities of the case. In the latter case the right to exercise the option cannot be waived until insanity is shown; and the company is not obliged to elect within the sixty days after proof of death, if it does not appear until afterwards that insanity existed.[1]

§ 2131. **"Death by the Hands of Justice."**—This means in consequence of a felony, and under and by virtue of a judicial sentence for a crime, and not a mere killing which would be justified in the slayer by the law, as of an escaping prisoner by an officer.[2]

§ 2132. **"Death in the Violation of Law."**—To come within this phrase, and excuse the insurer from paying the claim, he must prove that the insured died while engaged in a voluntary criminal act which he knew at the time to be a crime against the laws of the state or country in which he was.[3] That he was at the time engaged in a trespass against property, rendering him liable to a civil action, is not enough.[4] Nor can the phrase be construed to include suicide.[5] And the insured must have received the death-blow during and while engaged in the commission of the crime, and not merely as a consequence of it afterwards.[6] And the violation of the law must have been the cause of the death.[7]

[1] Salentine *v.* Ins. Co., 24 Fed. Rep. 159.

[2] Spruill *v.* Ins. Co., 1 Jones, 126. See Harper *v.* Ins. Co., 18 Mo. 109.

[3] Cluff *v.* Ins. Co., 13 Allen, 308; 99 Mass. 317; Bradley *v.* Ins. Co., 3 Lans. 341; 45 N. Y. 422; 6 Am. Rep. 115.

[4] Cluff *v.* Ins. Co., 13 Allen, 308; 99 Mass. 317.

[5] Patrick *v.* Ins. Co., 4 Hun, 263; Darrow *v.* Ins. Co., 42 Hun, 245.

[6] Cluff *v.* Ins. Co., 13 Allen, 308; 99 Mass. 317.

[7] Harper *v.* Ins. Co., 18 Mo. 109. In Bradley *v.* Ins. Co., 3 Lans. 341, 45 N. Y. 422, 6 Am. Rep. 115, Grover, J., says: "The violation of law in which the insured is engaged, whether such law be criminal or civil, must have some connection with the death, as cause and effect; not necessarily the immediate cause, as it is sufficient

ILLUSTRATIONS. — A policy is made void if the insured die "in the known violation of law." He is killed while in the act of adultery. The policy is forfeited. Having committed adultery, he is afterwards killed by the husband on account thereof. The policy is not forfeited: *Goetzmann* v. *Ins. Co.*, 5 Thomp. & C. 572. A policy was conditioned to be void if the assured should die "in or in consequence of the violation of the laws." The assured and his brothers planned an assault upon B, and in pursuance thereof, one of them seized and held him while the assured beat him. B drew a pistol, and the assured, seeking to escape, was killed by its discharge. B testified that the discharge was accidental. *Held*, that the policy was avoided: *Murray* v. *New York Life Ins. Co.*, 96 N. Y. 614; 48 Am. Rep. 658. A policy was to be void "if the assured shall die by suicide, or in consequence of the violation of any law, or shall be convicted of a felony," and he was killed while committing an unprovoked assault on another, under circumstances rendering the killing justifiable homicide. *Held*, that there could be no recovery, although the crime may have been beneath the grade of a felony: *Wolff* v. *Connecticut Mut. Life Ins. Co.*, 5 Mo. App. 236. A policy provided that it should be forfeited if the assured should die "by reason of intemperance," or in "known violation of the laws" of the states of the United States. The assured, while drunk, committed an assault and battery on a married woman, and while so engaged was killed by her husband. *Held*, that the policy was forfeited: *Bloom* v. *Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469. A, by a show of force and threats to rob, obtained a sum of money from a public building, and was shot and killed while escaping. *Held*, that he did not "die while violating any law" within the meaning of a clause in an insurance policy on his life: *Griffin* v. *Western Mut. Benevolent Ass'n*, 20 Neb. 620; 57 Am. Rep. 848. A policy provided that it should not extend to a case of death caused by "a breach of the law on the part of the assured, or by his willfully exposing himself to any unnecessary danger or peril." While he and another were driving sulkies in competition alongside of each other at a horse-race for money, — illegal by statute, — a collis-

if it puts in operation that cause. To illustrate: The sale of lottery-tickets is prohibited by the criminal law of New York. No one would contend that had the assured died in the state of New York from heart-disease while engaged in selling lottery-tickets the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. Again, the criminal law of New York probihits profane cursing and swearing. Suppose the death happened from some accident while the assured was violating the law, would this bring the case within the proviso? Clearly not, for the reasons above stated."

ion ensued, and he jumped to the ground uninjured, and then started to get hold of the reins of his horse, which were hanging across the axle-tree; and while doing so was killed by getting tangled in them, falling down, and being dragged against a stone. *Held*, that his death was within the condition: *Insurance Co.* v. *Seaver*, 19 Wall. 531.

§ 2133. "Death while in Military Service" — "War and Rebellion" — "Belligerent Forces," etc. — Entering the military service, which is a condition of forfeiture in most policies, includes only such service as will compel the assured to enter the field as a combatant;[1] therefore engaging in bridge-building in a hostile country is not within the phrase;[2] nor taking a merely clerical position in the office of the adjutant-general, subject to no military order or service.[3] But that the entering the service was caused by the threat of a conscription is not material.[4] Death from a roving band of robbers and banditti is not a death from "belligerent forces," or a "casualty or consequence of war or rebellion."[5]

§ 2134. Death Resulting from Intemperance. — That the insured died from the effect of intoxication or intemperate habits is no defense to the policy, unless it so declares.[6] If a policy is by its provisions to be void when the insured shall die by reason of intemperance in the use of intoxicating liquor, it must appear that intemperance is the paramount and proximate cause of death. It is not enough that the insured may have been addicted to habits of intemperance, indulged in for a considerable period prior to his death. Neither intemperance combined with other causes, nor intemperance as a secondary, remote, and predisposing cause, even though it may have

[1] Welts *v.* Ins. Co., 46 Barb. 412; 48 N. Y. 34; 8 Am. Rep. 518; New York Life Ins. Co. *v.* Hendren, 24 Gratt. 540.
[2] Welts *v.* Ins. Co., 46 Barb. 412; 48 N. Y. 34; 8 Am. Rep. 518.
[3] New York Life Ins. Co. *v.* Hendren, 24 Gratt. 540.
[4] Dillard *v.* Ins. Co., 44 Ga. 119; 9 Am. Rep. 167.
[5] Welts *v.* Ins. Co., 46 Barb. 412; 48 N. Y. 34; 8 Am. Rep. 518.
[6] May on Insurance, sec. 299; Reichard *v.* Ins. Co., 31 Mo. 518; Horton *v.* Ins. Co., 2 Big. L. & Acc. Ins. Cas. 108.

rendered the insured more susceptible to the attack, and less capable of resisting the ravages of disease, the disease being the controlling and efficient cause of death, will avoid the policy.[1] Where a policy was conditioned to be void if death should occur "while the insured was, or in consequence of his having been, under the influence of intoxicating drink," it was held that if the insured was under the influence of intoxicating drink when he died, the policy was avoided, and that it was immaterial whether or not the drunkenness was the cause proximate or remote of the death.[2] A specific and separate stipulation that if the assured shall become intemperate to a certain degree the company may cancel the policy supersedes a general stipulation that such a degree of intemperance shall work an absolute forfeiture.[3]

ILLUSTRATIONS.—The insured, in a fit of *delirium tremens*, escaped from those having him in charge, ran out into the streets, and was exposed in scanty clothing to the inclemency of the weather, which exposure contributed, with intemperance, to bring on congestion of the lungs, of which he died. *Held*, that the insurer was not liable under a policy excepting a death "by reason of intemperance from the use of intoxicating liquor": *Miller* v. *Ins. Co.*, 31 Iowa, 216; 34 Iowa, 222.

[1] May on Insurance, sec. 301; Miller *v.* Ins. Co., 31 Iowa, 216; 7 Am. Rep. 22; Holterhoff *v.* Ins. Co., 4 Big. L. & Acc. Ins. Cas. 395; Ranney *v.* Ins. Co., May on Insurance, sec. 302, the court saying: "The real question in this case is, whether intemperance from the use of intoxicating liquors was the cause of death. If the disease from which the insured was suffering was *delirium tremens*, or *mania a potu*, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application, or neglect of proper care or treatment, produced exhaustion or fever, and consequent death, the death would properly be considered as resulting from the intemperance, even if the disease were not so mortal in itself but that with good care, and under favorable circumstances, the insured might have recovered; yet if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death of the assured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug, and not of the disease, then, in such case, the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors, and the plaintiff, upon that branch of the case, would be entitled to recover."

[2] Shader *v.* Railway Pass'r Assur. Co., 66 N. Y. 441; 23 Am. Rep. 65.

[3] Northwestern Mut. Life Ins. Co. *v.* Hazelett, 105 Ind. 212; 55 Am. Rep. 192.

§ 2135. Restrictions on Residence and Travel.—A condition that the policy shall be void if the insured resides or goes out of certain limits is valid.[1] The "settled limits" of the United States means the established boundaries of the Union, and a death beyond the region of actual settlement is covered by the policy.[2] Where a permit is given to reside without the restricted limits a certain time, if the insured remain beyond that time the policy is void, unless, it seems, where by sickness he is unable to travel back.[3] But even in such a case, if the insured, when he obtained the permit, was in bad health, and his sickness, therefore, was not unforeseen, the act of God will not excuse the breach of the policy.[4] Where a person, insured under a policy providing that he should not, without the written consent of the insurers, engage in sea service, procured such written consent to be annexed to his policy, and paid a first additional premium therefor, it was held that the policy was forfeited by the continuance of the insured in sea service for more than a year without payment of another additional premium.[5] A permit to travel beyond the restricted limits must be strictly followed in its terms.[6] Thus a permit to make a

[1] Douglas *v.* Ins. Co., 83 N. Y. 492; Evans *v.* Ins. Co., 64 N. Y. 304; Nightingale *v.* Ins. Co., 5 R. I. 38. Thus a policy on the life of William M. Tweed was held avoided, under its clause restricting travel, by his escaping from imprisonment in New York and going to Vigo, in Spain, which was beyond the limits prescribed: Douglas *v.* Knickerbocker Life Ins. Co., 55 How. Pr. 104; 83 N. Y. 492.

[2] Casler *v.* Ins. Co., 22 N. Y. 427, the court saying: "The primary definition of the word 'settled' is fixed, placed, established. It is true, it is also, though more rarely, used as descriptive of a section of country that is 'planted with inhabitants'; but it is obvious that it can never with propriety be used in the latter sense in connection with the word 'limits.' Limit means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint. There may be a settled region, a settled country, or a settled territory, but there can be no such thing as a settled limit, in the sense contended for." And it was held not to be susceptible of meaning "the region of settlement."

[3] Baldwin *v.* Ins. Co., 3 Bosw. 530.

[4] Evans *v.* Ins. Co., 64 N. Y. 304.

[5] Ayer *v.* Ins. Co., 109 Mass. 430.

[6] Ayer *v.* Ins. Co., 109 Mass. 430. But where a company granted the insured a permit to go to Cuba, "he to take his own risk of epidemics," and he died from yellow fever in the city of Havana, it was held that, the yellow fever not being prevalent in Havana at that season, the company were liable for the insurance: Pohalaski *v.* Mutual Life Ins. Co., 45 How. Pr. 504.

voyage by a certain route will not cover a voyage to the same place by a different, even if safer, route.[1] But a permit setting forth that the insured is about to proceed to and reside at, Belize and granting liberty to reside there for one year, may be availed of for any year thereafter during the currency of the policy.[2] So a permission to go by sea in a first-rate vessel is not restrictive of the mode of travel, whether by steerage or in the cabin.[3] The receipt of the premium after a violation of the conditions will waive the forfeiture,[4] unless it is provided that the agent who receives the premium has no authority to waive the condition.[5]

§ 2136. Amount of Recovery.—A policy of life insurance is a valued policy. It is not a contract of indemnity. The amount of the insurance is the measure of damages, unless there is such an over-insurance as to render it a wagering policy, and therefore void.[6] Where a policy is taken out on a debtor's life as security for a debt, or a debtor insures his life for the benefit of his creditor, the residue after paying the debt belongs to the debtor's estate.[7] The fact that a woman to whom a policy taken out by her husband on his life payable in four years to her is plaintiff in a pending divorce suit at the time of the maturity of the policy does not preclude her from claiming the amount.[8] The creditors of an insolvent debtor are entitled to the proceeds of insurance policies on his life, taken out in the name and for the benefit of his wife,

[1] Hathaway *v.* Ins. Co., 11 Cush. 448.
[2] Notman *v.* Ass. Co., 4 Com. B., N. S., 476.
[3] Taylor *v.* Ins. Co., 13 Gray, 434.
[4] Bevin *v.* Ins. Co., 23 Conn. 244; Garber *v.* Ins. Co., 5 Big. L. & Acc. Ins. Cas. 221; Lorie *v.* Ins. Co., 5 Big. L. & Acc. Ins. Cas. 233; Walsh *v.* Ins. Co., 30 Iowa, 133; 6 Am. Rep. 664; Home Ins. Co. *v.* Pierce, 75 Ill. 426.
[5] Lorie *v.* Ins. Co., 5 Big. L. & Acc. Ins. Cas. 233.
[6] Bliss on Insurance, sec. 31; May on Insurance, sec. 114; Bevin *v.* Ins. Co., 23 Conn. 244; Miller *v.* Ins. Co., 2 E. D. Smith, 268; Grattan *v.* Ins. Co., 15 Hun, 77; St. John *v.* Ins. Co., 2 Duer, 419; Hoyt *v.* Ins. Co., 3 Bosw. 440; Trenton etc. Ins. Co. *v.* Johnson, 24 N. J. L. 581.
[7] Cammack *v.* Lewis, 15 Wall. 643; American Ins. Co. *v.* Robertshaw, 26 Pa. St. 189; Courtney *v.* Wright, 2 Giff. 337.
[8] Ætna Ins. Co. *v.* Mason, 14 R. I. 583.

only to the extent of the premiums paid after he became insolvent.[1] A stranger who pays the premiums to keep it alive, without any contract with the insured or the beneficiary, cannot claim reimbursement after the policy has matured.[2] The claim of a policy-holder in an insolvent life insurance company should be valued as a death claim, where, from the age and health of the claimant, reinsurance would be impossible.[3]

ILLUSTRATIONS. — After suit was begun on an insurance policy for five thousand dollars, to be paid as a benefit to the assured's "wife and children equally," one of the children died. *Held*, that the wife and remaining children were entitled to the full sum: *Covenant Mutual Benevolent Association* v. *Hoffman*, 110 Ill. 603. A life insurance policy stipulated to pay one third of the amount if death should occur after three and within six months; two thirds if after six months and within a year; the whole if after a year. *Held*, the insured having died within three months, that the whole amount was payable: *Metropolitan Life Ins. Co.* v. *Drach*, 101 Pa. St. 278. An insurance on the life of a husband was payable to his wife or her legal representatives. The husband paid the premiums, and he had the right to change the beneficiary by consent of the insurers. The wife died, and subsequently the husband. *Held*, that the insurance money belonged to the husband's estate: *Washington Beneficial Endowment Association* v. *Wood*, 4 Mackey, 19; 54 Am. Rep. 251. A man insured his life for "his wife, M., and children." He had children by a former wife and by M., and M. had a child by a former husband. *Held*, that his children by both wives were the children meant: *Koehler* v. *Ins. Co.*, 66 Iowa, 325.

§ 2137. Non-forfeiting Policies. — A policy defined in its margin as a non-forfeiture policy will be construed as such, if possible. All intendments will be made in favor of such construction.[4] Such a policy is not forfeited by a failure to pay interest on premium notes regarded by the company as a loan to the assured.[5] A provision in an insurance policy that if a policy for its surrender value

[1] Central Bank v. Hume, 3 Mackey, 360; 51 Am. Rep. 780.
[2] Meier v. Meier, 15 Mo. App. 68.
[3] People v. Life Ins. Co., 40 Hun, 44.
[4] Cowles v. Ins. Co., 63 N. H. 300.
[5] Bruce v. Ins. Co., 58 Vt. 253.

is taken it must be demanded within one year from the time an accrued premium falls due refers to an accrued premium, for the non-payment of which the company can determine the policy.[1] A participating policy of life insurance — for sharing surplus profits of the company with others holding similar policies — does not create a trust relation between the holder and the company.[2]

ILLUSTRATIONS. — A policy provided that, upon default in the payment of a premium, the policy might be exchanged for a paid-up policy upon condition of delivering the policy, receipted, within sixty days from the date of default. *Held*, that the fact that the company during such sixty days was enjoined from issuing policies afforded no excuse for a failure to deliver up the policy as required by the condition: *Universal Life Ins. Co.* v. *Whitehead*, 58 Miss. 226; 38 Am. Rep. 322. A insured his life on the half-note plan, by which he was entitled to have certain dividends applied in reduction of the premiums, which latter he paid yearly, on receipt of a note from the company stating the balance due, though not till several days after the day fixed. *Held*, that it was the duty of the company to send him such notice, and that they were estopped from pleading a forfeiture on the ground of non-payment *ad diem*: *Phœnix Mutual Life Ins. Co.* v. *Doster*, 106 U. S. 30. A paid-up policy was issued to plaintiff for three thousand dollars. The annual premium was $389.16. Plaintiff made ten annual payments, and then demanded a paid-up policy for the amount of premiums paid. *Held*, that the company could not contend that plaintiff's right was limited to three thousand dollars, the policy containing no words of restriction: *Christy* v. *Homœopathic Mutual Life Ins. Co.*, 93 N. Y. 345. A mutual insurance policy was marked "non-forfeitable," the premiums on which were paid by a note given for part of the premium, and "to remain a lien upon said policy until it becomes due by limitation, or by the death of A B, when the note shall be deducted from the said policy, unless sooner paid; the dividends on the policy to be applied to the payment of the note." *Held*, not forfeited by non-payment of the note: *Franklin Life Ins. Co.* v. *Wallace*, 93 Ind. 7. A policy provided that it should not be forfeited for non-payment of premiums, but that it should be continued in force for a period to be determined in a certain manner; or that the assured, at his option, should receive a paid-up policy for the full amount of premiums paid, "provided, that unless this policy shall be surrendered, and such paid-up

[1] Michigan Mutual Life Ins. Co. *v.* Bowes, 42 Mich. 10.

[2] Taylor *v.* Ins. Co., 9 Daly, 489; 59 How. Pr. 468.

policy shall be applied for within ninety days after such non-payment of premium as aforesaid, then this policy shall be void and of no effect." *Held*, that the option must be exercised within the ninety days, or that the right to have the policy continued or renewed in either form was lost: *Knapp* v. *Homœopathic Mutual Life Ins. Co.*, 117 U. S. 411. A, a married woman, held a policy on the life of her husband, B, for her benefit, and payable to her, her executors, administrators, or assigns; but in case of her death before B, it was payable to their children. On the surrender of the policy, after two annual premiums had been paid, she was entitled to a paid-up policy. *Held*, that, she having died before the payment of the second premium, leaving children, B was not entitled, on tendering payment, to a paid-up policy: *Continental Ins. Co.* v. *Hamilton*, 41 Ohio St. 274.

§ 2138. Assignment of Policy — Change of Beneficiaries. — A policy of life insurance, like any other chose in action, is assignable.[1] Where the policy is issued to "the assured, his executors, administrators, and assigns," to pay the "legal representatives" of the assured, the policy is nevertheless assignable, and the provision to pay the legal representatives is designed to apply only to a case where the insured died without having previously assigned the policy, and is not to be construed in any sense as limiting the power of the party insured to assign.[2] A policy made payable at a day named to the insured or his assigns, or to his personal representatives if he should die before the day, is assignable; and the assignee may recover, although the death is before the day named.[3] The proceeds of a life insurance must go as agreed upon and directed in the policy; and no diversion, or agreement for a diversion, will be effectual without the consent of him to whom the proceeds are by the original policy directed or agreed to be paid.[4]

[1] Palmer *v.* Merrill, 6 Cush. 282; 52 Am. Dec. 782; Anthracite Ins. Co. *v.* Sears, 109 Mass. 383; Fitzpatrick *v.* Ins. Co., 56 Conn. 116; 7 Am. St. Rep. 289. An oral assignment by a husband to his wife of a policy on his life is valid: Chapman *v.* McElwrath, 77 Mo. 38; 46 Am. Rep. 1.

[2] New York Ins. Co. *v.* Flack, 3 Md. 341; 56 Am. Dec. 742; Anthracite Coal Co. *v.* Sears, 109 Mass. 383.

[3] New York Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591.

[4] Smith *v.* Ins. Co., 4 Dill. 353; Dietrich *v.* Ins. Co., 47 Wis. 662; Stillwell *v.* Ins. Co., 72 N. Y. 385. The

Thus where, as is usual, a policy of life insurance is made payable to the wife or children of the insured, they become vested with the entire beneficial interest in the insurance.[1] One who procures an insurance on his life payable to his heirs cannot assign it.[2] One whose life is insured for another's benefit cannot, by will, divert the fund.[3] Having taken out a policy in his wife's favor, he cannot, having obtained a divorce for her adultery, have the policy reformed in accordance with an intention, not communicated to the company when it was issued, that, in such circumstances, it should not be payable to her.[4] Where one insured his life for the benefit of his wife and children, the fact being unknown to them until after his death, a surrender of the policies, made by him as guardian after his wife had died, and all the children except one had arrived at full age, was held void, and they entitled to the full amount, less the amount of premiums which accrued since the surrender.[5] An endowment policy payable to the wife of the insured is not assignable.[6] But in the absence of statutory prohibition, a policy of insurance upon the life of the husband for the benefit of the wife may be assigned or pledged by her as collateral security for his debts.[7] Insolvency does not destroy the right of

insured husband was allowed, after the death of his wife, to change the beneficiary, in Gambs *v.* Covenant Life Ins. Co., 50 Mo. 44; but this was where no rights had, by the death of the wife, vested in children or others. So in Robers *v.* Roberts, 64 N. C. 695, the court sustained a by-law of the insurer allowing the insured to appoint an executor to disburse the proceeds to the beneficiaries, a proceeding in aid, rather than in avoidance, of vested rights.

[1] Ruppert *v.* Ins. Co., 7 Robt. 115; Chapin *v.* Fellowes, 36 Conn. 132; 4 Am. Rep. 49; Gould *v.* Emerson, 99 Mass. 154; 96 Am. Dec. 720; Fraternal Ins. Co. *v.* Applegate, 7 Ohio St. 292; Robinson *v.* Duvall, 79 Ky. 83; 42 Am. Rep. 208; Fowler *v.* Butterly, 78 N. Y. 68; 34 Am. Rep. 507. But see Gainer *v.* Ins. Co., 17 Abb. N. C. 7.

[2] Gosling *v.* Caldwell, 1 Lea, 454; 27 Am. Rep. 774.

[3] Wilmaser *v.* Continental Life Ins. Co., 66 Iowa, 417; 55 Am. Rep. 277; Weishart *v.* Muhl, 81 Ky. 336.

[4] Goldsmith *v.* Union Mutual Life Ins. Co., 17 Abb. N. C. 15.

[5] Whitehead *v.* Ins. Co., 63 How. Pr. 394; 33 Hun, 425. See Dietrich *v.* Mad. Relief Ass., 45 Wis. 79.

[6] De Jonge *v.* Goldsmith, 46 N. Y. Sup. Ct. 131.

[7] Collins *v.* Dawley, 4 Col. 138; 34 Am. Rep. 72. A policy taken by a man on his life, and made payable to his wife or her assigns, is assignable by her in a state the law of which permits her to transfer her property: Damron *v.* Ins. Co., 99 Ind. 478.

a man to insure his life for the benefit of his wife and children. The fact that he is insolvent at the time of assigning for their benefit a policy previously taken out is not proof of fraud.[1] Money received by a wife on a policy issued upon the life of her husband for the benefit of herself and children is not subject to the claims of her creditors.[2] Where a wife insured the life of her husband for the benefit of herself, or in case of her decease of her children, and she died before her husband, and also one of the children died before him, leaving a child, it was held that a transmissible interest vested in the children on the issuing of the policy, and that the grandchild took by descent the interest of its parent.[3] If the wife insures for herself alone, and dies before her husband, the interest descends to her heirs.[4] A policy payable to the wife, or in case of her decease to the children, there being no children, becomes the absolute property of the wife, and she may even, after a divorce, exchange it for a new paid-up policy.[5]

ILLUSTRATIONS.—A policy was issued to A, in which the insurer promises "to pay to A, his assigns, in 1897, ... or if he should die before that time, then to make said payment to his legal representatives." *Held*, that the promise to pay in 1897 is assignable; the promise to pay the representatives upon death is not: *Armstrong* v. *Ins. Co.*, 20 Blatchf. 493. A obtained a policy of insurance upon his wife's life, payable to himself, his executors, and his assigns. A died. His wife afterwards died. *Held*, that the policy was payable to A's executors: *Hardy's Estate*, 12 Phila. 29. A policy upon the life of the husband issued to the use of his wife, and if she died before him the amount was made payable "to her children for

[1] McCutcheon's Appeal, 99 Pa. St. 133. Under a statute permitting a wife to insure her husband's life for her benefit, and hold the proceeds as against his creditors, less premiums, with interest, paid by him within the statutory period of limitation with intent to defraud creditors, she may in like manner hold the proceeds of a policy which the husband has procured on his own life and assigned to her when insolvent: Cole *v.* Marple, 98 Ill. 58; 38 Am. Rep. 83.

[2] Leonard *v.* Clinton, 26 Hun, 288.

[3] Continental Ins. Co. *v.* Palmer, 42 Conn. 60; 19 Am. Rep. 530; Robinson *v.* Duvall, 79 Ky. 83; 42 Am. Rep. 208.

[4] Hutson *v.* Merrifield, 51 Ind. 24; 19 Am. Rep. 722.

[5] Phœnix Ins. Co. *v.* Dunham, 46 Conn. 79; 33 Am. Rep. 14.

their use, or to their guardian if under age." She died before her husband. *Held*, that a grandchild, the issue of one of the children, who died before his mother, was entitled to a share: *Hull* v. *Hull*, 62 How. Pr. 100. A policy was issued to a girl of fourteen on her brother's life. She then had an insurable interest in his life, which afterwards ceased, when she became hostile to him. It did not appear that his life was in danger from her. *Held*, that he could not compel the cancellation of the policy on returning the premiums to the company: *Peckham* v. *Grindlay*, 17 Abb. N. C. 18. One by will gave to his daughters the proceeds of a life insurance, and afterwards, being behindhand in his assessments, wrote to his wife that the inclosed note made the policy hers, if she wished to keep it up. The "inclosed note" assigned the policy to her. She paid the assessments. Afterwards he died. *Held*, that the amount of the policy was payable to her: *Swift* v. *Railway Pass. & Benefit Ass'n*, 96 Ill. 309. A husband procured an insurance upon his life for the benefit of his wife, and delivered her the policy. Afterwards, without consideration, and without any design to part with her property therein, but by the undue influence and control of her husband, she was induced to execute an assignment of the policy, without any knowledge of the purpose or purport, to a third person, who assigned it to a fourth, and these assignees paid the premiums. *Held*, that the wife was entitled to the amount of the insurance, independent of the question whether the policy was assignable under the statute: *Fowler* v. *Butterly*, 78 N. Y. 68; 34 Am. Rep. 507. A wife procured a policy upon the life of her husband, payable to her if living; if not, to her children. Both she and one of her children died before the husband. *Held*, that a transmissible interest vested in the children upon the issuing of the policy, and that the heirs of the deceased child took, by descent, its interest, and were entitled to a portion of the amount assured: *Continental Life Ins. Co.* v. *Palmer*, 42 Conn. 60; 19 Am. Rep. 530. A wife took a policy upon the life of her husband. She died before her husband. *Held*, that she had such an interest in and ownership of the policy and right to the proceeds as would at her death descend to her heirs, notwithstanding the husband was living. *Hutson* v. *Merrifield*, 51 Ind. 24; 19 Am. Rep. 722. A man procured a policy on his life "for the benefit of his wife and children," and payable "to the said assured, their executors," etc. *Held*, that the money assured was to be distributed among the beneficiaries equally, and not according to the statute of distribution: *Cragin* v. *Cragin*, 66 Me. 517; 22 Am. Rep. 588. On the application of a wife, a policy on the life of her husband was issued for her sole benefit, and in the event of her death before her husband,

for the benefit of her children. The wife having died leaving children, the husband surrendered the policy to the company and procured another, likewise on his own life, for the same amount at the same premium, antedated to correspond with the date of the former policy, and made payable solely to himself. The husband soon died. *Held*, that the children were equitably entitled to the proceeds of the substituted policy as against the creditors of the husband: *Chapin* v. *Fellowes*, 36 Conn. 132; 4 Am. Rep. 49. A, in insuring his life, informed the company that he desired to assign the policy to B. He executed two copies of an assignment of the policy to B, delivered one to the company, but did not deliver the other to B. *Held*, that B, notwithstanding, was, on A's death, entitled to the fund: *Scott* v. *Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192. A man procured a policy payable to his wife, and without her knowledge until after his death, exchanged it for a paid-up policy, which also without her knowledge he surrendered for a certificate, which he assigned, and which was paid. *Held*, that the wife might ratify the exchange and repudiate the surrender: *People* v. *Ins. Co.*, 15 Abb. N. C. 75. P. took out a non-forfeitable policy under seal, wherein he was named as the covenantee, upon his own life, payable to S., a sister, for whom he was under no obligation to provide. At the time of taking out the policy, P. was told and believed that he could without S.'s consent change it to any one he chose. The policy was retained by P., who paid four of the five yearly premiums, and S. knew nothing of the transaction until informed afterwards by P., when she refused to assign it to him. *Held*, that a bill in equity, brought against S. and the insurance company to compel S. to assign the policy to P., could not be maintained: *Potter* v. *Spilman*, 117 Mass. 322. A policy was taken by a wife on the life of her husband, in favor of and made payable to her children. After the payment of several premiums, she assigned this policy in payment of a debt of her husband, and thereupon the assignee paid several successive premiums. After the death of the husband, the children filed a bill in equity claiming the whole sum insured. *Held*, that they were entitled only to the value of the policy at the time of its assignment, on the ground that the gift from the mother to them was executed only to that extent: *Landrum* v. *Knowles*, 22 N. J. Eq. 594. A policy was by its terms payable at the death of the insured to his wife if then living, or if not living, then to her children, with the proviso "that in case of the decease of the wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy." *Held*, that such substitution must be made upon the decease of the wife, or within a

reasonable time thereafter. It cannot be made after the date fixed for the next ensuing payment of premium on the policy: *Eiseman* v. *Judah*, 1 Flippin, 627. A policy on the life of a husband, payable in case of death to his wife, and in case of her death before her husband's death, payable to his children, was assigned by the wife, who died before her husband. *Held*, that the wife's interest was contingent on her surviving her husband, and that the assignment was void: *Connecticut etc. Ins. Co.* v. *Burroughs*, 34 Conn. 305; 91 Am. Dec. 725. A policy of insurance on the life of B. was made payable to M., who held it for the benefit of a creditor of the insured, although without the knowledge of the creditor. B. having died, *held*, that an action lay against M. by the creditor for so much of the proceeds of the policy as would satisfy the debt: *Hutchings* v. *Miner*, 46 N. Y. 456; 7 Am. Rep. 369. A father insured his life for the benefit of his infant daughter, himself paying the premiums and retaining the policy, the policy running to the daughter, her executor, etc. *Held*, that on her death the legal representative of the daughter was entitled to possession of the policy: *Glanz* v. *Gloeckler*, 104 Ill. 573; 44 Am. Rep. 94. A man procured a policy on his life, payable to his wife if living, otherwise to his children or their guardian. The wife died leaving children. The insured had then paid all the premiums ever required by the policy. Afterwards he remarried and had another child, surrendered the policy, and took a paid-up policy for the benefit of the second wife. *Held*, invalid as against his children, and that all the children by both marriages were entitled to share: *Ricker* v. *Charter Oak Life Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289. S. insured his life for the benefit of his wife, and paid the premiums until her death, he and two children surviving. Afterwards he assigned his interest to H. as security, and H. paid the premiums until S.'s death. *Held*, that on the wife's death one third of the policy went to the husband, and two thirds to the children, and that H. could take only the one third, but that he was entitled to be reimbursed for the premiums he had paid, with interest: *Harley* v. *Heist*, 86 Ind. 196; 44 Am. Rep. 285.

§ 2139. **Assignment of Policy to Person having No Interest in Life of Insured.**—If the policy is valid when made, it is not defeated by assigning it to a person having no legal interest in the life of the person insured.[1]

[1] Clark v. Allen, 11 R. I. 439; 23 Am. Rep. 496; St. John v. Ins. Co., 13 N. Y. 31; 64 Am. Dec. 529; Cunningham v. Smith, 70 Pa. St. 450; Valton v. Ins. Co., 20 N. Y. 32; Reese v. Ins. Co., 23 N. Y. 116; Olmstead v.

Keyes, 85 N. Y. 593; Mutual Life Ins. Co. *v.* Allen, 138 Mass. 24; 52 Am. Rep. 245. But in Stevens *v.* Warren, 101 Mass. 566, the court say: "The general rule recognized by the courts has been that no one can have an insurance upon the life of another unless he has an interest in the continuance of his life. . . . . When the contract between the insured and the insurers is expressed to be for the benefit of another, or is made payable to another than the representative of the insured, it may be sustained accordingly. The same would probably be held in the case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of the insurance which would sustain a policy to himself, the assignment would only take effect as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the insured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained. The purpose of the clause in the policy forbidding assignments without the assent of the company, in concurrence with the policy of the law, is undoubtedly to guard against the increased risks of speculating insurance." The view that an assignment to one having no insurable interest is invalid is held in Franklin Ins. Co. *v.* Hazzard, 41 Ind. 116; 13 Am. Rep. 313; Franklin Ins. Co. *v.* Sefton, 53 Ind. 380; Cammack *v.* Lewis, 15 Wall. 643; Warnock *v.* Davis, 104 U. S. 775; Mo. Valley R. R. Co. *v.* Sturges, 18 Kan. 93; 26 Am. Rep. 761; Helmetag *v.* Miller, 76 Ala. 183; 52 Am. Rep. 316; Basye *v.* Adams, 81 Ky. 368.

CHAPTER CI.

ACCIDENT INSURANCE.

§ 2140. Accident insurance — What is "accident"?
§ 2141. Traveling — Alighting.
§ 2142. Disease — Poison.
§ 2143. Contributory negligence not a defense.
§ 2144. Change of occupation — Increase of risk.
§ 2145. Disabilities — "Total disability."

§ 2140. Accident Insurance — What is "Accident"? —In the case of insurance against accidental injury or death, the meaning of the word "accident" is most material. Death by accident has been defined to be "death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things."[1] And in a recent New York case, an accident is said to be the happening of an event without the aid or the design of the person injured, and which is unforeseen.[2] Insurance against injury by accident includes all accidents not excepted by the terms of the policy.[3] A general insurance, however, against death by "violent and accidental means," followed by a proviso that the insurers will not be responsible for death caused by certain specified means, or happening in certain specified modes, must be construed as covering injuries happening by violent and accidental means, and not by the causes and modes specified in the excluding proviso. The exclusion of responsibility for

[1] North Am. Ins. Co. *v.* Burroughs, 69 Pa. St. 43; 8 Am. Rep. 212; McCarthy *v.* Ins. Co., 8 Biss. 362. In a Connecticut case it was held that "rupture caused by jumping from the cars while in motion, and afterwards running to accomplish certain business purposes, done voluntarily, and in the ordinary way, and without any necessity therefor, and with no unforeseen or involuntary movement of the body, such as stumbling or slipping or falling, is not by violent and accidental means. It might be otherwise if, in jumping, the insured should lose his balance and fall, or strike against some unforeseen object, or in running should stumble or slip": Southard *v.* Ins. Co., 34 Conn. 574.

[2] Paul *v.* Ins. Co., 112 N. Y. 472; 8 Am. St. Rep. 758.

[3] Prov. Life Ins. Co. *v.* Fennell, 49 Ill. 180; Prov. Life Ins. Co. *v.* Martin, 32 Md. 310.

death or injury in certain specified ways does not enlarge the scope of the general clause so as to include cases happening otherwise than by violent and accidental means.[1] A sprain of the muscles of the back caused by lifting heavy weights in the course of business is injury by accident or violence "occasioned by external or material causes operating on the person of the insured."[2] Death by drowning is death by "accident or violence";[3] and so, it seems, is death by being killed by robbers.[4] A death caused from escaping gas in a sleeping apartment is caused by "external, violent, and accidental means."[5] An insurance against death from bodily injury may include death from apoplexy caused by bodily injury.[6] Any accident arising in the course of traveling on a railroad is a "railroad accident." An accident to the railroad, or machinery connected with it, is not essential.[7] But death

[1] Southard *v.* Ins. Co., 34 Conn. 574.

[2] Martin *v.* Ins. Co., 1 Fost. & F. 505.

[3] Mallory *v.* Ins. Co., 47 N. Y. 52; 7 Am. Rep. 410. In Trew *v.* Ass. Co., 5 Hurl. & N. 211, the deceased went to bathe in the sea, and was not afterwards seen alive, his clothes being found on the shore, and his body in the sea. The court held the company liable, Cockburn, C. J., saying: "The counsel for the defendant contended, in effect, that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply; and whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind in many cases where death resulted from accident would afford no protection whatever to the assured. We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases. We are therefore of opinion that if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy." In Winspear *v.* Ins. Co., 43 L. T., N. S., 459, it was held that where a man in an epileptic fit fell into the water and was drowned, the death was accidental, and by an injury caused by some "outward and visible sign." And see Reynolds *v.* Ins. Co., 22 L. T., N. S., 820. In Mallory *v.* Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410, where the deceased was found in a creek, dead, with a cut on his head, it was held that the question of the cause of his death was properly left to the jury.

[4] See Ripley *v.* Ins. Co., 2 Big. L. & Acc. Ins. Cas. 738; 16 Wall. 336; 1 Dill. 403.

[5] Paul *v.* Travelers Ins. Co., 45 Hun, 313; 112 N. Y. 472; 8 Am. St. Rep. 758; U. S. Mutual Accident Ass'n *v.* Newman, 84 Va. 52.

[6] National Benefit Ass'n *v.* Grauman, 107 Ind. 288.

[7] Hence it has been ruled that a passenger who in alighting from a train slipped from the car-step and was injured suffered a "railroad accident" within a policy of insurance: Theobald *v.* Ass. Co., 10 Ex. 44.

by sunstroke is not death by accident.[1] Suicide cannot be regarded as a death by accident or from accidental causes from the fact that it was committed while the assured was insane, and the insanity was produced or accelerated by an accidental fall or injury.[2] The mere fact that one was injured in an "affray" does not, without more, show culpability on his part, or show that his injury was not the result of an "accident."[3]

ILLUSTRATIONS.—The insured was pitching hay. The handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died. *Held*, an accidental death: *North American Ins. Co.* v. *Burroughs*, 69 Pa. St. 43; 8 Am. Rep. 212. An accident policy insured against death from bodily injuries effected through external, accidental, and violent means, and provided that it should not extend to death caused "wholly or in part by bodily infirmities or disease, or to death caused by suicide." The assured, while insane, hanged himself. *Held*, that an action on the policy was maintainable: *Crandal* v. *Accident Ins. Co.*, 27 Fed. Rep. 40; 120 U. S. 527. An accident policy insured against death from external, violent, and accidental means. There was a proviso excepting death by suicide, whether the assured should be sane or insane. *Held*, that death from external violence was shown by proof that death ensued from a pistol-shot through the heart; that the presumption was against suicide; that from the mere fact of death it was not to be presumed that the assured was murdered; and that the question of suicide or murder was for the jury: *Travelers Ins. Co.* v. *McConkey*, 127 U. S. 661. The assured was found dead in a hot plunge-bath, in an almost standing position. There were two slight bruises on his head, insufficient to cause death, which resulted probably from an epileptic attack. *Held*, that he came to his death from other causes than "external, violent, and accidental means," within the meaning of that phrase as used in the policy: *Tennant* v. *Travelers Ins. Co.*, 31 Fed. Rep. 322.

[1] Sinclair *v.* Ins. Co., 3 El. & E. 478, the court saying: "We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate or atmospheric influences, cannot, we think, properly be said to be accidental, unless at all events the exposure is brought about by circumstances which may give it the character of accident."

[2] Sheeter *v.* West. Ins. Co., 65 Mich. 199; 8 Am. St. Rep. 882. But see Crandall *v.* Ins. Co., 27 Fed. Rep. 40; 120 U. S. 527.

[3] Chosen Friends Sup. Council *v.* Garrigus, 104 Ind. 133; 54 Am. Rep. 298.

§ 2141. **Traveling—Alighting—Etc.**—A person may be traveling in a carriage while alighting therefrom, until he has completely disconnected himself and landed. And an accident happening to the insured after the train has stopped at the station, by slipping off the step of the car, is a railroad accident "in a carriage on a line of railroad."[1] And so one is "traveling in a conveyance provided for the transportation of passengers," if, while in the prosecution of the journey had in view when the insurance was procured, he elects to go on foot, this being a usual mode of making the transit from the steamboat wharf to the railroad station, although a conveyance by means of public hack may be had for hire by travelers so desiring to make the transit, which he might have taken.[2] A railroad passengers' insurance company which insures against "any accident while traveling by public or private conveyance" is liable for the death of an engineer actually engaged in running trains, by an accident occurring on the railroad upon which he is employed.[3]

ILLUSTRATIONS.—The policy provided that the insurers should be liable for injuries "when accidentally received by the assured while actually traveling in a public conveyance provided by common carriers for the transportation of passengers." The assured took passage from Chicago, having purchased a ticket for Kankakee. The train stopped at that place, and he alighted, standing in the door of the depot while the engine took water, until the train started, moving slowly to the coal-house for the purpose of taking fuel, when he walked rapidly or ran to the train, and reaching the forward platform of the rear car, threw out his hand as if attempting to get on board, when he fell between the cars. *Held*, that the loss was within the policy: *Tooley* v. *Pass. Ass. Co.*, 3 Biss. 399. The insured attempted to jump on a public omnibus while it

[1] Theobald *v.* Ins. Co., 10 Ex. 44.

[2] Northup *v.* Ass. Co., 43 N. Y. 516; 3 Am. Rep. 724. In another case, where the plaintiff had completed the greater part of his journey by steamer, and, there being no public conveyance, he was proceeding from the port to his home on foot, a distance of several miles, it was held that this was not traveling by private conveyance within the meaning of a policy insuring against accidents while "traveling by public or private conveyance": Ripley *v.* Ass. Co., 1 Dill. 403; 16 Wall. 336. This ruling is criticised by Mr. May: See May on Insurance, sec. 529.

[3] Brown *v.* Rail. Pass. Ass. Co., 45 Mo. 221.

was in motion. He succeeded in getting on the rear steps, but was unable, on account of the jar, to maintain his footing, and was struck by the wheel and injured. *Held*, that he was at the time "traveling" within the policy: *Champlin* v. *Ins. Co.*, 6 Lans. 71.

§ 2142. **Disease — Poison, etc.** — In an English case, the deceased met with a violent fall, by which he immediately became ruptured in the bowels, and afflicted with strangulated hernia in the abdomen, for which a surgical operation was necessarily performed, in consequence of which, and the hernia, he died. The question was, whether this was a death within the exception of a policy which provided that the company did not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured, before, or at the time, or following such accidental injury, whether causing such death or disability directly, or jointly with such accidental injury. It was held that such a death did not arise from a cause within the system, and so was not within the exception.[1] Death by inadvertently taking an overdose of opium prescribed by a physician is caused by "medical treatment for disease," and is not a case of bodily injury effected through "external, violent, and accidental means," occasioning death.[2] But there may be a recovery on an accident insurance policy when the accident produced inflammation which affected the functions of other organs, so that from their disorder death ensued; otherwise if a dormant disorder was brought into activity, this alone causing the death.[3]

Illustrations. — A policy issued to A provided that the amount specified therein should be paid only on clear proof that the death of the party insured "was caused by external violence and accidental means"; no payment was to be made

[1] Fitton *v.* Acc. Co., 17 Com. B., N. S., 122; and see Smith *v.* Ins. Co., 22 L. T. 861.

[2] Bayliss *v.* Ins. Co., 6 Ins. Law J. 109.

[3] Barry *v.* Accident Ass'n, 23 Fed. Rep. 712.

if the death was caused "by the taking of poison," or was "the result of design either on the part of the member or of any other person." A died in consequence of his having taken a certain deadly poison which he mistook for a harmless beverage. *Held*, that, notwithstanding the poison was innocently taken, the company was not liable under the policy: *Pollock* v. *Ins. Co.*, 102 Pa. St. 230; 48 Am. Rep. 204. A policy insured against bodily injury "effected through external, violent, and accidental means," and provided that it should not extend to death or disability caused "by poison in any manner or form." The assured died from blood-poisoning communicated from putrid animal matter, with which, in his occupation as a butcher, he came in contact. *Held*, that an action was maintainable: *Bacon* v. *United States Mutual Accident Ass'n*, 44 Hun, 599.

§ 2143. Contributory Negligence not a Defense.—In the absence of stipulations to the contrary in the policy, it is no defense to the insurer that the "accident" was the consequence of the negligence of the insured.[1] And

[1] Champlin *v.* Travelers' Pass. Ins. Co., 6 Lans. 71; Prov. Life Ins. Co. *v.* Martin, 32 Md. 310 In Schneider *v.* Ins. Co., 24 Wis. 28, 1 Am. Rep. 157, the court say: "It is insisted that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word 'accident' which has never been established either in law or common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured which contributes to produce them. Thus men are injured by the careless use of fire-arms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterwards that a little greater care on their part would have prevented it. Yet such injuries, having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading 'accidents through carelessness.' There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result. An accident is defined as 'an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.' An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident. It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle, the servant fills the lighted lamp with kerosene, a hundred times without injury.

ordinary negligence will not vitiate a policy which stipulates that the company will not be liable for willful and wanton exposure to unnecessary danger, as this stipulation affords a reasonable inference that ordinary negligence is not excepted.[1] Where a traveler by railroad, while asleep and unconscious, involuntarily arises and walks to the car-platform, and falls therefrom and is injured, this is not a case of "voluntary exposure," "design," or "self-inflicted injuries."[2] But driving alone on a dark night in a network of tracks in a railroad station-yard, where there was no roadway for carriages, by which the driver was killed by a train coming against the vehicle, is a "voluntary exposure to unnecessary danger."[3] A provision that the company shall not be responsible if the death or injury may have been caused by intentional injuries inflicted by the insured or by any other person, refers to intention on the part of a third person inflicting the injury, without regard to whether the insured drew a brawl upon himself, or intentionally engaged therein.[4]

ILLUSTRATIONS. — An accident policy stipulated that the insurance shall only extend to bodily injuries, fatal or non-fatal, received while riding in a public conveyance of a common carrier, and "in compliance with all the rules and regulations of such carrier." The plaintiff was upon a train of cars, and as it "slowed up" upon approaching a station, went out upon the platform, and in consequence of a sudden jerk, another passenger was precipitated against him and he was thrown from the car and severely hurt. It was a regulation of the company that passengers should not stand upon the platform.

The next time the gun is discharged, and the lamp explodes. The result was unusual, and therefore as unexpected as it had been in all the previous instances. So there are undoubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore when an injury occurs it is an unusual result, and unexpected, and strictly an accident." *Contra*, Morel *v.* Miss. Val. Ins. Co., 4 Bush, 535.

[1] Schneider *v.* Prov. Ins. Co., 24 Wis. 28; 1 Am. Rep. 157. A locomotive-engineer, while backing his engine, at moderate speed, on a down grade, attempted to pass from the tender to a car attached, in order to apply the brakes. He slipped, fell, and was killed. Held, that he had not willfully exposed himself to an unnecessary peril: Providence Ins. etc. Co. *v.* Martin, 32 Md. 310.

[2] Scheiderer *v.* Travelers Ins. Co., 58 Wis. 13; 46 Am. Rep. 618.

[3] Neill *v.* Ins. Co., 19 Cent. L. J. 157.

[4] Fischer *v.* Travelers Ins. Co., 77 Cal. 246.

Held, that the plaintiff could not recover: *Bon* v. *Railway Pass. Ass. Co.*, 56 Iowa, 664; 41 Am. Rep. 127. One whose life was assured was killed by falling from the platform of a railroad car, between eleven and twelve at night, when the train was in full motion. *Held*, that there could be no recovery on the policy, which provided that the company would not be liable in case death occurred from the negligence of the assured: *Sawtelle* v. *Ass. Co.*, 15 Blatchf. 216. A policy against accident provided that there should be no recovery for death or injury in consequence of exposure to obvious or unnecessary danger, and that the insured should use all diligence for personal safety and protection. The insured was killed by a railroad train while he was running on the track in front of it, in the night, to get on a train approaching in another direction on a parallel track. *Held*, that there could be no recovery: *Tuttle* v. *Travelers Ins. Co.*, 134 Mass. 175; 45 Am. Rep. 316. An accident policy excepted death or injury "by voluntary exposure to unnecessary danger," and "while walking or being on the road-bed or bridge of any railroad." The insured stepped off a railroad train stopped at a draw-bridge at night, fell through a concealed hole in the bridge, and was killed. *Held*, not within the exceptions: *Burkhard* v. *Travelers Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205. An accident policy provided that the insured would use due diligence for his personal safety and protection. The insured, while inspecting a building which he was having erected, was precipitated from the second story thereof, and killed, in consequence of the accidental breaking of a joist on which he was standing, and in which there was a latent defect. *Held*, that the jury were justified in finding that the insured had not unduly exposed himself, and that the company was liable: *Stone* v. *United States Casualty Co.*, 34 N. J. L. 371. A held an accident policy, which provided that he should not expose himself to "unnecessary danger, hazard, or perilous adventure." A, on a dark night, attempted to cross a dangerous railroad trestle. He knew the danger, but had been accustomed to go that way home, it being the shorter way. He made a misstep, fell through, and was injured. *Held*, that A could not recover: *Travelers Ins. Co.* v. *Jones*, 80 Ga. 541. An accident policy contained a condition exonerating the insurer from liability if the death of the assured was the result of design on the part of the assured or any other person. The assured was shot by an officer, but there was some evidence tending to show that the officer did not know it was the assured at whom he shot, and that he did not intend to kill the assured. *Held*, that it could not be said, as a matter of law, that the assured lost his life from the design of another: *Utter* v. *Travelers Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913.

§ 2144. Change of Occupation—Increase of Risk.—A change in the occupation of the insured does not avoid the policy, unless so stipulated, or unless the liability is restricted by the contract to accidents occurring in the course of the occupation specified in the application.[1] A statement by the insured in his application as to his occupation is a representation of a then existing fact, and not a covenant or warranty that there shall be no change in the occupation affecting the risk during the currency of the policy.[2] Even where the policy prohibits a change of occupation, a change of occupation on the part of a person insured against injury by accident does not mean a casual change, such as most men do or may resort to during the intervals of time when their usual employment does not engage them, but rather "engaging in another employment as a usual business." An unemployed teacher, therefore, does not forfeit his right to recover because he meets with an accident while superintending the erection of a building for himself.[3] Nor does a person who, while on a visit to a friend who was a farmer, meets with an accident while casually assisting him in getting in hay, though farming is not his usual occupation.[4]

§ 2145. Disabilities—"Total Disability."—Total disability from the prosecution of one's usual employment means inability to follow his usual occupation, business, or pursuits in the usual way. Though he may do certain parts of his accustomed work, and engage in some of his usual employments, he may yet recover, so long as he cannot to some extent do all parts, and engage in all such employments. Thus a farmer who cannot attend to his other ordinary duties, though he may milk his cows, and

[1] Prov. Life Ins. Co. *v.* Fennell, 49 Ill. 180; Prov. Life Ins. Co. *v.* Martin, 32 Md. 310.

[2] May on Insurance, sec. 532.

[3] Stone *v.* United States Casualty Co., 34 N. J. L. 371.

[4] North America Ins. Co. *v.* Burroughs, 69 Pa. St. 43; 8 Am. Rep. 212.

a merchant who cannot get about to look after his business as he ordinarily does, though he may be able to keep his books, are totally disabled within the meaning of such a provision.[1] An accident policy was conditioned for indemnity in case the accident should wholly disable the insured from prosecuting any and every kind of business pertaining to his occupation. It was held that an instruction that a recovery might be had if plaintiff had been disabled from prosecuting his business, and for such time as he was "rendered wholly unable to do his accustomed labor,—that is, to do substantially all kinds of his accustomed labor to some extent,"—was erroneous.[2] But on a policy providing for payments while totally disabled and prevented from the transaction of all the kinds of business the insured cannot recover because totally disabled for his own trade or business, if he retains health, strength, etc., sufficient for any other vocations, whether he is conversant with such or not.[3]

ILLUSTRATIONS.—The plaintiff met with a serious sprain of the ankle, in consequence of which he was unable to leave his room for some weeks, and was confined to the house for some time longer. *Held*, that he was "wholly disabled from carrying on his usual occupation or business," within the policy: *Hooper* v. *Ass. Co.*, 5 Hurl. & N. 545; 6 Hurl. & N. 839. The insured sprained his knee, not, however, so severely that it compelled him to suspend his usual work, which he continued for some two weeks, when a wrenching of the same knee compelled him to quit labor, and totally disabled him for some time. *Held*, that as he actually continued his work after the first injury for sixteen days, and until the happening of the second injury, it could not be said that he became totally disabled by the first: *Rhodes* v. *Ass. Co.*, 5 Lans. 71.

[1] Sawyer *v.* United States Casualty Co., 1 Big. L. & Acc. Ins. Cas. 289; 8 Law Reg., N. S., 233.

[2] Saveland *v.* Fidelity and Casualty Co., 67 Wis. 174; 58 Am. Rep. 864. See Lyon *v.* Ass. Co., 46 Iowa, 631.

[3] Lyon *v.* Railway Passenger Ass. Co., 46 Iowa, 631.

CHAPTER CII.

MUTUAL INSURANCE.

§ 2146. Status of mutual insurance companies — Stock and assets of.
§ 2147. Premium notes — Stock notes — Security notes.
§ 2148. Liability of members — In general.
§ 2149. For assessments on premium notes.
§ 2150. Power of company to make assessments — Mode.
§ 2151. Relief, benefit, and benevolent associations.

§ 2146. Mutual Insurance Companies — Status of — Stock of. — In mutual insurance, each member insured is a member of the body corporate; is a stockholder entitled to his share in the management of its affairs and the profits and losses of the business. It is a mutual insurance equally, where the insured pay the whole premium in cash without further assessments, or part in cash, and part by a premium note.[1] Where a company chartered to do business upon the mutual plan only issued policies upon premium notes, and also for all cash premiums, the funds thus realized from both sources making a common fund for the payment of losses, it was held that this mode was not *ultra vires*, and that members were liable upon their premium notes for assessments to pay losses to policy-holders who paid cash premiums.[2] The capital stock of a mutual insurance company usually consists of its cash assets, its stock notes, its premium and deposit notes, assessable to pay losses, which are usually denominated absolute funds, and the liability to a fixed amount, by statute or charter, over and beyond these, to be resorted to after the first are exhausted, and usually denominated conditional funds.[3] Where a mutual company is authorized by a statute to issue policies on the cash prin-

[1] Mygatt *v.* Ins. Co., 21 N. Y. 52; Carey *v.* Nagle, 2 Abb. 156; Union Ins. Co. *v.* Hoge, 21 How. 35; Ohio etc. Ins. Co. *v.* Marietta Co., 3 Ohio St. 348.

[2] Schimpf *v.* Lehigh etc. Ins. Co., 86 Pa. St. 373.

[3] May on Insurance, sec. 548.

ciple to others than its members, all persons insured on that principle are entitled to look to the premium notes of the members as representing the capital stock of the company.[1] A mutual company may borrow money to pay its losses, and may give its note for such borrowed money. And a member of the company is liable to an assessment to pay a judgment on the note.[2] The fact that the policies of mutual insurance companies are issued for all cash, and on short time, does not make the policies stock policies.[3]

§ 2147. Premium Notes — Stock Notes — Security Notes. — Premium notes are those which are made by the members and deposited with the company to be payable as assessments are made. They are only payable at such times and in such portions as may be necessary to meet losses and expenses; are not negotiable, because payable only upon a contingency which may never happen; and the statutes of limitation do not run in favor of the note as a whole, but only upon so much as may be called for, and from the time of the call.[4] Stock or advance notes are sometimes given to the company in advance of premiums expressly made payable by installments from time to time. They are payable absolutely without regard to a question of loss, are negotiable, and are subject to the statute of limitations.[5] A stockholder cannot urge as a defense to a suit brought against him on his stock note,

[1] Hays *v.* Ins. Co., 98 Pa. St. 184.

[2] Orr *v.* Mercer County Mut. Fire Ins. Co., 114 Pa. St. 387.

[3] State *v.* Ins. Co., 91 Mo. 311.

[4] Savage *v.* Medbury, 19 N. Y. 32; Howland *v.* Edmunds, 24 N. Y. 307; Hope Ins. Co. *v.* Weed, 28 Conn. 51; Hope Ins. Co. *v.* Perkins, 2 Abb. App. 383; Howland *v.* Cuykendall, 40 Barb. 320; Sinkler *v.* Indiana Co., 3 Pa. 149; Elwell *v.* Cruker, 4 Bosw. 22. Such a note is not a "deposit note" within a statute: Union Ins. Co. *v.* Greenleaf, 64 Me. 123.

[5] Dana *v.* Munro, 38 Barb. 528; Maine Mutual Ins. Co. *v.* Scranton, 49 Me. 448; Savage *v.* Medbury, 19 N. Y. 32; Buckman *v.* Metcalf, 32 N. Y. 591. Whether a note is a premium or stock note is a question of evidence. If given before the organization of the company, the presumption is that it is a stock note: Jackson *v.* Van Slyke, 52 N. Y. 645. A note in form a premium note may be shown to have been given as a stock note: Sands *v.* St. John, 36 Barb. 628.

by the creditors, through their representative, that the charter has been illegally changed.[1] But a change in the charter will, as to the company, discharge previous subscribers who do not assent to the change from liability to pay future assessments on their stock.[2] Security notes are notes given in addition to the notes given for premiums in advance in the usual course of business, and to be resorted to only in case of the insufficiency of the latter to meet the claims against the company.[3] A premium note absolute on its face cannot be treated as a stock note by the company or any one but a *bona fide* holder without notice.[4]

§ 2148. Liability of Members — In General. — Until he becomes a member, the insured is not presumed to know the rules and by-laws of the company.[5] But as soon as he takes out a policy, he becomes a member, and is bound by the provisions of the charter and by-laws, which he is presumed to know.[6] The acts of its officers within their powers are binding on him.[7] The records of the company are evidence for or against him;[8] he cannot deny the existence of the company or its regularity.[9] He is not, however, bound by a by-law or other act of the company affecting his contract or relation to the company, passed without his consent, especially if in contravention

[1] Peychaud *v.* Lane, 24 La. Ann. 404.

[2] Ashton *v.* Burbank, 2 Dill. 435.

[3] May on Insurance, sec. 548.

[4] Bell *v.* Shilley, 33 Barb. 610; McIntire *v.* Preston, 5 Gilm. 48; 48 Am. Dec. 321.

[5] Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331. Unless, it seems, he had been previously insured in such a company: Fuller *v.* Ins. Co., 36 Wis. 599.

[6] Mitchell *v.* Ins. Co., 51 Pa. St. 402; Coles *v.* Ins. Co., 18 Iowa, 426. But not the business regulations and instructions to agents adopted by the officers: Walsh *v.* Ins. Co., 30 Iowa, 133; 6 Am. Rep. 664.

[7] Hackney *v.* Ins. Co., 4 Pa. St. 185.

[8] Diehl *v.* Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302.

[9] Sands *v.* Hill, 42 Barb. 65; Traders' Mutual Fire Ins. Co. *v.* Stone, 9 Allen, 483; Appleton Mutual Ins. Co. *v.* Jesser, 5 Allen, 446; Citizens' Mutual Ins. Co. *v.* Sortwell, 8 Allen, 217; Currie *v.* Mut. Ass. Soc., 4 Hen. & M. 315; 4 Am. Dec. 517; Cooper *v.* Shaver, 41 Barb. 151; Nashua Fire Ins. Co. *v.* Moore, 55 N. H. 48; Prov. Fire and Mar. Ins. Co. *v.* Murphy, 8 R. I. 171; Brouwer *v.* Appleby, 1 Sand. 158; Judale *v.* American Ins. Co., 4 Ind. 333; Yard *v.* Pacific etc. Ins. Co., 2 N. J. Eq. 480; 64 Am. Dec. 467.

of the charter.[1] And if he be induced to become a member by fraudulent representations of the insurers or their agents, the fraud vitiates the contract, and relieves the insured from any obligations towards the insurer under it.[2]

§ 2149. Liability for Assessments on Premium Note.— Members only are liable to assessment. Assignees of the policy who have not made themselves members by agreement are not liable.[3] But the liability of the member continues as long as he continues a member;[4] and is not affected by the fact that his own policy is voidable by his own act.[5] Though the policy provides that the person becoming a member shall continue so only so long as he remains insured, yet if it also provides that he shall not be released from his note till he has paid his part of all losses before the surrender of the policy, he will continue liable for such losses.[6] The maker of a premium note is liable to be assessed thereon for losses, whether occurring on cash premium or note premium policies, the fund produced by cash premiums having been exhausted.[7] The insolvency of the company is no defense to an action upon a premium note;[8] nor that the corporation had at some previous time made false and fraudulent representations concerning its solvency and the condition of its

[1] New England Mut. Fire Ins. Co. *v.* Butler, 34 Me. 451; Hamilton Mut. Ins. Co. *v.* Hobart, 2 Gray, 543; Insurance Co. *v.* Connor, 17 Pa. St. 136; Bradfield *v.* Union etc. Ins. Co., 10 Ins. Law J. 551; Wallace *v.* Insurance Co., 4 La. 289; Rosenberger *v.* Insurance Co., 87 Pa. St. 267; Van Slyke *v.* Trampealeau etc. Ins. Co., 48 Wis. 683; Great Falls Mutual Fire Ins. Co. *v.* Harvey, 45 N. H. 292.

[2] Jones *v.* Dana, 24 Barb. 395; Devendorf *v.* Beardsley, 23 Barb. 656; Fogg *v.* Griffin, 2 Allen, 1; Brown *v.* Donnell, 49 Me. 421; 77 Am. Dec. 266; Sterling *v.* Mer. Mut. Ins. Co., 32 Pa. St. 75; 72 Am. Dec. 773; Salmon *v.* Richardson, 30 Conn. 360; 79 Am. Dec. 255; City Bank *v.* Phillips, 22 Mo. 85; 64 Am. Dec. 254.

[3] Com. *v.* Ins. Co., 112 Mass. 116; Cummings *v.* Hildreth, 117 Mass. 399; New Hampshire Ins. Co. *v.* Hunt, 30 N. H. 219; Gardiner *v.* Ins. Co., 38 Me. 439; Boynton *v.* Ins. Co., 16 Barb. 254; Philbrook *v.* Ins. Co., 37 Me. 137.

[4] Iowa Ins. Co. *v.* Prosser, 11 Iowa, 115; Com. *v.* Ins. Co., 112 Mass. 116.

[5] Id.

[6] Hyatt *v.* Wait, 37 Barb. 29; Neely *v.* Ins. Co., 7 Hill, 49; Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

[7] White *v.* Havens, 4 Abb. App. 582.

[8] Cany *v.* Nagel, 2 Biss. 244; Sterling *v.* Mercantile Ins. Co., 32 Pa. St. 75; 72 Am. Dec. 773.

capital stock for the purpose of inducing persons generally to deal with it, unless such representations were held out at the time when the defendant gave the notes, and to induce him to give them.[1] But it is a good defense to a premium note given to a mutual insurance company of another state, that the note was given in Indiana to an agent of the company, and the company had not complied with the Indiana statute respecting foreign corporations.[2] The cancellation of the policy and premium note releases the member from future assessments, either for past or future losses.[3] The insolvency of the maker of the premium note, and his discharge from his debts, relieves the company from any obligation towards him, and the receipt of interest upon the premium note after the filing of the petition in bankruptcy, without actual knowledge, will not revive the policy.[4] Other authorities hold that in such cases the policy is merely voidable, and not void, and the premium note is therefore valid, at least till the insurers assert their right to claim a forfeiture.[5] The company, by electing to avoid the policy on any ground for which by its terms it is void or voidable, discharges the insured on his premium note, and he is not thereafter liable for assessments.[6] If the contract of insurance be invalid, as unauthorized by law, or as prohibited under certain preliminary conditions precedent, the premium

[1] Fogg *v.* Pew, 10 Gray, 409; 71 Am. Dec. 662.

[2] Lamb *v.* Lamb, 6 Biss. 420.

[3] Wadsworth *v.* Davis, 13 Ohio St. 123; Hyde *v.* Lynde, 4 N. Y. 387; Campbell *v.* Adams, 38 Barb. 132; York etc. Ins. Co. *v.* Turner, 53 Me. 225. Other cases hold that he is not relieved as to past losses: Com. *v.* Ins. Co., 112 Mass, 116; St. Louis Ins. Co. *v.* Broeckler, 19 Mo. 135; Sterling *v.* Ins. Co., 32 Pa. St. 75; 72 Am. Dec. 773; Alliance Ins. Co. *v.* Swift, 10 Cush. 433. And others that where the cancellation is in pursuance of a legal agreement to adjust, there is no longer any liability: Acker *v.* Hite, 10 Ins. Law J. 20; Sans *v.* Hill, 55 N. Y. 18; Columbia Ins. Co. *v.* Buckley, 83 Pa. St. 293; 24 Am. Rep. 172; New Hampshire Ins. Co. *v.* Rand, 24 N. H. 428.

[4] Reynolds *v.* Ins. Co., 34 Md. 280; 6 Am. Rep. 337.

[5] Huntley *v.* Perry, 38 Barb. 571; Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

[6] Tuckerman *v.* Bigler, 46 Barb. 375; Hazard *v.* Ins. Co., 7 R. I. 429; Frost *v.* Ins. Co., 5 Denio, 154; 49 Am. Dec. 234.

note is also invalid *ab initio*.[1] So if the policy be delivered, but is ineffectual because never countersigned, the premium note is also invalid.[2] An assessment after forfeiture of the policy, made with knowledge thereof, actual or constructive, and for losses occurring afterwards, is a waiver of the forfeiture, and gives to the insured the right to indemnity for loss under the policy.[3] It is otherwise, however, if the assessment is made for a loss occurring before the forfeiture, or is made without knowledge of the forfeiture.[4] And an assessment for losses occurring after forfeiture, made by the company with knowledge of the forfeiture, cannot be enforced.[5]

ILLUSTRATIONS.— A supplement to the charter of a mutual insurance company authorized them to insure for cash premiums which were to be paid into the common treasury. Afterwards one became a member on the mutual plan. *Held*, that he was liable for assessments for losses for insurances on the cash plan: *In re Hummel*, 78 Pa. St. 320. By the by-laws of the company, if the risk was increased, and no notice given them, the policy became void. The risk was increased, no notice given, and an assessment was laid and paid on the policy. *Held*, that the policy, being void, was not revived by such assessment: *Gardiner* v. *Ins. Co.*, 38 Me. 439. An assessment was made on a policy of insurance on property which had been overinsured, but the agent was instructed not to collect it. He forgot his instructions until after he made demand, but did not collect it. *Held*, that this did not estop the company from setting up the forfeiture: *Elliott* v. *Lycoming County etc. Ins. Co.*, 66 Pa. St. 22. A policy was conditioned to be void if any assessment on the premium note should not be paid within thirty days. An assessment was made which was not paid within the

[1] Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547; 80 Am. Dec. 123; Ingrams *v.* Mut. Ass. Soc., 1 Rob. (Va.) 661.

[2] Lynn *v.* Burgoyne, 13 B. Mon. 400.

[3] Sands *v.* Hill, 42 Barb. 651; Insurance Co. *v.* Stockbower, 26 Pa. St. 199; Tuttle *v.* Robinson, 33 N. H. 104; Viall *v.* Genesee etc. Ins. Co., 19 Barb. 440; Farmers' etc. Ins. Co. *v.* Bowen, 40 Mich. 147; Frost *v.* Ins. Co., 5 Denio, 154; 49 Am. Dec. 234; Keenan *v.* Ins. Co., 13 Iowa, 375. *Contra*, Philbrook *v.* New England Mut. Ins. Co., 37 Me. 137; Masonic Mut. Ins. Co. *v.* Beck, 77 Ind. 203; 40 Am. Rep. 295.

[4] Allen *v.* Vermont Mut. Fire Ins. Co., 12 Vt. 366; Finley *v.* Lycoming County Mut. Ins. Co., 30 Pa. St. 311; 72 Am. Dec. 705; Smith *v.* Saratoga etc. Ins. Co., 3 Hill, 508; Lyons *v.* Globe etc. Ins. Co., 28 U. C. C. P. 62.

[5] Tuckerman *v.* Bigler, 46 Barb. 375; Smith *v.* Saratoga County Mut. Ins. Co., 3 Hill, 500; Wilson *v.* Trumbull County Mut. Fire Ins. Co., 19 Pa. St. 372.

thirty days, and afterwards a further assessment was made which was also unpaid. An action was brought for both assessments. *Held*, that the failure to pay the first assessment within the thirty days did not *ipso facto* render the policy void, but that the company could waive the condition, and could, therefore, lawfully impose the second assessment: *Columbia Ins. Co.* v. *Buckley*, 83 Pa. St. 293; 24 Am. Rep. 172.

§ 2150. Power of Company to Make Assessments — Mode.—The officers of the company have power to make an assessment only where it is necessary for the purpose of meeting losses and expenses. This must affirmatively appear before its payment can be enforced.[1] The society in making assessments upon its members does not act in a judicial, but in a ministerial, capacity, and no presumption can arise in favor of the regularity or legality of its assessments,[2] and the charter authority must be strictly followed.[3] Where the charter required the separation of property insured into classes, each class to be liable only for losses occurring within that class, it was held that an assessment which ignored this requirement, and was imposed generally, was invalid, and that by virtue of such assessment an action upon a premium note could not be maintained.[4] Mutual insurance companies on the assessment plan have no authority to provide for the payment

[1] Pacific Mutual Ins. Co. *v.* Guse, 49 Mo. 329; 8 Am. Rep. 132; Long Pond Ins. Co. *v.* Houghton, 6 Gray, 77; Commonwealth *v.* Dorchester Mutual Fire Ins. Co., 112 Mass. 142; Nashua Fire Ins. Co. *v.* Moore, 55 N. H. 48; Atlantic Ins. Co. *v.* Fitzpatrick, 2 Gray, 279; Thomas *v.* Whallon, 31 Barb. 172; In re Bangs 15 Barb. 264; American Ins. Co. *v.* Schmidt, 19 Iowa, 502; Savage *v.* Medbury, 19 N. Y. 32; Bangs *v.* Duckinfield, 18 N. Y. 592; Stow *v.* Wadley, 8 Johns. 124; Bangs *v.* Gray, 11 N. Y. 477; Herkimer County Mutual Ins. Co. *v.* Fuller, 14 Barb. 373; Devendorf *v.* Beardsley, 23 Barb. 656; Appleton Mutual Fire Ins. Co. *v.* Jesser, 5 Allen, 446; Ohio Mutual Ins. Co. *v.* Marietta Woollen Co., 3 Ohio St. 348; Atlantic Mutual Fire Ins. Co. *v.* Young, 38 N. H. 451; 75 Am. Dec. 200; Jackson *v.* Roberts, 31 N. Y. 304; Embree *v.* Shideler, 36 Ind. 423; Ins. Co. *v.* Jarvis, 22 Conn. 133; Manlove *v.* Bender, 39 Ind. 371; 13 Am. Rep. 280. An assessment made by a minority of the directors of a mutual insurance company to meet the losses and expenses for a certain term is illegal: Monmouth etc. Ins. Co. *v.* Lowell, 59 Me. 564.

[2] American Mutual Aid Society *v.* Helburn, 85 Ky. 1; 7 Am. St. Rep. 571.

[3] Slater etc. Ins. Co. *v.* Barstow, 8 R. I. 343; Monmouth Ins. Co. *v.* Lovell, 59 Me. 564; Farmers' Ins. Co. *v.* Chase, 56 N. H. 341; National Mutual Ins. Co. *v.* Yeomans, 8 R. I. 171; Bersch *v.* Ins. Co., 28 Ind. 64.

[4] Atlantic Mutual Fire Ins. Co. *v.* Moody, 74 Me. 385.

of an agreed annual deposit during the life of a policy by which the holder shall be exempt from assessment for losses during the year of the payments as such annual deposit is in fact a premium for carrying the risk, and not a specific assessment authorized by the statute.[1] Where an insurance company provided for the payment of losses by an assessment on the then policy-holders, which they were at liberty to pay or not, it was held that the company could not collect such assessments by suit, and that the court had no authority to order a collection upon the bankruptcy of the company.[2] But slight errors will not be regarded.[3] A resolution levying a certain percentage on the premium notes of all the members of said company, but without specifying the names of all said members and the precise sum required to be paid by each, constitutes a good and valid assessment upon each and every one of them.[4] The intentional omission of members who are liable to any considerable amount will vitiate the whole assessment.[5] But the omission of a few adjusted and canceled policies, so small in amount as not materially to increase the assessment on the remainder, will not have this effect.[6] The insured must have notice of the assessment.[7] Where the charter provided that members should be notified of assessments by circular or verbally, and that if they did not pay within a fixed time they would forfeit protection through their policy, it was held that such personal liability could not attach from merely mailing the notice, if it was not actually received.[8] The officers of the company have power to waive provisions of the by-laws intended for the benefit of the com-

[1] State *v.* Fire Association, 42 Ohio St. 555.
[2] In re Protection Life Ins. Co., 9 Biss. 188.
[3] Marblehead Ins. Co. *v.* Underwood, 3 Gray, 210.
[4] Lycoming Fire Ins. Co. *v.* Rought, 97 Pa. St. 415.
[5] Marblehead Mut. Fire Ins. Co. *v.* Hayward, 3 Gray, 208; Herkimer County Mutual Ins. Co. *v.* Fuller, 14 Barb. 373; People's Eq. Mutual Ins. Co. *v.* Arthur, 7 Gray, 267.
[6] Fayette Mutual Fire Ins. Co. *v.* Fuller, 8 Allen, 27.
[7] Buckley *v.* Ins. Co., 83 Pa. St. 293.
[8] Castner *v.* Farmers' Mutual Fire Ins. Co., 50 Mich. 273.

pany.[1] Where a member of a fire insurance company is entitled, in case of loss, to have an assessment in his favor made on all other policy-holders, the directors cannot by a by-law to which he did not assent limit his right and cause the assessment to be made only on members of a certain class of policy-holders. And if the directors pay out money to which such member is entitled, he may hold them personally, although they acted in good faith.[2] But that a mutual life insurance company has realized the money with which to make payment of a member's claim makes it none the less the duty of the company to resist payment if the claim is illegal.[3]

§ 2151. **Relief, Benefit, and Benevolent Associations.** — Organizations known as relief, benefit, or benevolent associations, formed for the purpose of insuring the lives of their members for the benefit of their families, or of rendering assistance to them in case of sickness, are frequent in this country, under a variety of names. They are subject to many of the rules governing insurance in general.[4] Their certificates are in effect life insurance policies.[5] A mutual benefit association cannot insure a life in which the beneficiary has no interest.[6] The members are presumed to know and are bound by the provisions of the by-laws of the society.[7] False representations in the application are waived by the society collecting assessments after knowledge of them.[8] Where the rules of the order make the payment of assessments essential to the right of the beneficiary to share in the fund, there

[1] Union Mutual Ins. Co. *v.* Keyser, 32 N. H. 313; 64 Am. Dec. 375; Hale *v.* Ins. Co., 32 N. H. 295; 64 Am. Dec. 370.

[2] Stewart *v.* Lee Mutual Fire Ins. Ass'n, 64 Miss. 499.

[3] Mayer *v.* Equitable Reserve Fund Life Ass'n, 42 Hun, 237.

[4] May on Insurance, sec. 550 a. See *ante*, Division I., Voluntary Associations.

[5] Elkhart etc. Ass'n *v.* Houghton, 98 Ind. 149.

[6] Mutual Ben. Ins. Co. *v.* Hoyt, 46 Mich. 473.

[7] Red Men *v.* Schmidt, 57 Md. 98; Beneficial Soc. *v.* McVey, 92 Pa. St. 510; Robinson *v.* Yates City Lodge, 86 Ill. 598.

[8] Excelsior Mutual Association *v.* Riddle, 91 Ind. 84.

can be no recovery, where there has been a default.[1] Satisfactory proof is necessary of the default of the member, or of his loss of good standing, in order that the condition be enforced by the court.[2] The default of the member may be waived by the issuance of a certificate that he is in good standing, and the levying of later assessments upon him.[3] Also by the receipt of assessments from the member, with knowledge of the default;[4] or by payment to the subordinate lodge, where it is the agent for such purposes of the superior lodge;[5] or by the payment of it by the subordinate lodge for or in behalf of the member.[6] A member who has been suspended for failing to pay an assessment is not in "good standing" within the meaning of the by-laws or benefit certificate;[7] nor is one who is behind in his payment, though not formally suspended.[8]

[1] McMurry v. Knights of Honor, 20 Fed. Rep. 107.

[2] Mills v. Rebstock, 29 Minn. 380; Gellatly v. Mutual Ben. Soc., 27 Minn. 215.

[3] Roswell v. Equitable Aid Union, 13 Fed. Rep. 840; Aid Association v. Riddle, 91 Ind. 84.

[4] Masonic Mutual Life Co. v. Gibson, 52 Ga. 640; Erdmann v. Sons of Herman, 44 Wis. 376.

[5] Schunck v. Gegenseitiger Fond, 44 Wis. 369.

[6] Scheu v. Foresters, 17 Fed. Rep. 214.

[7] Karcher v. Knights of Honor, 137 Mass. 368.

[8] McMurray v. Knights of Honor, 20 Fed. Rep. 107.

CHAPTER CIII.

MARINE INSURANCE.

§ 2152. Marine insurance defined — The contract.
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§ 2154. Freight — Meaning of — Insurance of.
§ 2155. When risk on ship commences and ends.
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§ 2152. Marine Insurance Defined — The Contract. — Marine insurance is an insurance against risks connected with navigation to which a ship, cargo, freightage, profits, or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time.[1] A mistake in the name of a vessel in a policy does not prevent a recovery if both parties had in view the same vessel, and the underwriter, when the policy was issued, knew the true name, or intended to insure the particular vessel lost; but when there is a mistake as to the vessel sought to be insured, and the policy is upon another vessel than that for which application was made, no contract exists, as the minds of the parties do not meet.[2]

§ 2153. Insurable Interest — Who has. — The term "interest," as used in regard to the right to insure, does not imply any property in the subject of insurance.[3] Thus one may insure his equitable interest in property, the legal title to which is in another;[4] and the following, it has been held, are insurable interests, viz.: The interest of the owner of a chartered ship;[5] or the interest of a charterer of a ship;[6] or of the owner of a ship hypothecated by bot-

[1] Cal. Civ. Code, sec. 2655; N. Y. Civ. Code, sec. 1446.
[2] Hughes *v.* Mercantile Mutual Ins. Co., 55 N. Y. 265; 14 Am. Rep. 254.
[3] Buck *v.* Chesapeake Ins. Co., 1 Pet. 163.
[4] Oliver *v.* Greene, 3 Mass. 133; 3 Am. Dec. 96; Locke *v.* North American Ins. Co., 13 Mass. 61.
[5] Even where the charterer has covenanted to pay him its value in case of loss: Barber on Insurance, sec. 94.
[6] Bartlett *v.* Walter, 13 Mass. 267; 7 Am. Dec. 143.

tomry;[1] or of a lender on a bottomry bond;[2] or of the owner in the freight which would have been carried but for the loss;[3] or of a person who has made an oral contract to purchase a ship;[4] or of a commission merchant to whom a cargo is consigned for sale;[5] or of a lienor;[6] or in profits on goods shipped;[7] or of a mortgagor of a vessel;[8] or of a mortgagee;[9] or of a part owner;[10] or of the master;[11] or of one who has spent money on the ship for repairs;[12] or of an assignee of the commissions of a supercargo;[13] or of a vendee of a vessel who has made part payment;[14] or of a vendor who has contracted to sell a vessel for a fixed price, and to make title upon the payment of that sum.[15]

An insurance for whom it may concern is limited to those who have an insurable interest, who may be lawfully insured, and for whom it was intended, under their prior authorization or subsequent adoption.[16] Different

[1] Kenny *v.* Clarkson, 1 Johns. 385; 3 Am. Dec. 336. But his insurable interest is only the excess of the value of the ship over the amount secured by the bottomry bond: Barber on Insurance, sec. 95.

[2] Glover *v.* Black, 3 Burr. 1394; Mackenzie *v.* Whitworth, L. R. 10 Ex. 142; 1 Ex. Div. 36; Robertson *v.* United Ins. Co., 2 Johns. Cas. 250; 1 Am. Dec. 166; Jennings *v.* Ins. Co., 4 Binn. 244, 251; 5 Am. Dec. 404. And see Ins. Co. *v.* Gossler, 96 U. S. 645. But such interest must be specially mentioned in the policy: Id.; Kenny *v.* Clarkson, 1 Johns. 385; 3 Am. Dec. 336.

[3] Thompson *v.* Taylor, 6 Term Rep. 478; Adams *v.* Ins. Co., 22 Pick. 163; 1 Arnould on Insurance, 202. See Christ *v.* Barkee, 2 Johns. 346; 3 Am. Dec. 437.

[4] Arnswick *v.* Ins. Co., 129 Mass. 185.

[5] Putnam *v.* Ins. Co., 5 Met. 392; Holbrook *v.* Brown, 2 Mass. 280.

[6] Russell *v.* Ins. Co., 1 Wash. 409; Seamans *v.* Loring, 1 Mason, 127.

[7] Abbott *v.* Sebor, 3 Johns. Cas. 39; 2 Am. Dec. 139; Fosdick *v.* Ins. Co., 3 Day, 108; French *v.* Ins. Co., 16 Pick. 397; Locke *v.* Ins. Co., 13 Mass. 61.

[8] Strong *v.* Ins. Co., 10 Pick. 40; 20 Am. Dec. 507; Curry *v.* Ins. Co., 10 Pick. 535; Higginson *v.* Dall, 13 Mass. 96; Wilke *v.* Ins. Co., 19 N. Y. 184.

[9] Clark *v.* Ins. Co., 100 Mass. 509; 1 Am. Rep. 135.

[10] Bulkley *v.* Fishing Co., 1 Conn. 571; Oliver *v.* Greene, 3 Mass. 133; 3 Am. Dec. 97; Knight *v.* Ins. Co., 26 Ohio St. 778; 20 Am. Rep. 778. But a part owner insuring a vessel as owner cannot recover anything for the shares or interests of his co-owners: Finney *v.* Ins. Co., 1 Met. 16; 35 Am. Dec. 343.

[11] Buck *v.* Ins. Co., 1 Pet. 163; Holbrook *v.* Brown, 2 Mass. 280.

[12] Buchanan *v.* Ins. Co., 6 Cow. 319.

[13] Wells *v.* Ins. Co., 9 Serg. & R. 103. Or the supercargo himself: New York Ins. Co. *v.* Robinson, 1 Johns. 616.

[14] Rider *v.* Ins. Co., 20 Pick. 259; Kenny *v.* Clarkson, 1 Johns. 385.

[15] Stuart *v.* Columbian Ins. Co., 2 Cranch C. C. 442.

[16] Frierson *v.* Brenham, 5 La. Ann. 540; 53 Am. Dec. 603; Haynes *v.* Rowe, 40 Me. 181; Augusta Ins. etc. Co. *v.* Abbott, 12 Md. 348.

parties, having different interests in the same subject-matter, may severally procure insurance of their several interests.[1] But one whose interest was not intended to be insured cannot claim the benefit of an insurance effected by others, although, by the terms of the policy, his interest would seem to be covered.[2] Although a consignee has, under ordinary circumstances, no insurable interest in goods consigned to him for sale on commission beyond the probable amount of his commissions or profits, still, if he is instructed by his principals to insure for their benefit, he may protect himself against losses by insuring the whole property consigned.[3] So an insurance effected by one joint owner in his own name, on account of ——, inures to the benefit of his co-owner, where it appears that he had previously agreed to insure his co-owner's interest, and afterwards declared that he had done so.[4] Although a vessel may be liable to forfeiture for a cause not connected with the policy, she is nevertheless a subject of lawful insurance.[5]

§ 2154. **Freight—Meaning of—Insurance of.**—Freight, in a policy of marine insurance, means the benefit derived from the chartering of the ship, or the employment of it in carrying.[6] It may be insured[7] without reference to the profits.[8] The following may be insured under the designation of freight, viz.: The interest of the ship-owner, who also has cargo on board, in its safe arrival;[9] the interest of one not an owner of the vessel, e. g., a charterer;[10]

[1] Higginson *v.* Dall, 13 Mass. 96; Locke *v.* North American Ins. Co., 13 Mass. 61.

[2] Pacific Ins. Co. *v.* Catlett, 4 Wend. 75; 1 Wend. 561.

[3] Shaw *v.* Ætna Ins. Co., 49 Mo. 578; 8 Am. Rep. 150; Johnson *v.* Campbell, 120 Mass. 449; Home Ins. Co. *v.* Warehouse Co., 93 U. S. 327; Sturm *v.* Ins. Co., 63 N. Y. 77.

[4] Burrows *v.* Turner, 24 Wend. 276; 35 Am. Dec. 622.

[5] Polleys *v.* Ocean Ins. Co., 14 Me. 141.

[6] Kent's Com., sec. 219.

[7] McGaw *v.* Ins. Co., 23 Pick. 405.

[8] Lockwood *v.* Ins. Co., 47 Mo. 50.

[9] De Vaux *v.* J'Anson, 5 Bing. N. C. 519; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Flint *v.* Flemyng, 1 Barn. & Adol. 45.

[10] Oliver *v.* Greene, 3 Mass. 133; 3 Am. Dec. 96; Bartlett *v.* Walter, 13 Mass. 267; 7 Am. Dec. 143; Clark *v.* Ocean Ins. Co., 16 Pick. 289; Robinson *v.* Ins. Co., 1 Met. 146. *Contra*, Riley *v.* Delafield, 7 Johns. 522; Mellen *v.* Ins. Co., 1 Hall, 462.

passage-money.[1] Freight to accrue on the transportation of live-stock and cargo stored on deck cannot be insured as "freight" simply.[2] An insurable interest in freight exists as soon as the ship has broken ground on the chartered voyage;[3] and even earlier than this.[4] Where the goods are actually on board, it is clear that the ship-owner has an insurable interest in the freight which will be earned if the voyage is completed. And he has, also, where they are not actually on board, but there is a contract to deliver, and the ship is ready for the goods, and the goods are ready for the ship.[5] But it is not essential, if the cargo is ready for shipment, that it should be in close proximity to the vessel.[6] And where the policy expressly designates the time at which the insurance is to commence, this will control.[7]

[1] Denoon *v.* Ins. Co., L. R. 7 Com. P. 342. This is perhaps doubtful: See Barber on Insurance, sec. 96.

[2] Dodge *v.* Bartol, 5 Me. 286; 17 Am. Dec. 233; Wolcott *v.* Eagle Ins. Co., 4 Pick. 435; Toledo F. & M. Ins. Co. *v.* Speares, 16 Ind. 52; Adams *v.* Warren Ins. Co., 22 Pick. 163; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Smith *v.* Mississippi M. & F. Ins. Co., 11 La. 142; 30 Am. Dec. 714; Miller *v.* Titherington, 7 Hurl. & N. 954. But where, by special designation in the policy, or by a general usage regulating the transportation of cargo, the insurer is apprised of the nature of the risk, the policy will be enforced: Northwestern Ins. Co. *v.* Ætna Ins. Co., 26 Wis. 78; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Merchants' Ins. Co. *v.* Shillito, 15 Ohio St. 559; 86 Am. Dec. 491; Milward *v.* Hibbert, 3 Ad. & E., N. S., 120; Allegre *v.* Ins. Co., 2 Gill & J. 136; 20 Am. Dec. 424; Chesapeake Ins. Co. *v.* Allegre, 2 Gill & J. 164.

[3] Thompson *v.* Taylor, 6 Term R. 478; Williamson *v.* Innes, 8 Bing. 81; Atty *v.* Lindo, 1 Bos. & P. N. R. 236; Ellis *v.* Lafone, 8 Ex. 546; Horncastle *v.* Stuart, 7 East, 400; Davidson *v.* Willasey, 1 Maule & S. 313; Truscott *v.* Christie, 2 Ball & B. 320.

[4] Phillips on Insurance, sec. 335; Robinson *v.* Ins. Co., 1 Met. 146; Hart *v.* Ins. Co., 2 Wash. C. C. 346.

[5] Williamson *v.* Innes, 1 Moody & R. 8 Bing. 81, note; De Longuemere *v.* Ins. Co., 10 Johns. 202; Hodgson *v.* Ins. Co., 2 La. 341; Forbes *v.* Aspinall, 13 East, 323.

[6] "All that it seems necessary to determine with regard to the cargo is that it must have become the property of the parties insured, by a contract made with a view of its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board when the ship arrives at the place of deposit": De Vaux *v.* J'Anson, 5 Bing. N. C. 539; Montgomery *v.* Egginton, 3 Term R. 362; Thompson *v.* Taylor, 6 Term R. 478; Truscott *v.* Christie, 2 Brod. & B. 320; Parke *v.* Hebson, 2 Brod. & B. 329; Warre *v.* Millar, 4 Barn. & C. 538; Flint *v.* Flemyng, 1 Barn. & Adol. 45; Foley *v.* United F. & M. I. Co., L. R. 5 Com. P. 155.

[7] Jones *v.* Neptune M. I. Co., L. R. 7 Q. B. 702; Beckett *v.* West of England M. I. Co., 25 L. T., N. S., 379; Joyce *v.* Realm Ins. Co., L. R. 7 Q. B. 580; Jones *v.* Imperial Ins. Co., L. R. 7 Q. B. 702; Gordon *v.* Am. Ins. Co. of New York, 4 Denio, 362.

§ 2155. When Risk on Ship Commences and Ends. — A risk on a ship, or on goods therein, commences only at the very port or place named in the policy as that from which the ship is to sail or where the goods are to be loaded, and ends only when the ship has reached the port to which it is insured. An insurance on a ship from a port takes effect only after the ship has broken ground on her outward voyage.[1] If a ship, expected to arrive at a foreign port, be insured simply "at and from" that port, the policy will attach as soon as the vessel is within the port in such a condition of repair or seaworthiness as to be there in safety. If, after entering port in this condition, she sustains damage from a peril insured against, the insurer will be held liable.[2] A policy "at and from" a certain port is not by reason of such description avoided by the cargo having been laden at a previous port.[3] A policy at and from a home port in which the vessel is then lying protects the vessel during her stay in port, provided she does not remain there so long as materially to change the risk assumed by the insurer.[4] A policy simply to a designated port continues until she is anchored there at the usual place for the discharge of her cargo.[5] If a general usage can be shown that the ship is to sail, or the goods be taken, or the ship land, or the goods be discharged at another place than that named in the policy, the underwriter or the insurer will be bound by such a usage, and will not be allowed to dispute his

[1] Molloy, 255; Bond *v.* Nutt, Cowp. 607; Pettegrew *v.* Pringle, 3 Barn. & Adol. 514; Mey *v.* South Carolina Ins. Co., 3 Brev. 329; Union Ins. Co. *v.* Tysen, 3 Hill, 118; Bowen *v.* Hope Ins. Co., 20 Pick. 275; 32 Am. Dec. 213; 3 Kent's Com. *307.

[2] Motteux *v.* London Ass. Co., 1 Atk. 548; Parmeter *v.* Cousins, 2 Camp. 235, 237; Bell *v.* Bell, 2 Camp. 475; Haughton *v.* Empire Marine Ins. Co., L. R. 1 Ex. 206; Taylor *v.* Lowell, 3 Mass. 331; 3 Am. Dec. 141; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Garrigues *v.* Cox, 1 Binn. 592; 2 Am. Dec. 493.

[3] Silloway *v.* Ins. Co., 12 Gray, 73.

[4] Maclachan's Arnould on Insurance, 378; 3 Kent's Com. *307; Palmer *v.* Marshall, 8 Bing. 79; Palmer *v.* Fleming, 9 Bing. 460; Patrick *v.* Ludlow, 3 Johns. Cas. 14; 2 Am. Dec. 130; Smith *v.* Surridge, 4 Esp. 25; McLanahan *v.* Ins. Co., 1 Pet. 184.

[5] Stone *v.* Ins. Co., L. R. 1 Ex. Div. 81; Bill *v.* Mason, 6 Mass. 313; Garrigues *v.* Coxe, 1 Binn. 592; 2 Am. Dec. 493.

liability or set up a right on the ground of the conditions in the policy.[1]

§ 2156. **When Risk on Goods Commences and Ends.** —The risk on goods usually begins from the time of their being loaded on board the ship, unless it expressly insures them earlier.[2] Where the goods are insured at and from a certain port from their loading on the ship, they are not covered if taken on board at another port,[3] unless the policy is on a trading voyage, when it will cover all goods shipped at any port within the scope of the policy.[4] The policy covers the goods until "safely landed"; that is, until they are landed in safety at the port of discharge according to the custom of the port.[5] If the consignee takes charge of the goods himself before they are safely landed, as by receiving them in his own lighters, the insurer is discharged.[6] Goods necessarily transshipped, owing to a peril insured against, continue under the protection of the policy until safely landed at

[1] Kingston *v.* Knibbs, 1 Camp. 508; Miscor *v.* Atkin, 3 Camp. 200; Gracie *v.* Ins. Co., 8 Cranch, 75; Brown *v.* Carstairs, 3 Camp. 160.

[2] Barber on Insurance, 98; Patrick *v.* Ludlow, 3 Johns. Cas. 10; 2 Am. Dec. 130.

[3] Langhorn *v.* Hardy, 4 Taunt. 628; Horneyer *v.* Lushington, 15 East, 46; Spitta *v.* Woodman, 2 Taunt. 416; Mellish *v.* Allnutt, 2 Maule & S. 106; Rickman *v.* Carstairs, 2 Nev. & M. 571; Constable *v.* Noble, 2 Taunt. 403; Payne *v.* Hutchinson, 2 Taunt. 405; Graves *v.* Marine Ins. Co., 2 Caines, 339; Scriba *v.* Ins. Co., 2 Wash. C. C. 107; Richards *v.* Marine Ins. Co., 3 Johns. 307; Vredenburg *v.* Gracie, 4 Johns. 444; Murray *v.* Columbian Ins. Co., 11 Johns. 302. The strictness of this rule is relaxed in some cases, where it does not appear that the port of loading was regarded as a warranty: Carr *v.* Montefiore, 5 Best & S. 408, 430; Bell *v.* Hobson, 16 East, 240, 248; Gladstone *v.* Clay, 1 Maule & S. 418; Monnen *v.* Kittlewell, 16 East, 176. See also Manly *v.* United Fire and Marine Ins. Co., 9 Mass. 85; Martin *v.* Fishing Ins. Co., 20 Pick. 389; 32 Am. Dec. 220; Behn *v.* Burness, 3 Best & S. 751.

[4] Barber on Insurance, 98.

[5] 3 Kent's Com. 309; Mansur *v.* Ins. Co., 12 Gray, 528; Gardiner *v.* Smith, 1 Johns. Cas. 141; Phillips on Insurance, sec. 972; Mobile Marine Dock and Marine Ins. Co. *v.* McMullan, 27 Ala. 78; Gracie *v.* Maryland Ins. Co., 8 Cranch, 84; Osacar *v.* Louisiana State Ins. Co., 5 Mart., N. S. (La.), 386; Fletcher *v.* St. Louis Marine Ins. Co., 18 Mo. 193; Chickering *v.* Fowler, 4 Pick. 371; 2 Arnould on Insurance, sec. 289; Hyde *v.* Trent and Mersey Navigation Co., 5 Term Rep. 397; Norway Plains Co. *v.* R. R. Co., 1 Gray, 271; 61 Am. Dec. 423.

[6] Strong *v.* Nattally, 4 Bos. & P. 16; Low *v.* Davy, 5 Binn. 595; Bold *v.* Rotherham, 8 Q. B. 797; Sparrow *v.* Carruthers, 2 Strange, 1236.

the port of destination.[1] A policy to attach on goods shipped between the first and fifteenth of July will not cover goods shipped on either of such days.[2]

§ 2157. Marine Insurance Covers only Sea Perils.—The insurer undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed.[3] Perils of the sea has a wider meaning in a marine policy than in a bill of lading,[4] the insurer being liable where the loss is proximately caused by a marine disaster, although such disaster may have been indirectly occasioned by the negligence of the carrier or his servants.[5] Where the loss is from a sea peril, the fact that it happened through the neglect of the captain and crew is no defense to an action on the policy.[6] So the non-compliance with a statute prohibiting, under a pecuniary penalty, the carrying of certain material without special license cannot affect the insurance on vessel or cargo.[7]

§ 2158. What Property not Covered by Policy.—There are some parts and stores of a ship for which, convention-

[1] Plantamour *v.* Staples, 1 Term Rep. 611; Bold *v.* Rotherham, 8 Q. R. 797; De Cuadra *v.* Swann, 16 Com. B., N. S., 722. See Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543, 555; Columbian Ins. Co. *v.* Pierce, 14 Allen, 320.

[2] Atkins *v.* Ins. Co., 5 Met. 439; 39 Am. Dec. 692.

[3] 3 Kent's Com. 300; Dupeyre *v.* Ins. Co., 2 Rob. (La.) 457; 38 Am. Dec. 218; Potter *v.* Ins. Co., 2 Sum. 197; Coles *v.* Ins. Co., 3 Wash. 159; Greenwich Ins. Co. *v.* Raab, 11 Ill. App. 636. In an ordinary marine policy, the insurance against fire does not cover the case of spontaneous combustion caused by the inherent infirmity of the goods insured: Providence Washington Ins. Co. *v.* Adler, 65 Md. 162; 57 Am. Rep. 314.

[4] See Title Bailments—Common Carriers.

[5] Barber on Insurance, sec. 93; citing Johnson *v.* Friar, 4 Yerg. 48; 26 Am. Dec. 215; Grill *v.* General Iron Screw Co., L. R. 1 Com. P. 611, 612; Williams *v.* Branson, 1 Murph. 417; 4 Am. Dec. 562; Bell *v.* Reed, 4 Binn. 127; 5 Am. Dec. 398; Hall *v.* R. R. Co., 13 Wall. 367; The Planter, 2 Wood, 490; The Ocean Wave, 5 Biss. 378; Newcomb *v.* Cincinnati Ins. Co., 22 Ohio St. 382; 10 Am. Rep. 746; Merchants' etc. Ins. Co. *v.* Butler, 20 Md. 41; Williams *v.* Ins. Co., 3 Sum. 270; Phœnix Ins. Co. *v.* Cochran, 51 Pa. St. 143.

[6] Am. Ins. Co. *v.* Insley, 7 Pa. St. 223; 47 Am. Dec. 509; Parkhurst *v.* Ins. Co., 100 Mass. 305; 97 Am. Dec. 100; Enterprise Ins. Co. *v.* Parisot, 35 Ohio St. 35; 35 Am. Rep. 589. But see Cudworth *v.* Ins. Co., 4 Rich. 416; 55 Am. Dec. 692.

[7] Sherlock *v.* Globe Ins. Co., 1 Cin. Rep. 193.

ally, the English underwriters hold themselves not liable, either because they are in a notoriously insecure position, although the customary one, or because the loss of them comes under the denomination of "wear and tear"; as the stern-boat hanging in davits, or casks on deck, or warps and ropes coiled on deck.[1] So losses resulting from necessary consumption of the cargo by passengers, or from the sale of cargo to procure necessary supplies and repairs, the negligence of the ship-owner having occasioned such consumption and sale;[2] or the loss of passage-money by an unjust claim prosecuted by passengers at a port into which the ship is forced to repair, and followed by a decree, though justified by the evidence, yet inconsistent with the true rights of the parties litigant;[3] or a loss by embezzlement of the crew;[4] or arising from a breach of promise by a third party.[5] But "property on board" covers bank bills on board for the purposes of the business of the vessel;[6] and it covers also the insured's commission.[7] Goods on deck are not included in a policy covering "the goods and cargo, unless specifically mentioned.[8] But household furniture may sometimes be considered as cargo.[9]

§ 2159. **Insurance against Capture.** — An insurance against capture in general terms includes every species of capture, whether lawful or unlawful, and whether by friends or enemies.[10]

§ 2160. **Barratry.** — Barratry of the master and crew of a steamboat is not covered by a policy, unless specially

[1] Hopkins on Average, 151. But see Hall *v.* Ocean Ins. Co., 21 Pick. 483.
[2] Moses *v.* Sun Ins. Co., 1 Duer, 159.
[3] Marks *v.* Nashville Co., 6 La. Ann. 127.
[4] Hicks *v.* Fitzsimmons, 1 Wash. 279.
[5] Parsons *v.* Mass. Ins. Co., 6 Mass. 197; 4 Am. Dec. 115.
[6] Whiton *v.* Ins. Co., 2 Met. 1.
[7] Holbrook *v.* Brown, 2 Mass. 280.
[8] Lenox *v.* United Ins. Co., 3 Johns. Cas. 178.
[9] Vasse *v.* Ball, 2 Dall. 270.
[10] 3 Kent's Com. *304, *305; Mauran *v.* Ins. Co., 6 Wall. 1; Dole *v.* N. E. Ins. Co., 2 Cliff. 394; Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 170; 93 Am. Dec. 560; Olivera *v.* Union Ins. Co., 3 Wheat. 183; Wilson *v.* United Ins. Co., 14 Johns. 227.

named.[1] But it is held that a policy on a sea-going vessel against the usual marine risks insures against barratry of the master, in the absence of any stipulation to the contrary.[2] Any trick, cheat, or fraud, or any crime or willful breach of law committed by the master to the prejudice of the owners, is barratry.[3] So is a resistance by the master and seamen of a neutral vessel to the search of a belligerent.[4] So is larceny or embezzlement committed by the master or crew.[5] But to constitute barratry on the part of the master of a ship, the act must be either fraudulent or criminal.[6]

§ 2161. Construction of Policy—Meaning of Words.—A policy against all marine risks is as binding and effectual as if the risks are specified in detail.[7] A policy against "all risks" covers everything that may happen except by the fraudulent act of the insured.[8] An exemption from breaking of the machinery, unless occasioned by stranding, will render insurers liable, where the vessel is injured, first by perils of the sea, and afterwards by stranding, for so much of the injury only as the assured proves to have been occasioned by the stranding.[9] On a policy insuring horses on a voyage, including the risk of death, the insured is entitled to recover the value of a horse that was injured, so that he died three days after landing.[10] An insurance against fire does not cover a loss by the spontaneous combustion of the goods.[11] An ex-

[1] Gazzam *v.* Ohio Ins. Co., Wright, 202; Howell *v.* Cincinnati Ins. Co., 7 Ohio, 276; Fulton *v.* Lancaster Ins. Co., 7 Ohio, pt. 2, 5.

[2] Parkhurst *v.* Gloucester etc. Ins. Co., 100 Mass. 301; 1 Am. Rep. 105.

[3] Wilcocks *v.* Ins. Co., 2 Binn. 574; 4 Am. Dec. 480.

[4] Brown *v.* Ins. Co., 5 Day, 1; 5 Am. Dec. 123.

[5] Am. Ins. Co. *v.* Bryan, 26 Wend. 563; 37 Am. Dec. 278.

[6] Wiggin *v.* Amory, 14 Mass. 1; 7 Am. Dec. 175.

[7] Parkhurst *v.* Gloucester Mutual Fishing Ins. Co., 100 Mass. 301; 1 Am. Rep. 105.

[8] Goix *v.* Knox, 1 Johns. Cas. 337.

[9] Heebner *v.* Ins. Co., 10 Gray, 131; 69 Am. Dec. 309.

[10] Coit *v.* Smith, 3 Johns. Cas. 16.

[11] Prov. Washington Ins. Co. *v.* Adler, 65 Md. 162; 57 Am. Rep. 314. A vessel was insured against fire. A seaman carelessly put up a lighted candle in the binnacle, which took fire, and communicating to some powder, the vessel was blown up, and lost. Held, that the insurers were not liable: Grim *v.* Ins. Co., 13 Johns. 451.

emption from liability for damages occasioned by ice is not limited to the season of navigation.[1] But an exemption upon the cargo of ice, that the company "shall not be liable for ice melting in consequence of putting into port," does not include a loss occasioned by the melting of ice from other causes, such as the leaking of the vessel, and the necessary unlading of the ice to examine and repair the vessel in a tropical port, where the vessel is by reason of distress.[2] The phrase "lost or not lost" makes insurer responsible for any loss which may have already happened when the policy was made.[3] An insurance of goods as "shipped on board of the G. steamship company" is satisfied in terms by shipment on a vessel chartered by the company, and placed on its line, though not owned by it.[4] Insurance against loss by "thieves" covers a loss by simple larceny, as well as a loss by "assailing thieves."[5] But the wrongful seizure and sale of a cargo by a consul of the United States is not a loss by the acts of pirates and assailing thieves.[6]

§ 2162. **Contract of Marine Insurance Construed by Usage.**—In the law of marine insurance, every usage of a particular trade which is so well settled or so generally known that all persons engaged in it may be fairly considered as contracting with reference to it, is considered to form part of every policy designed to protect risks in such trade, unless the express terms or the policy decisively repel the inference.[7]

§ 2163. **Meaning of Words in Policy Explained by Usage.**—Where the sense of the words and expressions

[1] Allison *v.* Corn Exchange Ins. Co., 57 N. Y. 87.
[2] Tudor *v.* New England etc. Ins. Co., 12 Cush. 554.
[3] Arkansas Ins. Co. *v.* Bostick, 27 Ark. 539.
[4] Croswell *v.* Mercantile Mutual Ins. Co., 19 Fed. Rep. 24.
[5] American Ins. Co. *v.* Bryan, 26 Wend. 563; 37 Am. Dec. 278. *Contra*, Marshall *v.* Ins. Co., 1 Humph. 99.
[6] Paddock *v.* Ins. Co., 2 Allen, 93.
[7] Lawson on Usages and Customs, secs. 110 et seq; Norris *v.* Ins. Co., 3 Yeates, 84; 2 Am. Dec. 360; Allegre *v.* Ins. Co., 6 Har. & J. 408; 14 Am. Dec. 289; Grant *v.* Lexington Ins. Co., 5 Ind. 23; 61 Am. Dec. 75.

used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in a given case.[1]

§ 2164. **Concealment — Effect of.** — As in other kinds of insurance, a failure of the insured to communicate all the information which he possesses material to the risk is a concealment, and will avoid the policy.[2] And in marine insurance such a concealment will avoid the policy, even though no fraud was intended, and the failure to communicate was the result of accident, mistake, or inadvertence.[3] If the party, after he has applied for a marine insurance, and before the contract is executed, receives intelligence of a loss, or of a fact enhancing the risk, he must communicate it with due diligence to the insurer.[4] But he is not bound to use extraordinary or unusual efforts to convey the information.[5] An omission on the part of an agent for effecting insurance to disclose any material information in his possession, or which the principal could have disclosed had he personally effected the policy, will be a fatal concealment.[6]

If an agent, in ignorance of a loss known to its principal,

[1] Lawson on Usages and Customs, secs. 201 et seq.

[2] Carter v. Boehm, 3 Burr. 1905; Murgatroyd v. Crawford, 3 Dall. 491; McLanahan v. Ins. Co., 1 Pet. 185; Livingston v. Delafield, 1 Johns. 522; Vale v. Ins. Co., 1 Wash. 283; Livingston v. Ins. Co., 6 Cranch, 274; Biays v. Union Ins. Co., 1 Wash. 506; Oliver v. Greene, 3 Mass. 133; 3 Am. Dec. 96; Stocker v. Ins. Co., 6 Mass. 220; Fiske v. Ins. Co., 15 Pick. 310; Burritt v. Saratoga Ins. Co., 5 Hill, 189; 40 Am. Dec. 345; Howell v. Cincinnati Ins. Co., 7 Ohio, 276; Ingraham v. S. C. Ins. Co., 2 Tread. Const. 707; Price v. De Peau, 1 Brev. 452; 2 Am. Dec. 680.

[3] Burritt v. Ins. Co., 5 Hill, 191; 40 Am. Dec. 345; Carter v. Boehm, 3 Burr. 1906; Oliver v. Greene, 3 Mass. 133; 3 Am. Dec. 96; Stocker v. Ins. Co., 6 Mass. 220; Walden v Ins. Co., 12 La. 134; 32 Am. Dec. 116; Biays v. Ins. Co., 1 Wash. C. C. 506; Union Ins. Co. v. Stoney, Harp. 235.

[4] 1 Phillip on Insurance, sec. 561. General intelligence contained in a public gazette, and bearing upon the subject-matter of insurance, must be disclosed to the insurers, although they are subscribers to the paper; Dickenson v. Commercial Ins. Co., Anth. 92.

[5] Snow v. Mercantile Ins. Co., 61 N. Y. 160.

[6] Fitzherbert v. Mather, 1 Term Rep. 12; Ruggles v. Gen. Int. Ins. Co., 4 Mason, 74; 12 Wheat. 409; Proudfoot v. Montefiore, L. R. 2 Q. B. 511. But see Snow v. Ins. Co., 61 N. Y. 160.

effect insurance for his principal, the policy will not be void by reason of concealment, if the principal, by using due diligence, could not have apprised his agent of the loss in season to countermand the policy.[1]

§ 2165. What Insured Bound and What not Bound to Disclose.—It has been held that the insured was bound to communicate to the insurer that, a few hours after the sailing of the vessel, a violent storm had occurred at her port of departure;[2] that she has been so long on the voyage as to raise a presumption of an accident or casualty;[3] that the vessel at the time was actually lost;[4] that the owner is a subject of a country at war with another;[5] that the vessel carries belligerent goods, or goods contraband of war;[6] that the cargo or ship is overvalued;[7] that the ship carried a deck cargo.[8]

But in the absence of inquiry the insured is not bound to communicate to the insurer the date of the vessel's sailing; or that he is a charterer, and not the owner, of

[1] Green *v.* Ins. Co., 10 Pick. 402; McLanahan *v.* Ins. Co., 1 Pet. 186; Snow *v.* Ins. Co., 61 N. Y. 160.

[2] Ely *v.* Hallett, 2 Caines, 57; Moses *v.* Delaware Ins. Co., 1 Wash. C. C. 387.

[3] 2 Duer on Insurance, 468; Westbury *v.* Aberdein, 2 Mees. & W. 267; Elkin *v.* Jansen, 13 Mees. & W. 655; Rickards *v.* Murdock, 10 Barn. & C. 527; Graham *v.* Ins. Co., 6 La. Ann. 432.

[4] Ins. Co. *v.* Lyman, 15 Wall. 664.

[5] This is the English rule: Barber on Insurance, 101. And see Union Ins. Co. *v.* Stoney, Harp. 235. But Duer on Insurance, 570, says: "In the United States, the law may be considered as now settled, that where the insurance is made 'for whom it may concern,' or by other words as extensive in their meaning, the fact that a belligerent subject is the owner, in whole or in part, of the property insured, is not necessary to be communicated, unless in reply to the inquiries of the insurer. The general words are construed to embrace the belligerent risk": Elting *v.* Scott, 2 Johns. 157; Hodgson *v.* Marine Ins. Co., 5 Cranch, 100; Buck *v.* Chesapeake Ins. Co., 1 Pet. 151; Maryland and Phœnix Ins. Co. *v.* Bathurst, 5 Gill & J. 159; Seamans *v.* Loring, 1 Mason, 128.

[6] Barber on Insurance, 101.

[7] Ionides *v.* Pender, L. R. 9 Q. B. 531; Clarkson *v.* Young, 22 L. T., N. S., 41. So an assured demanding insurance on live-stock must notify the assurer of the nature of the cargo: Allegre *v.* Ins. Co., 8 Gill & J. 190; 29 Am. Dec. 537.

[8] Allegre *v.* Ins. Co., 2 Gill & J. 136; 20 Am. Dec. 424; McLanahan *v.* Ins. Co., 1 Pet. 188; Barber on Insurance, 101, the author saying: "Concealment of the date of sailing was held to vitiate the policy in the following cases: Livingston *v.* Delafield, 3 Caines 49; Fiske *v.* N. E. Ins. Co., 15 Pick. 310; Himely *v.* South Carolina Ins. Co., 1 Mill Const. 153; 12 Am. Dec. 623; Stewart *v.* Morrison, Fac. Col. 102; Key *v.* Young, Fac. Col. 196; Allen *v.* Young, Fac. Col. 248;

the vessel;[1] or that the insurance is a reinsurance;[2] or what his title is;[3] or the nature of the cargo generally;[4] or how long the vessel has lain in port before obtaining the policy;[5] or the amount of his interest in the policy;[6] or that a ship upon which a policy of insurance is effected is in command of a master who sails her at halves, manning and victualing her and paying her port charges;[7] nor a fact not material to the risk;[8] nor any facts as to which there is a warranty, express or implied.[9]

§ 2166. **Representations — Warranties.** — A representation by the insured intentionally false in any respect avoids the policy at the election of the insurer, whether material or not.[10] Substantial compliance with the terms of a representation is sufficient.[11] A representation as to the destination of a ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed.[12] The falsity of a representation of opinion does not, in the absence of fraud, avoid the contract;[13] as a statement that "said vessel will sail from A in the course of this month";[14] or a statement that the vessel would obtain a cargo of a certain value;[15]

Gillespie *v.* Douglas, Fac. Dec. 251." The non-disclosure of the time of sailing will not vitiate the policy if its disclosure would have had no tendency to show that the vessel was overdue or missing: Foley *v.* Moline, 5 Taunt. 430; Littledale *v.* Dixon, 4 Bos. & P. 151; Elton *v.* Larkins, 5 Car. & P. 86.

[1] Bartlett *v.* Walter, 13 Mass. 267; 7 Am. Dec. 143.

[2] Mackenzie *v.* Whitworth, 23 Week. Rep. 323; 24 Week. Rep. 287.

[3] Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Locke *v.* N. American Ins. Co., 13 Mass. 61; Bartlett *v.* Walter, 13 Mass. 267; 7 Am. Dec. 143; Curry *v.* Commonwealth Ins. Co., 10 Pick. 535; 20 Am. Dec. 547.

[4] Duplanty *v.* Commercial Ins. Co., Anth. 114.

[5] Kemble *v.* Bowne, 1 Caines, 75.

[6] Lawrence *v.* Van Horne, 1 Caines, 276.

[7] Russ *v.* Ins. Co., 52 Me. 187.

[8] Fiske *v.* Ins. Co., 15 Pick. 310; Littledale *v.* Dixon, 4 Bos. & P. 151; Elton *v.* Larkin, 5 Car. & P. 86; Marsh *v.* Muir, 1 Brev. 134; 2 Am. Dec. 648. But if it is material, it is not excuse that it was not true: Lynch *v.* Dunsford, 14 East, 494.

[9] N. Y. Firemen's Ins. Co. *v.* DeWolf, 2 Cow. 56.

[10] 3 Kent's Com. 283; 2 Duer on Insurance, 692. But see Clason *v.* Smith, 3 Wash. 156.

[11] Pawson *v.* Watson, Cowp. 785.

[12] Hubbard *v.* Coolidge, 2 Gall. 353.

[13] Cal. Civ. Code, sec. 2677; Barber on Insurance, sec. 106; Bryant *v.* Ocean Ins. Co., 22 Pick. 200.

[14] Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136; 20 Am. Dec. 424; Rice *v.* Ins. Co., 4 Pick. 439; Currell *v.* Ins. Co., 9 La. 163; 29 Am. Dec. 439.

[15] Fosdick *v.* Ins. Co., 3 Day, 108.

or a statement, "We have no doubt that we could get the insurance effected in New York at that premium."[1] A warranty must be carried out in its exact terms, though it will not be extended to include things not actually included.[2]

§ 2167. **Representation may be Implied.** — It is not necessary that a representation should be made in express terms. It may be implied from the language of the policy, or from that of another representation actually made.[3]

§ 2168. **Warranty of Seaworthiness.** — In every marine insurance upon a ship, or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy,[4] and the insurer is not liable if the vessel is not so.[5] A vessel is said to be seaworthy when she is reasonably fit to perform the services, and to encounter the ordinary perils of the voyage contemplated by the parties to the policy.[6] The warranty of seaworthiness extends not only to the ship itself, but to its lading, its proper officers, and seamen, its appurtenances, ballast, cables, anchors, sails and cordage, food and water, fuel, lights, and all proper stores and equip-

[1] Clason *v.* Smith, 3 Wash. C. C. 157.

[2] Hyde *v.* Bruce, 3 Doug. 213; Duncan *v.* Ins. Co., 6 Wend. 488; 22 Am. Dec. 539; Canere *v.* Ins. Co., 3 Har. & J. 324; Bayard *v.* Ins. Co., 4 Mass. 256.

[3] Barber on Insurance, sec. 106.

[4] Cal. Civ. Code, sec. 2681; N. Y. Civ. Code, sec. 1460; Warren *v.* United Ins. Co., 2 Johns. Cas. 232; 1 Am. Dec. 165; Barnewall *v.* Church, 1 Caines, 217; 2 Am. Dec. 180; Flemming *v.* Ins. Co., 4 Whart. 59; 33 Am. Dec. 33; Draper *v.* Ins. Co., 21 N. Y. 378; Van Wickle *v.* Ins. Co., 97 N. Y. 350; Field *v.* Ins. Co., 3 Md. 244; Taylor *v.* Lowell, 3 Mass. 331; 3 Am. Dec. 141; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Starbuck *v.* New England Ins. Co., 19 Pick. 198; Talcot *v.* Commercial Ins. Co., 2 Johns. 124; 3 Am. Dec. 406; Talcot *v.* Marine Ins. Co., 2 Johns. 130; American Ins. Co. *v.* Ogden, 15 Wend. 532; Hudson *v.* Williamson, 3 Brev. 342; Ingraham *v.* S. C. Ins. Co., 2 Tread. Const. 707; Lapene *v.* Ins. Co., 8 La. Ann. 1; 58 Am. Dec. 668.

[5] Cases in last note. But an insurer cannot show that the ship had received part of the injury before the voyage, unless she was in fact unseaworthy: Depau *v.* Ins. Co., 5 Cow. 63; 15 Am. Dec. 431.

[6] Small *v.* Gibson, 4 H. L. Cas. 384; Tidmarsh *v.* Ins. Co., 4 Mason, 441; Watson *v.* Ins. Co., 2 Wash. 480; Schultz *v.* Ins. Co., 14 Fla. 73.

ments for the voyage;[1] so it extends to the machinery of a steamer.[2] A ship is not seaworthy for a foreign voyage if constructed without knees;[3] or where the timbers are decayed and the iron-work loose;[4] or where the captain is incompetent;[5] or the crew inadequate;[6] or where there is no proper supply of sails;[7] or no fuel and candles;[8] or no medicine-chest, where one is required for the voyage;[9] or where she is overladen.[10] So one insuring a floating-dock warrants that it is seaworthy, and fit for the work for which it is designed, with efficient machinery, and protected against accidents from the ordinary effects of water.[11]

But the warranty does not include the employment of a pilot;[12] nor is it broken by the fact that the person named in the registry and shipping articles as master of the ship is an incompetent person, provided the vessel be actually under the direction of a competent navigator;[13] nor by the stowing on deck of all the water on board, contrary to the requisition of a statute;[14] nor by the non-compliance of her owners with a statute requiring all vessels bound on a voyage across the Atlantic to have on board, secured under deck, a certain quantity of water, and imposing a penalty on the master or owner in case the crew or passengers are put on short allowance through failure to comply with its requirements;[15] nor because the vessel

[1] Barber on Insurance, sec. 110; Caldwell *v.* Ins. Co., 19 La. 42; 36 Am. Dec. 667; Lawton *v.* Ins. Co., 50 Wis. 163; McLanahan *v.* Ins. Co., 1 Pet. 183; Silva *v.* Low, 1 Johns. Cas. 184; The Gentleman, Olcott, 110; Seaman *v.* Ins. Co., 21 Fed. Rep. 778.

[2] Myers *v.* Girard Ins. Co., 26 Pa. St. 192.

[3] Watt *v.* Morris, 1 Dow, 32.

[4] Douglass *v.* Scougall, 4 Dow, 269.

[5] Walden *v.* Fireman's Ins. Co., 12 Johns. 133.

[6] Silva *v.* Low, 1 Johns. Cas. 184.

[7] Wedderburn *v.* Bell, 1 Camp. 1.

[8] Fontaine *v.* Phœnix Ins. Co., 10 Johns. 58.

[9] Wolf *v.* Claggett, 3 Esp. 257.

[10] Cin. etc. Ins. Co. *v.* May, 20 Ohio, 211; see Merchants' etc. Ins. Co. *v.* Butler, 20 Md. 41.

[11] Marcy *v.* Sun Ins. Co., 11 La. Ann. 748.

[12] McMillan *v.* Ins. Co., Rice, 248; 33 Am. Dec. 112. *Contra*, Whitney *v.* Ocean Ins. Co., 14 La. 485; 33 Am. Dec. 575; and see note on this subject in 33 Am. Dec. 599–601; McDowell *v.* Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619.

[13] Draper *v.* Commercial Ins. Co., 21 N. Y. 378.

[14] Deshon *v.* Merchants' Ins. Co., 11 Met. 199.

[15] Warren *v.* Ins. Co., 13 Pick. 518; 25 Am. Dec. 341.

is not officered and manned when she is laid up in port.[1]

The seaworthiness need only exist at the time of the commencement of the risk.[2] Where the vessel is seaworthy in the outset, loss by perils insured against, consequent upon subsequent unseaworthiness, occasioned by the negligence or mistakes of the master and crew, without fraud, is at the risk of the underwriters.[3] So if a vessel be seaworthy at the time of sailing, it is not necessary that she be so at the inception of the risk.[4] And unseaworthiness existing at the commencement of a voyage, which is remedied before loss, will not bar a recovery.[5] If a ship is at sea at the commencement of a risk on cargo, there is no implied warranty on the part of the assured that the vessel is seaworthy.[6] If, at the time of insuring a ship, "lost or not lost," she is in her home port, the implied warranty of seaworthiness is held to exist; but not so if she is then in a distant ocean.[7] Upon an insurance "at and from," a warranty of seaworthiness must be referred to the commencement of the risk; and if between that time and the time of sailing she becomes unfit for sea, without the fault of the insured, and is afterwards lost by the perils of the sea, the insured can recover.[8]

In England, in the case of time policies, there is no implied warranty of seaworthiness.[9] In America there are many cases holding that there is in time policies a

[1] Bell *v.* Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 543.

[2] Dixon *v.* Sadler, 5 Mees. & W. 405; Peters *v.* Ins. Co., 3 Serg. & R. 25.

[3] Phillips on Insurance, sec. 733; St. Louis Ins. Co. *v.* Glasgow, 18 Mo. 713; 41 Am. Dec. 661. But see Paddock *v.* Ins. Co., 11 Pick. 234; Dupeyre *v.* Ins. Co., 2 Rob. (La.) 457; 38 Am. Dec. 218; McDowell *v.* Ins. Co., 7 La. Ann. 684; 56 Am. Dec. 619.

[4] Taylor *v.* Lowell, 3 Mass. 331; 3 Am. Dec. 141; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Paddock *v.* Ins. Co., 3 Id. 227.

[5] Lapene *v.* Ins. Co., 8 La. Ann. 1; 58 Am. Dec. 668.

[6] Macy *v.* Mutual M. Ins. Co., 12 Gray, 497.

[7] Rouse *v.* Ins. Co., 3 Wall. Jr. 367.

[8] Garrigues *v.* Coxe, 1 Binn. 592; 2 Am. Dec. 493.

[9] Dudgeon *v.* Pembroke, L. R. 2 App. C. 284.

warranty of seaworthiness at the commencement of the risk.[1]

Generally, the proof lies on the insured; but where it appears that the loss may be fairly imputed to sea damage or other misfortune, the proof lies on the insurer, if he defends on the ground of unseaworthiness.[2] Where a vessel springs a leak shortly after the voyage has commenced, and is obliged to seek a port of safety, or founders without having encountered any heavy weather, or sustained any hurt from the dangers of the sea, the presumption is that she was not seaworthy when she sailed.[3] The presumption of seaworthiness during the entire risk arises from proof of seaworthiness at its commencement.[4] The question of seaworthiness belongs to the jury, and where there is evidence on both sides, the court will not disturb the verdict, even if contrary to the weight of evidence, unless the preponderance is such as to induce the belief that the jury must have mistaken the evidence.[5]

§ 2169. **Warranty of Neutrality.**—Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any documents which cast reasonable sus-

[1] Martin *v.* Fishing Ins. Co., 20 Pick. 389; 32 Am. Dec. 220; Hoxie *v.* Home Ins. Co., 32 Conn. 21; 85 Am. Dec. 240; Hoxie *v.* Pacific M. Ins. Co., 7 Allen, 211; American Ins. Co. *v.* Ogden, 20 Wend. 287; Rouse *v.* Ins. Co., 3 Wall. Jr. 367; Jones *v.* Ins. Co., 2 Wall. C. C. 278; Capen *v.* Ins. Co., 12 Cush. 517; Dalam *v.* Ins. Co., 6 Phila. 15; Pope *v.* Ins. Co., 6 Saw. 533.

[2] Brown *v.* Girard, 4 Yeates, 115; 1 Binn. 40; 2 Am. Dec. 400; Taylor *v.* Lowell, 3 Mass. 331; 3 Am. Dec. 141; Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Martin *v.* Fishing Ins. Co., 20 Pick. 389; 32 Am. Dec. 220.

[3] Wallace *v.* De Pau, 1 Brev. 252; 2 Am. Dec. 662; Talcot *v.* Ins. Co., 2 Johns. 124; 3 Am. Dec. 406; Miller *v.* Ins. Co., 2 McCord, 336; 13 Am. Dec. 734; Prescott *v.* Ins. Co., 1 Whart. 399; 30 Am. Dec. 307; Dupeyre *v.* Ins. Co., 2 Rob. (La.) 457; 38 Am. Dec. 218; Rugely *v.* Ins. Co., 7 La. Ann. 279; 56 Am. Dec. 603; Parker *v.* Ins. Co., 15 La. Ann. 688; Patrick *v.* Hallett, 3 Johns. Cas. 76; Walsh *v.* Ins. Co., 32 N. Y. 427. But this presumption does not arise in the case of a barge on a river: Snethen *v.* Ins. Co., 3 La. Ann. 474; 48 Am. Dec. 462.

[4] Martin *v.* Ins. Co., 20 Pick. 389; 32 Am. Dec. 220.

[5] Fuller *v.* Alexander, 1 Brev. 149; McFee *v.* S. C. Ins. Co., 2 McCord, 503; 13 Am. Dec. 757; Patrick *v.* Hallett, 1 Johns. 241; Union Ins. Co. *v.* Caldwell, Dud. (S. C.) 263.

picion thereon.[1] A representation in a policy that the property insured is neutral is equal to an express warranty that the property is neutral.[2]

§ 2170. **Deviation — Delay.** — The contract of marine insurance is, that the ship shall proceed without delay from one terminus of the voyage insured to the other in a direct course, without touching at any intermediate point or pursuing any intermediate adventure. Therefore, if she do so, without leave for that purpose being expressly given in the policy, this, however trifling in extent or duration, is a deviation, although the ship may afterwards return to her proper course, and this will discharge the underwriter.[3] The insured is not liable for a loss happening after a deviation,[4] even although the loss was not the immediate consequence of the deviation;[5] and a deviation by the ship discharges an insurance on the cargo.[6] It does not alter the case that the deviation was only for a short time or distance.[7] Taking a brig in tow by a steamer is a deviation by the latter;[8] and so is

[1] Cooledge *v.* Ins. Co., 14 Johns. 314; Higgins *v.* Livermore, 14 Mass. 106; Schwartz *v.* Ins. Co., 6 Binn. 378; Barker *v.* Ins. Co., 8 Johns. 307; 5 Am. Dec. 340.

[2] Walton *v.* Bethune, 2 Brev. 453; 4 Am. Dec. 597.

[3] Kent's Com. 312; Arnould on Insurance, 554; Fox *v.* Black, Parker, 620; Townson *v.* Guyon, Parker, 620; Clason *v.* Simmonds, 6 Term Rep. 533; Walsh *v.* Homer, 10 Mo. 6; 45 Am. Dec. 342; Folsom *v.* Ins. Co., 38 Me. 414; Coffin *v.* Ins. Co., 9 Mass. 436; Henshaw *v.* Ins. Co., 2 Caines, 274. And the premium is not returned, but is forfeited to the usurer: Hearne *v.* Ins. Co., 20 Wall. 488. In the New York and California codes deviation is defined as follows: "Deviation is a departure from the course of the voyage insured, or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage": Cal. Civ. Code, sec. 2694; N. Y. Civ. Code, sec. 1470.

[4] Davis *v.* Garrett, 6 Bing. 716.

[5] Martin *v.* Delaware Ins. Co., 2 Wash. 254; Stetson *v.* Mass. Ins. Co., 4 Mass. 330; 3 Am. Dec. 217; Brazier *v.* Clap, 5 Mass. 1; Breed *v.* Eaton, 10 Mass. 21; Kettell *v.* Wiggin, 13 Mass. 68; Wiggin *v.* Amory, 14 Mass. 1; 7 Am. Dec. 175; Merrill *v.* Boylston etc. Ins. Co., 3 Allen, 247; Natchez Ins. Co. *v.* Stanton, 10 Miss. 340; 41 Am. Dec. 592; Gazzam *v.* Ohio Ins. Co., Wright, 202; Jolly *v.* Ohio Ins. Co., Wright, 539; Odiorn *v.* Ins. Co., 101 Mass. 551; 3 Am. Rep. 401; Wilkins *v.* Ins. Co., 30 Ohio St. 317; 27 Am. Rep. 455.

[6] Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340; 41 Am. Dec. 592.

[7] 3 Kent's Com. 313; Coffin *v.* Ins. Co., 9 Mass. 436. But departing from the usual channel in a river is not a deviation: Keeler *v.* Firemen's Ins. Co., 3 Hill, 250.

[8] Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340; 41 Am. Dec. 592.

pursuing a vessel that has been piratically taken by its crew.[1] But an intention to deviate does not affect the insurance; an act of deviation must be done.[2] A delay, to amount to a deviation, must be unreasonable;[3] but a mere unexcused waste of time after the risk attaches is a deviation.[4] A delay which is necessary or proper to avert a threatened danger, or to carry out the purposes of the voyage, is not a deviation;[5] nor is not touching at a port in the course of a voyage, where a vessel has a privilege to call at.[6] A deviation is waived by a subsequent payment of a partial loss, and giving liberty to proceed again to sea, with full knowledge on the part of the insurer of the prior deviation.[7]

§ 2171. **When Deviation Excused.**—A deviation is excused, and will not release the insurer,—1. Where it is compelled by necessity, or by circumstances over which the owner of the ship has no control;[8] as mutiny on board the vessel, sickness incapacitating the crew from doing duty, arrest and detention by a belligerent power, an

[1] Hood *v.* Nesbitt, 1 Yeates, 114; 1 Am. Dec. 265.

[2] Snow *v.* Ins. Co., 48 N. Y. 624; 8 Am. Rep. 578; Marine Ins. Co. *v.* Tucker, 3 Cranch, 357.

[3] Oliver *v.* Maryland Ins. Co., 6 Cranch, 274; Hubbard *v.* Coolidge, 2 Gall. 353. It may be collected from numerous cases that delay before or after the commencement of a voyage insured is not equivalent to a deviation, unless it be unreasonable. And we think that no certain and fixed time can be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed must vary with the varying circumstances, which may render it more or less difficult to obtain such cargo": Tindal, C. J., in Phillips *v.* Irving, 7 Man. & G. 325; Earl *v.* Shaw, 1 Johns. Cas. 314; 1 Am. Dec. 117.

[4] Hamilton *v.* Sheddon, 3 Mees. & W. 49; Palmer *v.* Marshall, 8 Bing. 79; Hartley *v.* Buggin, 3 Doug. 39; Hermann *v.* Western F. & M. Ins. Co., 15 La. 517; Mount *v.* Larkins, 8 Bing. 108; Martin *v.* Delaware Ins. Co., 2 Wash. C. C. 254; Upton *v.* Salem Ins. Co., 8 Met. 605; Settle *v.* St. Louis P. I. Co., 7 Mo. 379; Arnold *v.* Pacific M. I. Co., 78 N. Y. 7; Himeley *v.* Ins. Co., 1 Mill Const. 153; 12 Am. Dec. 623; Gilfert *v.* Hallet, 2 Johns. Cas. 296.

[5] Smith *v.* Surridge, 4 Esp. 25; Bain *v.* Case, 3 Car. & P. 496; Col. Ins. Co. *v.* Catlett, 12 Wheat. 383; Phillips *v.* Irving, 7 Man. & G. 328; Schroeder *v.* Thompson, 7 Taunt. 463; 1 Phillips on Insurance, sec. 1002.

[6] Cross *v.* Shutliffe, 2 Bay, 220; 1 Am. Dec. 645.

[7] Silloway *v.* Ins. Co., 12 Gray, 73. Or it may be expressly waived: Warren *v.* Ins. Co., 16 Me. 439; 33 Am. Dec. 674.

[8] Robinson *v.* Ins. Co., 2 Johns. 89; Turner *v.* Protection Ins. Co., 25 Me. 515; Lapene *v.* Ins. Co., 8 La. Ann. 1; 58 Am. Dec. 669; Clark *v.* Ins. Co., 7 Mass. 365; 5 Am. Dec. 50.

injury sustained compelling the vessel to seek a port of safety, a blockade of the port of destination, stress of weather, etc.[1] 2. Where it is necessary to comply with a warranty. Thus if a vessel is warranted to depart on a voyage from one port to another with convoy, it is no deviation if she sail from the port of departure to the port of rendezvous for convoy before proceeding to the port of destination.[2] 3. Where the deviation is made in good faith and on reasonable grounds to avoid a peril.[3] But mere apprehension of danger, unless founded on reasonable evidence, is not sufficient. The peril apprehended must be one that would occasion serious loss or injury; it must be imminent and obvious, not problematical or contingent.[4] 4. When made to save human life on another vessel, or to relieve another vessel in distress.[5] A deviation to save life on the vessel insured would perhaps also be justified, unless it was caused by the neglect of the vessel to be properly provided before leaving port.[6] 5. And the usage of the trade may change the rule as to deviation, provided it be clearly established and general in its operation, and may justify a ship in

[1] Barber on Insurance, sec. 118; Savage *v.* Pleasants, 5 Binn. 403; 6 Am. Dec. 424. So a seizure of a vessel by an officer of the law is not a deviation: Bell *v.* Ins. Co., 5 Rob. 423; 39 Am. Dec. 543.

[2] Gordon *v.* Morley, 2 Strange, 1265.

[3] Driscoll *v.* Bovill, 1 Bos. & P. N. R. 200; Driscoll *v.* Passmore, 1 Bos. & P. N. R. 221; Blankenhagen *v.* London Assurance Co., 1 Camp. 453; O'Reilly *v.* Gonne, 4 Camp. 249; Oliver *v.* Maryland Ins. Co., 7 Cranch, 493; Whitney *v.* Haven, 13 Mass. 172; Reade *v.* Com. Ins. Co., 3 Johns. 352; 3 Am. Dec. 495; Patrick *v.* Ludlow, 3 Johns. Cas. 10; 2 Am. Dec. 130; Hughes *v.* Ins. Co., 3 Wheat. 159; Bradley *v.* Ins. Co., 3 La. Ann. 708; 48 Am. Dec. 466. "The master in most cases must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed in safety to a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision in respect to these matters, made in good faith, should be satisfactory to all interested, although he should err in judgment: Turner *v.* Protection Ins. Co., 25 Me. 523; 43 Am. Dec. 294.

[4] Riggin *v.* Ins. Co., 7 Har. & J. 279; 16 Am. Dec. 302,

[5] 3 Kent's Com. 313; 2 Parsons on Maritime Law, 301; The George Nicholaus, Newb. Adm. 449; Crocker *v.* Jackson, Sprague, 141; Scaramanga *v.* Stamp, L. R. 5 Com. P. Div. 295; The Boston, 1 Sum. 328; Settle *v.* St. Louis etc. Ins. Co., 7 Mo. 379; Box of Bullion, 1 Sprague, 57.

[6] Perkins *v.* Augusta etc. Co., 10 Gray, 312; 71 Am. Dec. 654.

quitting the direct line between the port of departure and the port of destination.[1]

§ 2172. Actual Total Loss. — An actual total loss takes place where the thing is totally destroyed, or is lost by sinking or by being broken up, or so damaged as to be valueless to the owner for the purpose for which it is held, or where in any way the owner is deprived of the possession at the port of destination of the thing insured.[2] As to the ship, it must have become a total wreck; it must have perished, and have ceased to exist as a ship, although fragments of the wreck may remain and may reach the home port.[3] As to the cargo, the insured must establish the physical extinction of the property insured, or the extinction of its value, arising from the perils insured against. Total loss of value to the owner is equivalent to total physical loss. But evidence falls short of establishing a total loss which does not prove that the portion of the property insured which reached the port of destination was of no mercantile value at the time of its arrival.[4] It is a total loss, where, by reason of the peril insured against, the cargo is permanently prevented from arriving at the port of destination.[5] But where a vessel, after a disaster, reaches her place of destination without sinking, an insurer "against actual total loss only" is not liable.[6] The mere fact that an insured vessel exists in specie does not necessarily prevent the insured from claiming a total loss without abandonment.[7] The necessary sale of a vessel

[1] Lawson on Usages and Customs, sec. 112.

[2] Sewall *v.* Ins. Co., 11 Pick. 90; Peele *v.* Ins. Co., 7 Pick. 257; 19 Am. Dec. 286; Williams *v.* Cole, 16 Me. 207.

[3] Burt *v.* Brewers' etc. Ins. Co., 16 N. Y. Sup. Ct. 383.

[4] Young *v.* Pacific Mut. Ins. Co., 34 N. Y. Sup. Ct. 321.

[5] Robinson *v.* Ins. Co., 3 Sum. 220.

[6] Burt *v.* Brewers' etc. Ins. Co., 78 N. Y. 400.

[7] McCall *v.* Sun Mutual Ins. Co., 66 N. Y. 515; Bullard *v.* Roger Williams Ins. Co., 1 Curt. 152; Roux *v.* Salvador, 3 Bing. N. C. 288. In McCall *v.* Sun Mut. Ins. Co., the court say: "If after encountering a sea peril from which it sustained injury it is for that reason justifiably sold by the master, the loss then, as between the insured and insurer, becomes a total one. The title is by such a sale irrevocably gone from the owner, and cannot by abandonment be transferred

in the course of a voyage to defray salvage creates, of itself, a total loss of the vessel for the voyage.[1] So if a vessel be so damaged that she cannot carry her cargo, it is a loss of the voyage, though she can carry a more buoyant one.[2] So it is a total loss if the vessel insured be captured, though she afterwards be released.[3]

§ 2173. **Constructive Total Loss.**—A constructive total loss arises where the insured exercises his right of abandonment.[4] Thus an injury to repair which would exceed half the value of the vessel makes a total loss.[5] An insurance confined by its terms to an actual total loss will not cover or extend to a constructive total loss.[6]

§ 2174. **Reshipping Cargo — Liabilities of Insurer.**— When a ship is prevented at an intermediate port from completing the voyage by the perils insured against, the master must make every exertion to procure, in the same

to the insurer. The insured may, under such circumstances, claim a total loss, accounting to the insured for the proceeds of the sale, as salvage received for his benefit: Idle *v.* Royal Ex. Ins. Co., 7 Taunt. 755; Cambridge *v.* Atherton, 1 Ryan & M. 60; 2 Barn. & C. 691; Roux *v.* Salvador, 2 Bing. N. C. 288; Dyson *v.* Rowcroft, 3 Bos. & P. 474; Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249; Am. Ins. Co. *v.* Center, 4 Wend. 53; 2 Parsons on Marine Insurance, 86; Arnould on Insurance, *850; 2 Phillips on Insurance, sec. 1497. The sale, when justifiably made, is not the cause of the loss, but the sea peril which made the sale necessary."

[1] Williams *v.* Suffolk Ins. Co., 3 Sum. 510; Stephenson *v.* Piscataqua etc. Ins. Co., 54 Me. 55; Mutual Safety Ins. Co. *v.* Cohen, 3 Gill, 459; 43 Am. Dec. 341. But see Stephenson *v.* Pacific Mut. Ins. Co., 7 Allen, 232; 83 Am. Dec. 681.

[2] Abbott *v.* Broome, 1 Caines, 292; 2 Am. Dec. 187.

[3] Lee *v.* Boardman, 3 Mass. 238; 3 Am. Dec. 134; Smith *v.* Touro, 14 Mass. 112.

[4] The Cal. Civ. Code, sec. 2705, gives this definition. Mr. Barber points out (Barber on Insurance, sec. 133) that this definition is incomplete, as under the general law of insurance a case of constructive total loss exists "when the thing insured has been reduced to such a state, or placed in such a position by the perils insured against, as to make its probable destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival, under the terms of the policy, though not hopeless, yet exceedingly doubtful": 2 Arnould on Insurance, *1052.

[5] Wood *v.* Lincoln and Kennebeck Ins. Co., 6 Mass. 479; 4 Am. Dec. 163; Peele *v.* Suffolk Ins. Co., 7 Pick. 254; Hall *v.* Franklin Ins. Co., 9 Pick. 466; Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; 28 Am. Dec. 245; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; 32 Am. Dec. 271; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383. See *post*, Abandonment.

[6] Barber on Insurance, sec. 131.

or a contiguous port, another ship for the purpose of conveying the cargo to its destination; and the liability of a marine insurer thereon continues after they are thus reshipped,[1] provided always that the transshipment is necessary.[2] But where a reshipment is not necessary, or is not permitted by the terms of the policy, it will discharge the insurer.[3] The insurer is bound for damages, expenses of discharging, storage, reshipment, extra freightage, and all other expenses incurred in saving cargo reshipped, up to the amount insured.[4]

§ 2175. Insurance Free from Average—Memorandum Articles.—It is the custom as to certain articles—those generally that are liable to damage and deterioration from inherent decay—to provide that they shall be "free from average, unless general or the ship is stranded." These are called, in the language of the trade, "memorandum articles." "Free from average, unless general," is held to mean "free from particular average," and the insurer is exempted from liability for a partial loss. There must, in order to render him liable, be a total loss of the property, or a loss for which, under a general average contribution, the property insured is liable to pay its proportionate share; or, in the words of the memorandum, the ship must "be stranded."[5] The codes of New York and California for-

[1] As to the duty of the master in such emergency, see *ante*, Titles Ships and Shipping and Common Carriers; Saltus *v.* Ins. Co., 12 Johns. 107; 7 Am. Dec. 290.

[2] Salisbury *v.* Ins. Co., 23 Mo. 553; 66 Am. Dec. 687.

[3] Malincrodt *v.* Ins. Co., 1 Mo. App. 205; Salisbury *v.* Ins. Co., 23 Mo. 553; 66 Am. Dec. 687.

[4] Cal. Civ. Code, sec. 2708; N. Y. Code, sec. 1481; 3 Kent's Com. 338; Mumford *v.* Scovell, 4 Johns. Ch. 218; Dodge *v.* Com. Ins. Co., 5 Johns. 262; Searle *v.* Marine Ins. Co., 17 Mass. 471.

[5] Wilson *v.* Smith, 3 Burr. 1550; Waln *v.* Thompson, 9 Serg. & R. 115; 11 Am. Dec. 675; Aranzamendi *v.* Ins. Co., 2 La. 432; 22 Am. Dec. 136. As to the construction of the word "stranded," see 2 Parsons on Maritime Law, 268, 269. A vessel is stranded when in an unusual and dangerous manner she comes in contact with and rests on the strand, the ground, a rock, or an artificial obstruction, so that unless removed from this position she may be regarded as wrecked: Lake *v.* Ins. Co., 13 Ohio, 48; 42 Am. Dec. 189. It is held in the English courts that if the ship be in fact stranded while the specified articles are on board and covered by the policy, the underwriter is liable to pay partial losses on them caused by sea

mulate this rule thus: "Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession at the port of destination of the whole of such thing or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured."[1]

§ 2176. **Abandonment Defined — When Permitted.** — Abandonment is the act by which, after a constructive total loss, a person insured by a contract of marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured.[2] The person insured may abandon the thing insured and recover as for a total loss, — 1. Where more than one half of it in value is actually lost, or would have to be expended to recover it from the peril; but the rule is, that the right of abandonment does not depend upon the certainty, but upon the high probability, of a total loss;[3] 2. Where the thing

damage, whether produced by the stranding or not: Cantillon *v.* London Ass. Co., 3 Burr. 1553; Bowring *v.* Elmslie, 7 Term Rep. 216, note; Burnett *v.* Kensington, 7 Term Rep. 210.

[1] Cal. Civ. Code, sec. 2711; N. Y. Civ. Code, sec. 1483.

[2] This definition is taken from the California Civil Code, section 2716, and the New York Civil Code, section 1486. Where insurance reaches every part of the ownership of a vessel indiscriminately, an abandonment will extend to the entire property, though its value exceeds the amount of the insurance: The Manitoba, 30 Fed. Rep. 129.

[3] 3 Kent's Com. *321; Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 41; Bradlie *v.* Maryland Ins. Co., 12 Pet. 397, 398; Copelin *v.* Phœnix Ins. Co., 46 Mo. 211; 2 Am. Rep. 504; Woolw. 283; 9 Wall. 461; Ruckman *v.* Merchants' L. I. Co., 5 Duer, 342; The Brig Sarah Ann, 2 Sum. 206, 215; Fulton Ins. Co. *v.* Goodman, 32 Ala. 108; Hyde *v.* Ins. Co., 2 Mart. 410; 14 Am. Dec. 196; Dickey *v.* Ins. Co., 3 Wend. 658; 20 Am. Dec. 763; Cohen *v.* Ins. Co., Dud. (S. C.) 147; 31 Am. Dec. 549; Copelin *v.* Ins. Co., 46 Mo. 211; 2 Am. Rep. 504. But in Massachusetts it is held that where the recovery of the vessel is hazardous, but not impossible, there can be no abandonment if the underwriter will undertake to pay all expenses of an endeavor to rescue and repair the vessel, or will himself undertake to make such endeavor, until the endeavor has been made and has proved unsuccessful: Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. 484; 4 Am. Dec. 163. The insured has no right to abandon because the ship is in imminent danger of being totally lost: Deblois *v.* Ocean Ins. Co., 16 Pick. 311; 28 Am. Dec. 245. It is immaterial how crit-

insured is injured to such an extent as to reduce its value more than one half;[1] 3. If, the thing insured being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances;[2] 4. If, the thing insured being cargo or freightage, the voyage cannot be performed, nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo without incurring the like expense or risk.[3] Where the policy covers different kinds of articles, each of which is separately valued for one gross premium, each may be separately abandoned.[4] The insured is never compelled to abandon. He has an election to do so, but no right to claim for a technical or constructive total loss until such election is made.[5]

ical the condition of the vessel was when abandoned, if she is subsequently saved at a less expense than half her value: Wood *v.* Ins. Co., 6 Mass. 479; 4 Am. Dec. 163; Hall *v.* Ins. Co., 9 Pick. 481; Deblois *v.* Ins. Co., 16 Pick. 311; 28 Am. Dec. 245; Com. Ins. Co. *v.* Chase, 20 Pick. 142; Peele *v.* Ins. Co., 7 Pick. 256. And the same view is taken in Maine: Downing *v.* Ins. Co., 57 Me. 113.

[1] Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. 479, 482; 4 Am. Dec. 163; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Gordon *v.* Mass. Ins. Co., 2 Pick. 249, 261; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; 28 Am. Dec. 245; Abbott *v.* Broome, 1 Caines, 292; 2 Am. Dec. 187; Saurez *v.* Sun Mut. Ins. Co., 2 Sand. 482; Peters *v.* Phœnix Ins. Co., 3 Serg. & R. 25.

[2] Cal. Civ. Code, sec. 2717; N. Y. Civ. Code, sec. 1487; Thompson *v.* Ins. Co., 2 La. 228; 22 Am. Dec. 129. As, for example, an embargo imposed by the government of the assured whereby the insured vessel cannot lawfully proceed on her voyage by leaving the port, or complete it by entering the port: See Green *v.* Young, 2 Ld. Raym. 840; Schmidt *v.* United Ins. Co., 1 Johns. 249; 3 Am. Dec. 319; McBride *v.* Marine Ins. Co., 5 Johns. 299; Walden *v.* Phœnix Ins. Co., 5 Johns. 310; 4 Am. Dec. 359; Odlin *v.* Washington Ins. Co., 2 Wash. C. C. 312; Lorent *v.* South Carolina Ins. Co., 1 Nott & McC. 505; Ogden *v.* N. Y. F. Ins. Co., 10 Johns. 177; Abbott *v.* Broome, 1 Caines, 292; 2 Am. Dec. 187.

[3] Cal. Civ. Code, sec. 2717; N. Y. Civ. Code, sec. 1487.

[4] Barber on Insurance, sec. 133; Deidricks *v.* Com. Ins. Co., 10 Johns. 233; Ocean Ins. Co. *v.* Carrington, 3 Conn. 357; Kettell *v.* Alliance Ins. Co., 10 Gray, 144, 154; Silloway *v.* Neptune Ins. Co., 12 Gray, 73; 3 Kent's Com. *329; Meredith's Emerigon, c. 17, sec. 8; 1 Pouget Droit Mar. 318; Humphreys *v.* Union Ins. Co., 3 Mason, 429, 442; Wilkinson *v.* Hyde, 13 Com. B., N. S., 30. But see Hernandez *v.* Ins. Co., 6 Blatchf. 320.

[5] Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. 450; 22 Am. Dec. 337.

§ 2177. Fifty per Cent Damage—How Estimated.—As to the basis of valuation on which the loss of fifty per cent is to be estimated, the weight of authority estimates it according to the value of the ship at the time and place of the casualty.[1] Whether, in determining the amount of damage for the purpose of abandonment, the deduction of one third new for old[2] is to be made is disputed. Kent states the rule to be, that "the half-value which authorizes an abandonment is half the sum which the ship if repaired would be worth without any such deduction";[3] while the contrary is held in Massachusetts.[4] As to what is to be taken into consideration in estimating the fifty per cent, it is held that the following must be reckoned, viz.: The cost of completely and thoroughly repairing the ship, and not merely of rendering her seaworthy;[5] the cost of taking her to the nearest port where she can be

[1] 3 Kent's Com. 331; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Bradlie *v.* Ins. Co., 12 Pet. 378, the court saying: "It is understood to be a fixed rule that if the ship require repairs to the extent of more than half her value at the time of the loss, the insured may abandon; for if ship or cargo be damaged so as to diminish their value above half, they are said to be constructively lost. The meaning of the words in the rule 'one half of the value' has been held to be the half of the general market value of the vessel at the time of the disaster, and not her value for any particular voyage or purpose. The expense of the repairs at the port of necessity, including the expense of getting the ship afloat if stranded, is the true test for determining the amount of the injury; and such sum is to be taken as will fully reinstate the vessel, and in general with the same kind of materials of which she was composed at the time of the disaster. It has also been considered that the three objects of insurance — vessel, cargo, and freight — stand on the same ground as to a total loss by a deterioration of more than one half in value." A different rule obtains in England; while in Massachusetts the value of the vessel as set out in the policy is deemed conclusive: Deblois *v.* Ins. Co., 16 Pick. 303; 28 Am. Dec. 245; Hall *v.* Ins. Co., 21 Pick. 472; Orrok *v.* Ins. Co., 21 Pick. 456; 32 Am. Dec. 271; Allen *v.* Ins. Co., 1 Gray, 154. And see American Ins. Co. *v.* Ogden, 20 Wend. 299.

[2] See *post*, § 2203.

[3] 3 Kent's Com. 331. And see Bradlie *v.* Ins. Co., 12 Pet. 378; Dupuy *v.* U. Ins. Co., 3 Johns. Cas. 182; Coolidge *v.* Gloucester Ins. Co., 15 Mass. 341; Peele *v.* Marine Ins. Co., 3 Mason, 76, 77; Williams *v.* Suffolk Ins. Co., 3 Sum. 270; Phillips *v.* St. Louis Perpetual Ins. Co., 11 La. Ann. 459.

[4] Sewall *v.* Ins. Co., 11 Pick. 90; Winn *v.* Ins. Co., 12 Pick. 279; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; 28 Am. Dec. 245; Allen *v.* Ins. Co., 1 Gray, 154; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; 32 Am. Dec. 271.

[5] Lincoln *v.* Ins. Co., 8 Gray, 22; 14 Gray, 320; Center *v.* Ins. Co., 4 Wend. 45.

completely repaired;[1] the cost of the custody of the vessel during the repairs.[2]

§ 2178. Sale by Master. — If the vessel is in such peril as in the best judgment of the master a sale is necessary to protect the interests of all concerned, he may make the sale; and in case he cannot consult with the owners in time, he may make it on his own responsibility.[3] The subsequent rescue of the vessel, even at a small expense, from the destruction with which she was menaced, though a circumstance in determining whether the sale was made in good faith, and dictated by sound judgment as to its necessity, is not conclusive.[4] But the master cannot become the purchaser, either on his own account or on account of the owners.[5] Where a ship is sold as a measure of necessity in consequence of a peril insured against, no abandonment is necessary. The sale *per se* vests the proceeds in the underwriters.[6]

[1] Lincoln *v.* Ins. Co., 8 Gray, 22; 14 Gray, 320.

[2] But not the wages and keep of the crew during that time: Hall *v.* Ins. Co., 21 Pick. 472.

[3] See *ante*, Title Ships and Shipping; Acatos *v.* Burns, L. R. 3 Ex. Div. 282; Knight *v.* Faith, 15 Q. B. 649; Hunter *v.* Parker, 7 Mees. & W. 342; Robinson *v.* Com. Ins. Co., 3 Sum. 220, 227; Idle *v.* Royal Ex. Ass. Co., 3 Moore, 115; Hall *v.* Franklin Ins. Co., 9 Pick. 477; The Sarah Ann, 2 Sum. 215; 13 Pet. 387; Prince *v.* Ocean Ins. Co., 40 Me. 481; 63 Am. Dec. 676; Fitz *v.* Galiot Amélie, 2 Cliff. 440; 6 Wall. 18; Stephenson *v.* Ins. Co., 54 Me. 77; Pierce *v.* Ins. Co., 18 Pick. 83; 29 Am. Dec. 567; Robinson *v.* Ins. Co., 17 Me. 131; 35 Am. Dec. 239; Caldwell *v.* Ins. Co., 19 La. 42; 36 Am. Dec. 667; Robertson *v.* Ins. Co., 19 La. 227; 36 Am. Dec. 673; Mut. Safety Ins. Co. *v.* Cohen, 3 Gill. 459; 43 Am. Dec. 341. "If, after an abandonment, but before the underwriters can take possession, the master sells the vessel, this act will be considered as done by him as agent of the underwriters; and if the facts at the time of the abandonment showed the loss to be total, the sale will not in any way affect the rights of the assured": 2 Parsons on Maritime Law, 344, 345.

[4] 2 Arnould on Insurance, *1096; Ship Fortitude, 3 Sum. 228; Fontaine *v.* Phœnix Ins. Co., 11 Johns. 295; Peele *v.* Merchants' Ins. Co., 3 Mason, 27; Idle *v.* Royal Exchange Ass. Co., 3 Moore, 115; Robertson *v.* Carruthers, 2 Stark. 572; Domett *v.* Young, 1 Car. & M. 465; Gardner *v.* Salvador, 1 Moody & R. 116; Doyle *v.* Dallas, 1 Moody & R. 48; Mount *v.* Harrison, 4 Bing. 388.

[5] Church *v.* Ins. Co., 1 Mason, 341; Robertson *v.* Ins. Co., 19 La. 227; 36 Am. Dec. 673; Barker *v.* Ins. Co., 2 Mason, 369; Ogden *v.* Ins. Co., 10 Johns. 178.

[6] Farnworth *v.* Hyde, 18 Com. B., N. S., 835; 114 Eng. Com. L. 835; Saunders *v.* Baring, 34 L. T., N. S., 419; Mowry *v.* Charleston Ins. Co., 6 Rich. 146; 60 Am. Dec. 122; Fuller *v.* Kennebec M. Ins. Co., 31 Me. 325; Smith *v.* Manufacturers' Ins. Co., 7 Met. 448;

But where the injury sustained by a vessel insured is not of such a nature and extent as to warrant an abandonment, it is not such a case of necessity as will warrant a sale by the master.[1]

§ 2179. **Capture or Detention by Hostile Force — Embargo.** — Where the property is captured, arrested, or even detained by an indefinite embargo, it is a total loss, and the insured may abandon.[2] The reasonable apprehension of capture through breach of a blockade or entry into a hostile port will justify an abandonment.[3]

§ 2180. **Abandonment of Cargo.** — Where the cargo is destroyed to more than half its value by sea peril, or to carry it to its destination will cost more than it is worth, this justifies an abandonment.[4] Goods insured "free of

Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249; Mutual Safety Co. *v.* Cohen, 3 Gill, 459; 43 Am. Dec. 341; Rasetto *v.* Gurney, 11 Com. B. 176; Potter *v.* Rankin, L. R. 5 Com. P. 341; The Brig Sarah Ann, 2 Sum. 210; Prince *v.* Ocean Ins. Co., 40 Me. 482; 63 Am. Dec. 676; 2 Maclachan's Arnould on Insurance, 964. *Contra*, Am. Ins. Co. *v.* Francia, 9 Pa. St. 390.

[1] Orrok *v.* Ins. Co., 21 Pick. 456; 32 Am. Dec. 272

[2] Peele *v.* Merchants' Ins. Co., 3 Mason, 27; Smith *v.* Steinbach, 2 Caines Cas. 158; Murray *v.* United Ins. Co., 2 Johns. Cas. 263; Parage *v.* Dale, 3 Johns. Cas. 156; Brown *v.* Phœnix Ins. Co., 4 Binn. 445; Mey *v.* Tunno, 2 Bay, 307; Rhinelander *v.* Ins. Co., 4 Cranch, 29; Queen *v.* Union Ins. Co., 2 Wash. 331; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348; Dorr *v.* New England Ins. Co., 11 Mass. 1; Dorr *v.* Union Ins. Co., 8 Mass. 494; 8 Mass. 502; Munson *v.* New England Ins. Co., 4 Mass. 88; Delano *v.* Bedford Ins. Co., 10 Mass. 347; 6 Am. Dec. 132; Oliver *v.* Newburyport Ins. Co., 3 Mass. 37; 3 Am. Dec. 77; Tucker *v.* United Ins. Co., 12 Mass. 288; Amory *v.* Jones, 6 Mass. 318; Richardson *v.* Maine Ins. Co., 6 Mass. 102; 4 Am. Dec. 92; Martin *v.* Salem Ins. Co., 2 Mass. 420; Dorr *v.* New England Ins. Co., 4 Mass. 221; Law *v.* Goddard, 12 Mass. 112.

[3] Craig *v.* United Ins. Co., 6 Johns. 226; 5 Am. Dec. 222; Saltus *v.* United Ins. Co., 15 Johns. 523; Schmidt *v.* United Ins. Co., 1 Johns. 249; 3 Am. Dec. 424; Saltus *v.* Everett, 15 Johns. 523; 3 Kent's Com. *294; Lorent *v.* South Carolina Ins. Co., 1 Nott & McC. 505; Thompson *v.* Read, 12 Serg. & R. 440; Savage *v.* Pleasants, 5 Binn. 403; 6 Am. Dec. 424; Vigers *v.* Ocean Ins. Co., 12 La. 367; 32 Am. Dec. 118; Olivera *v.* Union Ins. Co., 3 Wheat. 183; King *v.* Delaware Ins. Co., 2 Wash. C. C. 300; Walden *v.* Ins. Co., 5 Johns. 310; 4 Am. Dec. 359. But see Suydam *v.* Ins. Co., 1 Johns. 181; 3 Am. Dec. 307. *Aliter* in Massachusetts: Richardson *v.* Maine Fire and Marine Ins. Co., 6 Mass. 102; 4 Am. Dec. 92; Cook *v.* Essex Fire and Marine Ins. Co., 6 Mass. 122; Wheatland *v.* Gray, 6 Mass. 124; Lee *v.* Gray, 7 Mass. 349; Tucker *v.* United Marine and Fire Ins. Co., 12 Mass. 288; Brewer *v.* Ins. Co., 12 Mass. 169; 7 Am. Dec. 53.

[4] 3 Kent's Com. 329; Reimer *v.* Ringrose, 6 Ex. 263; Ludlow *v.* Ins. Co., 1 Johns. 335; Moses *v.* Ins. Co., 6 Johns. 219; Hart *v.* Ins. Co., 2 Wash. C. C. 346; Clarkson *v.* Ins. Co., 9

average," or "against total loss only," cannot be abandoned for a mere diminution in quantity or value owing to a sea peril.[1] The owner of the goods being liable for the increased freight where the master transships them from an intermediate port to the port of destination,[2] he may, it would seem, recover the increased freight as a loss on cargo. "If the goods," says Mr. Parsons, "are sent on for the benefit of the insurer on them, he should be liable for the increased freight, but not if this increased freight might be avoided by a delay which would not be injurious to the goods, and they are sent forward for the benefit of the owner."[3]

§ 2181. **Freight—Total and Constructive Loss—Abandonment.**—As to insurance on freight, if the vessel is totally lost by a sea peril, the insurer becomes liable on the policy.[4] In England, a vessel, as to insurance on freight, is not totally lost if, in the place where she is, under all circumstances, she can be repaired and put in a condition to prosecute the voyage at a cost less than her value when repaired. But in America the vessel sustains a constructive total loss, which the owner, if he choose, may treat as a total loss by abandonment, if she cannot be repaired for less than half her value, making customary allowances.[5] The insurer of freight is not liable where the loss of freight is due to the mistake or misconduct of the master of the ship;[6] nor where the loss of freight is due to the omission of the master to forward

Johns. 1; Waddell *v.* Ins. Co., 10 Johns. 61; Marcardier *v.* Ins. Co., 8 Cranch, 47.

[1] De Mattos *v.* Saunders, L. R. 7 Com. P. 570; 2 Phillips on Insurance, sec. 1767.

[2] Dodge *v.* Ins. Co., 17 Mass. 471; Center *v.* Ins. Co., 4 Wend. 45; Hugg *v.* Ins. Co., 7 How. 609; Mumford *v.* Ins. Co., 5 Johns. 262.

[3] 2 Parsons on Maritime Law, 439.

[4] Barber on Insurance, sec. 133.

[5] Lord *v.* Neptune Ins. Co., 10 Gray, 113; Thwing *v.* Washington Ins. Co., 10 Gray, 455; Jordan *v.* Warren Ins. Co., 1 Story, 342; Everth *v.* Smith, 2 Maule & S. 278.

[6] Clark *v.* Ins. Co., 2 Pick. 104; 13 Am. Dec. 400; Philpott *v.* Swan, 11 Com. B., N. S., 280; Lord *v.* Ins. Co., 10 Gray, 119; Moss *v.* Smith, 9 Com. B. 94.

it from an intermediate port to its destination.[1] But where the expense of sending it to its destination exceeds the amount originally contracted for for the whole voyage, there is a total loss, and no abandonment is necessary.[2] The California code contains a provision that in no case can freightage be abandoned unless the ship is also abandoned.[3] This is not in accordance with the general law of marine insurance.[4]

§ 2182. **Must be Unconditional and Entire.** — An abandonment must be unconditional,[5] and it must also as a rule, be entire, and not partial.[6] But when several kinds of commodities are separately valued in the policy, they may each be separately abandoned, even though the policy may simply insure a gross sum on the whole.[7]

§ 2183. **At What Time Made.** — The abandonment must be made within a reasonable time after information of the loss.[8] What is a reasonable time depends on the circumstances of the particular case,[9] and is a question for the jury, under proper directions by the court.[10]

[1] Am. Ins. Co. v. Center, 4 Wend. 45; Schieffelin v. Ins. Co., 9 Johns. 21; Herbert v. Hallett, 3 Johns. Cas. 93; Griswold v. Ins. Co., 1 Johns. 205; 3 Johns. 321; 3 Am. Dec. 490; Clark v. Ins. Co., 2 Pick. 104; 13 Am. Dec. 400; Jordan v. Ins. Co., 1 Story, 342; Lord v. Ins. Co., 10 Gray, 109.

[2] Robertson v. Ins. Co., 68 N. Y. 145; Am. Ins. Co. v. Center, 4 Wend. 45; Whitney v. Ins. Co., 18 Johns. 209; Saltus v. Ins. Co., 12 Johns. 107; 7 Am. Dec. 290; Thwing v. Ins. Co., 10 Gray, 443.

[3] Cal. Civ. Code, sec. 2717.

[4] See Barber on Insurance, 532.

[5] Pierce v. Ocean Ins. Co., 18 Pick. 93; 29 Am. Dec. 567; Higginson v. Dall, 13 Mass. 96; Gordon v. Mass. F. & M. Ins. Co., 2 Pick. 249.

[6] Cal. Civ. Code, sec. 2718; N. Y. Civ. Code, sec. 1488.

[7] Barber on Insurance, sec. 134.

[8] 2 Arnould on Insurance, 1165; 2 Phillips on Insurance, 1669; 2 Parsons on Maritime Law, 407; Fuller v. McCall, 1 Yeates, 464; 1 Am. Dec. 312; Teasdale v. Ins. Co., 2 Brev. 190; 3 Am. Dec. 705; Savage v. Pleasants, 5 Binn. 403; 6 Am. Dec. 424; Cohen v. Ins. Co., Dud. (S. C.) 147; 31 Am. Dec. 549. A pestilence will excuse the insured from making an abandonment immediately after knowledge of the ship's loss: McCalmont v. Murgatroyd, 3 Yeates, 27.

[9] Cases in last note; Bell v. Beveridge, 4 Dall. 272; Reynolds v. Ins. Co., 22 Pick. 191; 33 Am. Dec. 727.

[10] Bell v. Beveridge, 4 Dall. 272; Livingston v. Maryland Ins. Co., 7 Cranch, 506; Hurtin v. Phœnix Ins. Co., 1. Wash. C. C. 400; Livermore v. Newburyport Ins. Co., 1 Mass. 264; Smith v. Newburyport Ins. Co., 4 Mass. 668; Peele v. Suffolk Ins. Co., 7 Pick. 254; Reynolds v. Ocean Ins. Co., 22 Pick. 191; 33 Am. Dec. 727; Peirce v. Ocean Ins. Co., 18 Pick. 83.

The insured is entitled to a reasonable time to satisfy himself that it is a proper case for abandonment; but, subject to this limitation, he must be prompt in giving notice of abandonment to the insurer.[1] And the abandonment must be made before the party abandoning has information of the completion of the voyage.[2] The insured cannot abandon after the vessel has been repaired and is successfully pursuing her voyage;[3] nor for a capture, if, before doing so, or before given notice of it, he received intelligence that the vessel has been released and has proceeded on her voyage.[4] Where a ship was abandoned under a policy containing a clause that no abandonment should be made for detention until proof that it had continued three months, it was held, in apportioning the premium, that the abandonment had relation back to the beginning of the detention, and that the risk was then at an end.[5]

§ 2184. Notice of Abandonment.—The abandonment is made by giving notice thereof to the insurer. This notice may be either oral or written.[6] The notice must state the cause for which the abandonment is made, and the insured cannot thereafter rely on any other cause under the notice.[7] No precise form is necessary, provided it contains the essential facts.[8]

[1] Barber on Insurance, sec. 135; citing 3 Kent's Com. *320; Kaltenbach v. Mackenzie, L. R. 3 C. P. D. 467, 475; 38 L. T. 942; Gernon v. Royal Ex. Co., 6 Taunt. 381; Gardner v. Columbian Ins. Co., 2 Cranch C. C. 550; Maryland Ins. Co. v. Ruden, 6 Cranch, 338; Duncan v. Koch, Wall. C. C. 45; Reynolds v. Ocean Ins. Co., 22 Pick. 190; 33 Am. Dec. 727; Beale v. Pettit, 1 Wash. C. C. 241; Kleinwort v. Cassa Maritima, L. R. 2 App. C. 156.

[2] Cal. Civ. Code, sec. 2719.

[3] Depau v. Ins. Co., 5 Cow. 63; 15 Am. Dec. 431.

[4] De Peau v. Russell, 1 Brev. 441; 2 Am. Dec. 676; Livermore v. Ins. Co., 1 Mass. 264.

[5] Lovering v. Mercantile Ins. Co., 12 Pick. 348.

[6] Cal. Civ. Code, sec. 2721; N. Y. Civ. Code, sec. 1491.

[7] Pierce v. Ins. Co., 18 Pick. 93; 29 Am. Dec. 567; Suydam v. Marine Ins. Co., 1 Johns. 181; 3 Am. Dec. 307.

[8] Heebner v. Ins. Co., 19 Gray, 130; 69 Am. Dec. 308; McConochie v. Ins. Co., 26 N. Y. 477; Bosley v. Ins. Co., 3 Gill & J. 450; 22 Am. Dec. 337; Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Suydam v. Marine Ins. Co., 1 Johns. 181; 3 Am. Dec. 307; Dickey v. New York Ins. Co., 4 Cow. 222; Reynolds v. Ins. Co., 22 Pick. 191.

§ 2185. **Acceptance of Abandonment.**—The acceptance of the abandonment by the underwriter is not essential to its validity.[1] But the underwriter's mere silence does not estop him from contesting an invalid abandonment or an insufficient notice.[2] Taking possession of the vessel is an acceptance of the abandonment.[3] And even where, by virtue of a special stipulation or established usage, such right exists, unnecessary delay in completing the repairs and making the tender will be regarded as an acceptance of the abandonment.[4] Where the underwriter, though refusing in terms to accept the abandonment, does an act inconsistent with any other position than that of an abandonee, he will be held to have thereby waived his refusal and accepted the abandonment.[5] But if, after refusing an abandonment, the underwriter takes charge of a vessel thrown on his hands, this is no waiver of his refusal to accept.[6] Whether an abandonment was accepted or not is a question of fact for the jury.[7]

§ 2186. **Not Defeated by Subsequent Events.**—Where due notice of the abandonment is given, the validity of the abandonment depends on the facts as they existed at the time notice was given.[8] And the insured cannot

[1] Barber on Insurance, sec. 143.

[2] Peele *v.* Ins. Co., 3 Mason, 27; Badger *v.* Ins. Co., 23 Pick. 347.

[3] 2 Phillips on Insurance, secs. 1559, 1706; Prov. Ins. Co. *v.* Le Duc, L. R. 6 P. C. 224; 2 Parsons on Maritime Law, 361.

[4] Peele *v.* Suffolk Ins. Co., 7 Pick. 254; 19 Am. Dec. 286; Norton *v.* Lexington Ins. Co., 16 Ill. 235; Reynolds *v.* Ins. Co., 22 Pick. 191; 33 Am. Dec. 727; Copelin *v.* Ins. Co., 9 Wall. 461.

[5] Hudson *v.* Harrison, Brod. & B. 97; Peele *v.* Merchants' Ins. Co., 3 Mason, 27; Gloucester Ins. Co. *v.* Younger, 2 Curt. 337; Peele *v.* Ins. Co., 7 Pick. 254; 19 Am. Dec. 286; Northwestern Trans. Co. *v.* Ins. Co., 24 Fed. Rep. 171.

[6] Savage *v.* Ins. Co., 4 Bosw. 1.

[7] Bell *v.* Smith, 2 Johns. 98.

[8] Bradlie *v.* Maryland Ins. Co., 12 Pet. 378; Marshall *v.* Delaware Ins. Co., 4 Cranch, 202; Pezant *v.* National Ins. Co., 15 Wend. 460; Coolidge *v.* Gloucester Ins. Co., 15 Mass. 341; Lee *v.* Boardman, 3 Mass. 238; 3 Am. Dec. 135; Teasdale *v.* Ins. Co., 2 Brev. 290; 3 Am. Dec. 705; Wood *v.* Ins. Co., 6 Mass. 479; 4 Am. Dec. 163; Jumel *v.* Ins. Co., 7 Johns. 412; 5 Am. Dec. 283; Dickey *v.* Ins. Co., 3 Wend. 658; 20 Am. Dec. 763; Snow *v.* Ins. Co., 119 Mass. 349; 20 Am. Rep. 349; Wallace *v.* Ins. Co., 22 Fed. Rep. 66. In England, on the other hand, it depends on the state of facts existing at the time of commencing suit for a total loss. If, before that time, the cause of abandonment no longer exists, the abandonment becomes inoperative: 3 Kent's Com. *324; Naylor *v.* Taylor, 9 Barn. & C. 724; Lozano *v.* Janson, 28 L. J. Q. B. 343.

abandon upon a mere apprehension of a total loss, and afterwards sustain the abandonment by facts subsequently coming to his knowledge.[1]

§ 2187. **Effect of Abandonment — Assured's Interest Passes to Insurer.** — The effect of the abandonment is to transfer to the insurer all the assured's rights in the interest insured. The insurer becomes substituted as owner.[2] Thus any compensation for the loss sustained, whether by general average contributions,[3] or by recovery of damages against a third party causing the loss,[4] or by indemnity from a foreign government,[5] or by grace and favor of the home government,[6] is due to the abandonees. But it passes to the underwriter, subject to all liens against it.[7] And the underwriters are liable for seamen's wages from the time they so become owners.[8] And the interest of the assured in property not covered by the policy does not pass.[9] So if the insurer pays for a loss as if it were an actual total loss, he is entitled to whatever may remain of the thing insured, or its proceeds or salvage, as if there had been a formal abandonment.[10]

[1] Bosley *v.* Ins. Co., 3 Gill & J. 450; 22 Am. Dec. 337.

[2] Randal *v.* Cockran, 1 Ves. Sr. 98; Leatham *v.* Terry, 3 Bos. & P. 479; Thompson *v.* Rowcroft, 4 East, 34; Comegys *v.* Vasse, 1 Pet. 213–220; Rogers *v.* Hosack's Ex'rs, 18 Wend. 319; Sun Ins. Co. *v.* Hall, 104 Mass. 507. The sole owner of a vessel worth thirteen thousand five hundred dollars insured her for eleven thousand dollars, and subsequently abandoned all his right, title, and interest in her, when wrecked, to the insurers, who paid him eleven thousand dollars. Held, that he had thereby ceased to own any interest in the vessel: The Mary E. Perew, 15 Blatchf. 58.

[3] Sturgess *v.* Cary, 2 Curt. 59.

[4] Yeates *v.* Whyte, 4 Bing. N. C. 272; Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285. But this right may be defeated by an agreement between the assured and such third party prior to the contract of insurance: Mer. Mut. Ins. Co. *v.* Calebs, 20 N. Y. 173.

[5] Rogers *v.* Hosack's Ex'rs, 18 Wend. 332; Gracie *v.* Palmer, 8 Johns. 246; Burnand *v.* Rodocanachi, L. R. 5 C. P. D. 424.

[6] Randal *v.* Cockran, 1 Ves. Sr. 98.

[7] Barbour on Insurance, sec. 140.

[8] Hammond *v.* Essex F. & M. Ins. Co., 4 Mass. 196.

[9] Cincinnati Ins. Co. *v.* Duffield, 6 Ohio St. 200; 67 Am. Dec. 339; Mills *v.* The Mary Perew, 15 Blatchf. 58.

[10] Cal. Civ. Code, sec. 2725; N. Y. Civ. Code, sec. 1495; Radcliff *v.* Coster, Hoff. Ch. 98; Home Ins. Co. *v.* Western T. Co., 33 How. Pr. 107, 110; The Planter, 2 Woods, 490; The Ocean Wave, 5 Biss. 378; North of England I. S. S. Ins. Co. *v.* Armstrong, L. R. 5 Q. B. 244; Phillips on Insurance, secs. 1723, 1732.

§ 2188. **As to Freight.** — On an accepted abandonment of a ship, freightage earned previous to the loss belongs to the insurer thereof; but freightage subsequently earned belongs to the insurer of the ship.[1]

§ 2189. **Insured's Agents Become Insurer's Agents.** — And on the abandonment the master and the other agents and servants of the insured become the agents of the insurer,[2] and the insured is not liable for their acts.[3]

§ 2190. **Waiver of Abandonment.** — An abandonment, prior to its acceptance, may be waived by any conduct of the assured inconsistent with the complete transfer of the insured interest to the underwriters, and their control over it, as successors in interest to the assured, by virtue of the abandonment.[4] Thus it has been held that the abandonment was waived, where after it was made she was sold by the master in a case of necessity, but purchased by the owner on his own account,[5] or where the master undertakes to repair the ship to continue the voyage.[6] But acts of the master, after abandonment, in respect to the aban-

[1] Cal. Civ. Code, sec. 2730; N. Y. Civ. Code, sec. 1500; U. S. Ins. Co. *v.* Lenox, 1 Johns. Cas. 377; 2 Johns. Cas. 443. In England the rule is different. There the whole freight pending at the time of the casualty, and ultimately earned by the ship on her arrival, passes to the abandonee of the ship: Case *v.* Davidson, 5 Maule & S. 79.

[2] Gould *v.* Citizens' Ins. Co., 13 Mo. 524; Gardiner *v.* Smith, 1 Johns. Cas. 141; Union Ins. Co. *v.* Burrell, Anth. 128; Gardere *v.* Columbian Ins. Co., 7 Johns. 514; Rogers *v.* Hosack, 18 Wend. 319; Atlantic Ins. Co. *v.* Storrow, 1 Edw. 621; Cincinnati Ins. Co. *v.* Duffield, 6 Ohio St. 200; 67 Am. Dec. 339; Hurtin *v.* Phœnix Ins. Co., 1 Wash. 400; Mutual etc. Ins. Co. *v.* Cargo, Olcott Adm. 89; Norton *v.* Lexington etc. Ins. Co, 16 Ill. 235; Phillips *v.* St. Louis Ins. Co., 11 La. Ann. 459; Graham *v.* Ledda, 17 La. Ann. 45; Peirce *v.* Ocean Ins. Co., 18 Pick. 83; 29 Am. Dec. 567; Smith *v.* Touro, 14 Mass. 112; Oliver *v.* Newburyport Ins. Co., 3 Mass. 37; 3 Am. Dec. 77; Badger *v.* Ocean Ins. Co., 23 Pick. 347.

[3] 3 Kent's Com. 331; Robertson *v.* Ins. Co., 19 La. 227; 36 Am. Dec. 673; Mowry *v.* Ins. Co., 6 Rich. 146; 60 Am. Dec. 123.

[4] Barber on Insurance, sec. 144.

[5] Ogden *v.* Ins. Co., 10 Johns. 177; 12 Johns. 25; Abbott *v.* Sebor, 3 Johns. Cas. 45; 2 Am. Dec. 139; Robertson *v.* Ins. Co., 19 La. 227; 36 Am. Dec. 673.

[6] Dickey *v.* Ins. Co., 3 Wend. 658; 20 Am. Dec. 763. If, however, the repairs are merely partial and temporary, made to enable the vessel to reach a port of refuge where full repairs may be obtained, the abandonment will not be effected thereby. Such repairs are, indeed, in the nature of salvage for the benefit of all concerned: Saurez *v.* Sun Mutual Ins. Co., 2 Sand. 482; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 369.

doned property, which are consistent with his position as agent of the underwriters, will not invalidate the abandonment.[1]

§ 2191. **Rights of Owner Omitting to Abandon.**—An owner omitting to abandon may still recover his actual loss.[2]

§ 2192. **Liability of Insurer Refusing to Accept Abandonment.**—Where an insurer refuses to accept a valid abandonment, he is liable as for an actual total loss, less the value of anything which may have come into the hands of the assured.[3]

§ 2193. **Measure of Recovery — Valued Policy — Valuation Conclusive.**—"The difference in point of effect between a valued and an open policy is, that under an open policy, in case of loss, the assured must prove the actual value of the subject of insurance; under a valued policy he need never do so, except in cases of enormous or fraudulent over-valuation. Except in such cases, the valuation in the policy is conclusive, and the case is the same as though the subject of insurance was actually proved to have been worth the sum at which it was valued."[4] But though the valuation in a policy fixes the price of the subject-matter of the insurance, it is not an admission that so much property is at risk.[5] Over-valua-

[1] Columbian Ins. Co. *v.* Ashby, 4 Pet. 139; Walden *v.* Phœnix Ins. Co., 5 Johns. 310; 4 Am. Dec. 359; Clarkson *v.* Phœnix Ins. Co., 9 Johns. 1; Waddell *v.* Columbia Ins. Co., 10 Johns. 61; Curcier *v.* Philadelphia Ins. Co., 5 Serg. & R. 113; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348.

[2] Cal. Civ. Code, sec. 2732; N. Y. Civ. Code, sec. 1502; Earl *v.* Shaw, 1 Johns. Cas. 314; 1 Am. Dec. 117.

[3] Barber on Insurance, sec. 147.

[4] 1 Arnould on Insurance, *303. See Phœnix Ins. Co. *v.* McLoon, 100 Mass. 475; Barker *v.* Janson, L. R. 3 Com. P. 303; Patapsco Ins. Co. *v.* Biscoe, 7 Gill & J. 293; 28 Am. Dec. 219; Cox *v.* Ins. Co., 3 Rich. 331; 45 Am. Dec. 770; Snell *v.* Ins. Co., 1 Wash. 509; Watson *v.* Ins. Co., 3 Wash. 1; Howell *v.* Ins. Co., 7 Ohio, 284.

[5] Haven *v.* Gray, 12 Mass. 71; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; 28 Am. Dec. 245; Winn *v.* Columbian Ins. Co., 12 Pick. 279; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348; Kane *v.* Commercial Ins. Co., 8 Johns. 229.

tion is presumptive evidence of fraud,[1] and a fraudulent valuation entitles the insurer to rescind.[2] But if a party insures property expected to be on board a ship, to a large amount, upon a valued policy, and much less is in fact shipped, he is entitled to recover, in case of loss, a proportion *pro rata* only, notwithstanding the valuation.[3]

§ 2194. Partial Loss. — In case of partial loss, the marine insurer — unlike the case of fire insurance, where the insurer is liable for the entire loss up to the amount of the policy — is liable only for such a proportion of the loss as the amount insured bears to the entire value of the insured property.[4] In a valued policy on freight or cargo, if a part only of the subject is exposed to risk, the valuation applies only in proportion to such part.[5] The measure of damages is the difference between the appraisement of the damaged articles and that stipulated in the policy, with all necessary damages.[6] Where the policy fixes the value of the goods at the sum insured, in case of a partial loss, — as where the property insured was grain, a portion of which reached the port of destination in a damaged condition, — the liability of the insurer is the value so fixed, and not the value in the market.[7] Where a partial loss is repaired by the insured, and the vessel is then totally lost during the term of the policy, the insurer is liable for both losses, though it exceeds the sum named in the policy.[8] The expense of saving is to

[1] Sturm *v.* Ins. Co., 63 N. Y. 77.

[2] 2 Parsons on Maritime Law, 64; 3 Kent's Com. 283; Catron *v.* Ins. Co., 6 Humph. 176.

[3] Alsop *v.* Ins. Co., 1 Sum. 451.

[4] 2 Phillips on Insurance, sec. 1435; 1 Arnould on Insurance, 7.

[5] Barber on Insurance, sec. 152. "Thus," says Mr. Barber, "if an entire cargo valued at one hundred thousand dollars, insured for that amount on a certain vessel in a certain voyage, and only half of the cargo is actually on board the vessel and subjected to the risk, the valuation is considered as reduced one half. If in such case a total loss of the cargo on board occurs, the assured recovers half the valuation, and receives back half the premium"; citing Forbes *v.* Aspinall, 13 East, 327; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

[6] Natchez Ins. Co. *v.* Buckner, 4 How. (Miss.) 63.

[7] Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513; 5 Am. Rep. 162.

[8] Matheson *v.* Ins. Co., 118 Mass. 209; 19 Am. Rep. 441.

be added to that of repairing, in estimating a partial loss.[1] Under a policy upon a ship which provides that the insurers shall not be liable for a partial loss unless it shall amount to five per cent, successive partial losses by distinct gales or storms upon different passages cannot be added together to make up the requisite five per cent; and the burden of proving a partial loss amounting to five per cent from one gale or storm is upon the assured.[2]

§ 2195. **Profits.**—Where profits are separately insured in a contract of marine insurance, the insured is entitled to recover, in case of loss, a proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole.[3] A loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation fixes their amount.[4] But under a policy on profits, the assured cannot sell his goods, and then call on the underwriters for a loss on the profits.[5]

§ 2196. **Open Policy—Value of Ship—How Estimated.**—The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value, or which are necessary to prepare it for the voyage insured, and including the cost of insur-

[1] Sewall *v.* United States Ins. Co., 11 Pick. 90.

[2] Paddock *v.* Commercial Ins. Co., 104 Mass. 521; Hagar *v.* New England etc. Ins. Co., 59 Me. 460.

[3] Cal. Civ. Code, sec. 2738; N. Y. Civ. Code, sec. 1505. Mr. Barber says (Insurance, sec. 151): "Profits should be and usually are insured at a stated valuation, on account of the difficulty of ascertaining, in the event of a total loss of ship and cargo, the amount of indemnity to which the insured should be entitled. His loss is measured by the increased value which the goods would have reached had they been transported in safety to the port of destination. But it is impossible to say at what date they would have arrived; and even assuming, as it appears to be the rule in the United States, that a loss of the goods implies some loss of profits, there must always be great difficulty in ascertaining the quantum of such loss, in the absence of an agreed valuation"; citing Mumford *v.* Hallett, 1 Johns. 433; Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222; Loomis *v.* Shaw, 2 Johns. Cas. 36.

[4] Cal. Civ. Code, sec. 2740; N. Y. Civ. Code, sec. 1507.

[5] Tom *v.* Smith, 3 Caines, 245.

ance.[1] The insured is entitled to recover the actual value of the vessel, and not its cost to him.[2]

§ 2197. Open Policy—Value of Cargo—How Estimated.—The value of cargo is its actual cost to the insured when laden on board, or, where that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to the expenses incurred on the way or on arrival, and cost of insurance.[3] On the other hand, insurers do not guarantee a speedy arrival, nor arrival in time for an advantageous market, nor do they incur loss from delay in the voyage, unless the delay is produced by peril insured against, or the cargo be subject to deterioration by mere lapse of time.[4] An open policy is valid, though it insure an amount greater in value than the property; but in such case, the recovery is restricted where a loss has occurred to the value of the property.[5]

§ 2198. Open Policy—Value of Freight—How Estimated.—The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it and the cost of its insurance.[6] The underwriters are liable for freight, as a total loss, when there is a total destruction in specie of the cargo.[7] But they are

[1] Cal. Civ. Code, sec. 2741; Carson *v.* Ins. Co., 2 Wash. 468.

[2] Snell *v.* Ins. Co., 4 Dall. 430.

[3] Cal. Civ. Code, sec. 2741. Also the cost of insurance is to be added: Cox *v.* Ins. Co., 3 Rich. 331; 45 Am. Dec. 771. But see Barber on Insurance, sec. 154; Allegre *v.* Ins. Co., 6 Har. & J. 408; 14 Am. Dec. 289; Gahn *v.* Broome, 1 Johns. Cas. 120.

[4] Salisbury *v.* Ins. Co., 23 Mo. 553; 66 Am. Dec. 687.

[5] Cohen *v.* Ins. Co., Dud. (S. C.) 147; 31 Am. Dec. 549.

[6] Cal. Civ. Code, sec. 2741; Stevens *v.* Ins. Co., 3 Caines, 43; 2 Am. Dec. 247. "Primage" is a small payment made to the master, presumably for his own use, for his care and trouble with respect to the goods.

[7] Ridyard *v.* Phillips, 4 Blatchf. 443; Am. Ins. Co. *v.* Center, 4 Wend. 45.

not liable for freight insured, if the master has lost the freight by his own act, in unwarrantably giving up the voyage.[1]

§ 2199. **Cargo Arriving Damaged.**—If cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the value which the market price at that port of the thing so damaged bears to the market price it would have brought if sound.[2]

§ 2200. **Insurer Liable for Labor and Expenses.**—The insurer is liable for all the expenses attendant upon a loss which forces a ship into port to be repaired;[3] and generally for all expenses resulting as a direct and immediate consequence of a peril insured against.[4] The insurer on the ship is not liable for any expense incurred specifically and exclusively for the benefit of the cargo; nor for any sum per diem agreed by the owner to be allowed the master while in port;[5] nor for the wages of the crew while a steamboat is detained by accident.[6]

§ 2201. **"Suing and Laboring" Clause.**—A clause is often inserted called the "suing and laboring clause." This clause provides that in case of disaster the assured may labor, travel, and sue for the safeguard and recovery of the property, for the expense of which the insurer is to contribute in proportion to the amount insured by him to that of the whole property at risk.[7] This clause extends

[1] Clark *v.* Ins. Co., 2 Pick. 104; 13 Am. Dec. 400.

[2] Cal. Civ. Code, sec. 2742; N. Y. Civ. Code, sec. 1509. See Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513; 5 Am. Rep. 162.

[3] Norwich etc. Trans. Co. *v.* Ins. Co., 34 Conn. 561; Young *v.* Ins. Co., 24 Fed. Rep. 279.

[4] Hale *v.* Washington Ins. Co., 2 Story, 176; Perry *v.* Ohio Ins. Co., 5 Ohio, 305; Gazzam *v.* Cincinnati Ins. Co., 6 Ohio, 71.

[5] Barber on Insurance, sec. 156.

[6] Jolly *v.* Ins. Co., Wright, 539; May *v.* Delaware Ins. Co., 19 Pa. St. 312. A policy upon the hull of a steamboat, on time, does not cover expenses, or the ordinary wages of the crew, while navigating the boat into port for repairs after her foundering: Webb *v.* Protection Ins. Co., 6 Ohio, 456.

[7] Yet if a vessel insured meets with a disaster, the captain and crew are bound diligently to labor for the recovery of the property; and the insertion

to all cases in which the insurer is saved from loss, whether partial or total, or whether an abandonment does or probably may take place or not.[1] But where the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed, where it is evident from the facts of the case that no danger of a total loss existed.[2]

§ 2202. General Average — Contribution. — The insurer is liable for what the insured has paid by way of contribution for the safety of their goods; i. e., general average.[3] Loss incurred voluntarily to prevent greater loss is a general average loss.[4] To constitute a case for general average, the vessel should be in distress, and a part should be voluntarily sacrificed to save the rest. A previous consultation is not necessary, nor that the part sacrificed should be in more imminent danger than the rest.[5] The distinct property of several persons must be exposed to a common peril, and relief from that peril must be obtained intentionally.[6] To constitute a right of general average for goods jettisoned, there must concur, — 1. A common peril affecting vessel and cargo; 2. A voluntary sacrifice of the part jettisoned for the safety of the remainder; and 3. The deliverance thereby of the remainder from the peril.[7] If goods are necessarily thrown overboard for the purpose of lightening the ship, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all. But the sacrifice being made for

of such a clause in the policy does not impose any additional duty upon the assured: Cincinnati etc. Ins. Co. *v.* May, 20 Ohio, 211.

[1] Kidston *v.* Ins. Co., L. R. 1 Com. P. 544. See Lohre *v.* Atchison, L. R. 2 Q. B. 535.

[2] Peninsular R. R. Co. *v.* Saunders, 1 Best & S. 41; 2 Best & S. 266; Booth *v.* Gair, 15 Com. B., N. S., 291; Kidston *v.* Empire Ins. Co., L. R. 1 Com. P. 535; L. R. 2 Com. P. 357.

[3] Parsons on Maritime Law, 289. Particular average loss is to be borne by the owner of the ship; general average loss is to be sustained by the ship, cargo, and freight: Orrock *v.* Commonwealth Ins. Co., 21 Pick. 456; 32 Am. Dec. 281.

[4] Reynolds *v.* Ocean Ins. Co., 22 Pick. 191; 33 Am. Dec. 727.

[5] Sims *v.* Gurney, 4 Binn. 513.

[6] Whitteredge *v.* Norris, 6 Mass. 125.

[7] Slater *v.* Hayward Rubber Co., 26 Conn. 128.

the safety of the vessel and remaining cargo, the owner of the goods bears no more than his just proportion of the loss thus incurred.[1] From the benefit of this right to contribution the owner of goods loaded above deck is excluded, on the ground that such loading is improper, tending to embarrass the movements of the crew and the working of the ship,[2] except where it is shown that such mode of carrying the particular goods is according to the custom of trade.[3] So the following are subjects of general average, viz.: Wages, provisions, and other expenses of the voyage to a port of necessity, for the purpose of making repairs;[4] where the cargo is sent from the port of disaster to the port of destination by another vessel at a higher rate of freight than under the original contract;[5] where the vessel is voluntarily stranded;[6] where the agent of a wrecking company was employed by the master of a shipwrecked vessel to raise and save the vessel and cargo, and thereby a quantity of petroleum was saved;[7] repairs to a ship rendered necessary by a voluntary stranding.[8] Where goods insured by a valued policy are jettisoned for the common benefit, the underwriters are liable for the amount at which the goods are valued in the policy, though it may exceed their market value at the port of destination.[9] In the adjust-

[1] Wood *v.* Phœnix Ins. Co., 37 Leg. Int. 148; Miller *v.* Tetherington, 6 Hurl. & N. 278.

[2] The Paragon, 1 Ware, 322; Triplet *v.* Van Name, 2 Cranch C. C. 332; Biays *v.* Chesapeake Ins. Co., 7 Cranch, 415; Toledo etc. Ins. Co. *v.* Speares, 16 Ind. 52; Cram *v.* Aiken, 13 Me. 229; 29 Am. Dec. 503; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178; Smith *v.* Wright, 1 Caines, 43; 2 Am. Dec. 162; Meaher *v.* Lufkin, 21 Tex. 383; Doane *v.* Keating, 12 Leigh, 391; 37 Am. Dec. 671.

[3] Lawson's Usages and Customs, c. 3.

[4] Potter *v.* Ocean Ins. Co., 3 Sum. 27; Thornton *v.* United States Ins. Co., 12 Me. 150; Walden *v.* Leroy, 2 Caines, 262; 2 Am. Dec. 236; Henshaw *v.* Marine Ins. Co., 2 Caines, 274; Barker *v.* Phœnix Ins. Co., 8 Johns. 307; 5 Am. Dec. 339; Rogers *v.* Murray, 3 Bosw. 357; Hanse *v.* Ins. Co., 10 La. 1; 29 Am. Dec. 456. But see Dunham *v.* Ins. Co., 11 Johns. 315, 6 Am. Dec. 374.

[5] McLoon *v.* Cummings, 73 Pa. St. 98.

[6] Rathbone *v.* Fowler, 6 Blatchf. 294; O'Connor *v.* The Ocean Star, 1 Holmes, 248.

[7] Jones *v.* Bridge, 2 Sweeny, 431.

[8] Northwestern Trans. Co. *v.* Continental Ins. Co., 24 Fed. Rep. 171.

[9] Forbes *v.* Ins. Co., 1 Gray, 371.

ment of partial losses in cases of general average, valued policies are to be treated like open policies.[1]

Where a person insured by a contract of marine insurance has a demand against others for contribution, he may claim the whole loss from the insurer without demanding payment of contribution or delaying until an adjustment of the average is made[2] subrogating him to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right.[3]

§ 2203. **One Third New for Old.**— In the case of a partial loss of a ship or its equipments, the old materials are to be applied towards payment for the new; and whether the ship is new or old, a marine insurer is liable for only two thirds of the remaining cost of the repairs, except that he must pay for anchors and cannon in full, and for sheathing-metal at a depreciation of only two and one half per cent for each month that it has been fastened to the ship.[4] This deduction of one third new for old is made as well from the cost of temporary repairs at the port of necessity, including the necessary expenses of raising money therefor, as from the cost of permanent repairs.[5]

[1] Clark *v.* Ins. Co., 7 Mass. 365; 5 Am. Dec. 50.

[2] Faulkner *v.* Ins. Co., 2 McMull. 158; 39 Am. Dec. 119.

[3] Cal. Civ. Code, sec. 2745; N. Y. Civ. Code, sec. 1512; Jumel *v.* Ins. Co., 7 Johns. 412; 5 Am. Dec. 283; Maggrath *v.* Church, 1 Caines, 196; 2 Am. Dec. 173; Hanse *v.* Ins. Co., 5 La. 379. The liability of a cargo to contribute, in general average, in favor of the ship, does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining: McAndrews *v.* Thatcher, 3 Wall. 347.

[4] Cal. Civ. Code, sec. 2746, N. Y. Civ. Code, sec. 1513; Barber on Insurance, sec. 159; Dunham *v.* Ins. Co., 11 Johns. 315; 6 Am. Dec. 374.

[5] Barber on Insurance, sec. 159; Paddock *v.* Commercial Ins. Co., 104 Mass. 535, citing Brooks *v.* Oriental Ins. Co., 7 Pick. 259; Orrok *v.* Commercial Ins. Co., 21 Pick. 456; 32 Am. Dec. 271; Lincoln *v.* Hope Ins. Co., 8 Gray, 22, 26. *Aliter* in England: Hopkins on Average, 149.

CHAPTER CIV.

OTHER KINDS OF INSURANCE.

§ 2204. Guaranty insurance — Insurance against dishonesty and negligence.
§ 2205. Insurance against bankruptcy, and of payment of debts — Rents — Titles.
§ 2206. Insurance of animals.
§ 2207. Storms — Hail.
§ 2208. Against birth of issue.

§ 2204. Guaranty Insurance — Insurance against Dishonesty and Negligence. — There is a species of insurance of modern date in England, and of more recent date in this country, whereby the insurer guarantees to indemnify the insured from loss through the negligence, fraud, or dishonesty of his agents or servants. In such a contract a statement in the application that the officer's accounts would be examined at certain times was held a representation, and not a warranty, and that the insured might recover for a loss resulting from the dishonesty of the officer, though it was also caused by the neglect of the insured to examine his accounts.[1] But a statement as to the amount of money which the employee would have in his hands at any one time has been held to be a warranty, and if false, a bar to recovery.[2] A representation that a town treasurer's accounts shall be from time to time audited, and that money shall only be drawn in a certain way, must be substantially complied with, or no recovery can be had.[3] A representation that the person whose fidelity, etc., is insured "has never been in arrears or default in his accounts" covers arrears and defaults prior to the time when he entered the service of the person insured.[4] Where the policy insuring against embezzlement

[1] Benham v. United Guarantee Co., 7 Ex. 744.
[2] Towle v. Nat. Soc., 7 Jur., N. S., 618.
[3] Board of Education v. Ins. Co., 30 U. C. C. P. 132.
[4] Ottawa Ins. Co. v. Can. etc. Ins. Co., 30 U. C. C. P. 360.

required the employer to use all due diligence in prosecuting to conviction the employee, this was held a condition precedent to the right of the insured to recover.[1] On a guaranty policy of a clerk's faithful and diligent performance of his duty, who left a large sum of money in open bags in his room while he went to lunch, which money disappeared while he was gone, it was held that the insurers were liable.[2] The allowance of over-drafts without security, in collusion with the parties overdrawing, is a loss "by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities of the manager" of a bank.[3]

§ 2205. Insurance against Bankruptcy, and of Payment of Debts — Rents — Titles. — In several English cases insurance taken out against loss on the returns of one's business by the bankruptcy of purchasers has been before the courts.[4] In Maryland suit was brought on a policy of insurance guaranteeing the payment at maturity of a promissory note.[5] Rents are also a subject of insurance, and so are titles.

§ 2206. Insurance of Animals. — Live-stock is frequently insured in this country. A provision in the charter of a mutual live-stock insurance company that the business of the company shall be confined to certain counties does not deprive one who has removed horses insured in those counties to another county from recovering on the policy for their loss.[6] But an insurance of horses against death by accident or disease by a company whose charter and articles of incorporation only author-

[1] Fearnley *v.* London Guar. Soc., 9 Ins. Law J. 160.
[2] In re Citizens' Ins. Co., 16 Can. L. J. 334.
[3] Bank of Toronto *v.* Ins. Co., 14 L. C. Jur. 186.
[4] Solvency Guarantee Co. *v.* Froane, 7 Hurl. & N. 5; Solvency Guarantee Co. *v.* York, 3 Hurl. & N. 588; Solvency Guarantee *v.* Freeman, 7 Hurl. & N. 17.
[5] Ellicott *v.* Ins. Co., 8 Gill & J. 166.
[6] Coventry Mut. Live Stock Ins. Ass. *v.* Evans, 102 Pa. St. 281.

ized it to insure property "against loss or damage by fire, lightning, and inland navigation and transportation" is void.[1] A company authorized to insure "live-stock, wagons, harness," etc., "being upon farms as farm property," but not village property, within one hundred feet of other buildings, is not liable for live-stock and harnesses insured as farm property, but destroyed while in a village barn within one hundred feet of other buildings.[2] The liability under a policy upon "live-stock on premises" is not avoided by the fact that the horse killed was not owned by the assured when the policy was issued, but was afterwards acquired by him in exchange for horses that were then on the premises.[3] Under a policy for safe carriage of live-stock, covering, with the usual exceptions, the perils of railroad and river, the insurers are liable for a loss occurring in a necessary transshipment from cars to steamboat, upon the route, if not caused by a peril excepted.[4] One who beats his insured mare with an iron rod so that she dies cannot recover the insurance.[5]

ILLUSTRATIONS. — A fire policy insured a horse described as in a certain barn. The policy contained a lightning clause. The horse was struck by lightning while at pasture. *Held*, that the company was liable: *Haws* v. *Philadelphia Fire Ass'n*, 114 Pa. St. 431. B was insured against damage by fire "on his horses and colts while in barn, and by lightning only while in use, or running in pasture or yard on his farm, in the town of L." *Held*, that the risk against lightning while the horses were "in use" or "running in pasture" was not limited to the farm occupied by plaintiff at the date of the issue of the policy, but extended to any place in the town: *Boright* v. *Springfield Fire and Marine Ins. Co.*, 34 Minn. 352.

§ 2207. **Storms — Hail.** — Insurance against hail-storms is practiced in this country.[6] A policy insuring against loss by "fire or storm" does not cover a freshet occa-

[1] Ins. Co. *v.* Martin, 13 Minn. 59.
[2] Wildey *v.* Ins. Co., 52 Mich. 446.
[3] Mills *v.* Ins. Co., 37 Iowa, 400.
[4] Ætna Ins. Co. *v.* Stivers, 47 Ill. 86; 95 Am. Dec. 467.
[5] Western Horse and Cattle Ins. Co. *v.* O'Neill, 21 Neb. 548.
[6] Mutual Hail Ins. Co. *v.* Wilde, 8 Neb. 427.

sioned by the melting of the snow and prevailing south winds and rain, which carried away the property.[1] Where a policy on growing crops provided for an appraisal of damages, and stipulated that on demand of the agent managing the assessment, the necessary costs should be deposited by the insured before the assessment should be made, it was held that he could not recover for an alleged loss by hail, if such security was proved to have been demanded and refused.[2]

§ 2208. **Insurance against Birth of Issue.** — In England this form of insurance is to be found. "The risk," says Bunyon,[3] "may be either coupled or not with some contingency dependent upon the duration of human life, such as the attainment of a particular age by the issue.

[1] Storer *v.* Ins. Co., 3 Phila. 38.
[2] Ins. Co. *v.* Wilde, 8 Neb. 427.
[3] Bunyon on Life Insurance, 98.

CHAPTER CV.

OFFICERS AND AGENTS.

§ 2209. Authority of agent of insurer to bind principal — In general.
§ 2210. What is and what is not within power of general agent — Before policy issued.
§ 2211. After policy issued.
§ 2212. Payment of premium.
§ 2213. To accept notice.
§ 2214. Waiver of conditions in policy.
§ 2215. Agents of mutual insurance companies.
§ 2216. Powers of local or special agents.
§ 2217. Of subagents and clerks.
§ 2218. Agent is agent for insurer.
§ 2219. Liability of insurer for misrepresentations of agents.
§ 2220. Mistakes or omissions of agents.

§ 2209. Authority of Agent of Insurer to Bind Principal — In General. — The general rules as to the authority of the agent to bind his principal apply in most instances to the cases of the agents of insurers.[1] A general agent of an insurance company has power to bind his principal in all matters within the scope of his agency, and the secret limitations of his power made by his principal do not bind strangers who treat with him under his implied powers.[2] An agent of an insurance company who has general charge of the business of the company for a state, and who acts under general instructions to such agents, and without special limitations upon his authority, is a general agent.[3]

§ 2210. What is and is not within Power of General Agent — Before Policy Issued. — Before the contract is consummated, and the policy issued, the general agent has large powers.[4] Thus the following have been held

[1] See *ante*, Title Principal and Agent.
[2] *Ante*, Title Principal and Agent; South. Life Ins. Co. *v.* McCaw, 96 U. S. 84.
[3] Southern Life Ins. Co. *v.* Booker, 9 Heisk. 606; 24 Am. Rep. 344.
[4] May on Insurance, sec. 129; citing Gloucester Mfg. Co. *v.* Howard Fire

within his powers, viz.: To make a parol contract to insure and issue a policy;[1] to insure property beyond the limits of his territory;[2] to change or modify the description of the property in the application.[3]

§ 2211. **After Policy Issued.** — And when once the contract is perfected, and the policy issued, his powers are still many.[4] Thus an agent has been held to have implied power to grant a permit to an insured to reside in a prohibited district.[5]

§ 2212. **Payment of Premium.** — An agent authorized to receive payment of the premium may receive a check instead of currency;[6] or he may waive payment of the premium;[7] or he may request the insured to keep the money until the policy arrives;[8] or he may agree to be responsible to the company and accept the applicant as his personal debtor;[9] or give credit for the premium;[10] or receive the premium before it is due.[11] But he has no

Ins. Co., 5 Gray, 498; 66 Am. Dec. 376; Brockelbank *v.* Sugrue, 5 Car. & P. 21; Warner *v.* Peoria Mar. & Fire Ins. Co., 14 Wis. 318; Dayton Ins. Co. *v.* Kelley, 24 Ohio St. 345; 15 Am. Rep. 612; Rowley *v.* Empire Fire Ins. Co., 36 N. Y. 550; Malleable Iron Works *v.* Phœnix Ins. Co., 25 Conn. 465; Combs *v.* Hannibal Ins. Co., 43 Mo. 148; 97 Am. Dec. 383; Moliere *v.* Penn. Fire Ins. Co., 5 Rawle, 342; 28 Am. Dec. 675; Benson *v.* Ottawa Agr. Ins. Co., 42 U. C. Q. B. 282; Mancur *v.* St. Louis Ins. Co., 68 N. Y. 625. But see Hartford Fire Ins. Co. *v.* Webster, 69 Ill. 392.

[1] Angel *v.* Ins. Co., 59 N. Y. 171; 17 Am. Rep. 322.

[2] Lightbody *v.* Ins. Co., 23 Wend. 18; Knox *v.* Ins. Co., 12 Cent. L. J. 105.

[3] Gloucester Ins. Co. *v.* Ins. Co., 5 Gray, 497; 66 Am. Dec. 376.

[4] May on Insurance, sec. 129; citing Healey *v.* Ins. Co., 5 Nev. 268.

[5] Walsh *v.* Ins. Co., 30 Iowa, 133; 6 Am. Rep. 664.

[6] Tayloe *v.* Ins. Co., 9 How. 390; Goit *v.* Ins. Co., 25 Barb. 189.

[7] South. Ins. Co. *v.* Booker, 9 Heisk. 606; 24 Am. Rep. 344; Ball and Sage Wagon Co. *v.* Aurora Fire and Marine Ins. Co., 20 Fed. Rep. 232; Marvin *v.* Ins. Co., 85 N. Y. 278; 39 Am. Rep. 657.

[8] Hallock *v.* Ins. Co., 26 N. J. L. 268.

[9] May on Insurance, sec. 134; citing Sheldon *v.* Connecticut Mutual Life Ins. Co., 25 Conn. 207; 65 Am. Dec. 565; Bouton *v.* American Mutual Life Ins. Co., 25 Conn. 542; Post *v.* Ætna Ins. Co., 43 Barb. 351; Woody *v.* Old Dominion Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732; Gerlach *v.* Ins. Co., 4 Ins. Law J. 239; Home Ins. Co. *v.* Curtis, 32 Mich. 402; Mississippi etc. Life Ins. Co. *v.* Neyland, 9 Bush, 431; Chickering *v.* Globe Mutual Life Ins. Co., 116 Mass. 321; Jones *v.* Ins. Co., 8 Ins. Law J. 415; Angel *v.* Hartford Fire Ins. Co., 59 N. Y. 171; 17 Am. Rep. 322.

[10] Boice *v.* Thames and Mersey Marine Ins. Co., 38 Hun, 246.

[11] Fahrenkrug *v.* Ins. Co., 68 Ill. 463.

authority to accept a horse instead of money,[1] nor can he agree with a creditor of his who is an applicant that his debt to the company is to be set off by his personal debt to the applicant.[2]

§ 2213. To Accept Notice. — Where notice is required to be given to the company of the happening of any fact, notice given to any officer or agent of the company whose duty it is, or it may be implied it is, to communicate it to the company, is notice to the company.[3] Verbal notice is sufficient, unless written notice is required by the terms of the policy;[4] but where notice is required by the policy, mere knowledge on the part of the agent does not take the place of express notice.[5] All the facts material to the contract made known to the agent of the insurer in the negotiation are deemed to be known to the company.[6] The agent's knowledge, though not acquired in his capacity as such, or while engaged in the transaction of his principal's business, will still bind the insurer, if he possessed such knowledge when he received the policy;

[1] Hoffman *v.* Ins. Co., 92 U. S. 161.

[2] Merchants' Mutual Ins. Co. *v.* Excelsior Ins. Co., 4 Mo. App. 578. But a premium on a policy may be paid by an insurance agent out of money due from him to a policy holder: Chickering *v.* Ins. Co., 116 Mass. 321; Woody *v.* Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732. See Sheldon *v.* Ins. Co., 25 Conn. 207; 65 Am. Dec. 565.

[3] Ins. Co. *v.* Wilkinson, 13 Wall. 222; Peck *v.* Ins. Co., 22 Conn. 575; Miller *v.* Ins. Co., 51 Iowa, 216; 7 Am. Rep. 122; Liverpool etc. R. R. Co. *v.* Orr, 63 Miss. 431; 56 Am. Rep. 810.

[4] Schenck *v.* Ins. Co., 24 N. J. L. 447; McEwen *v.* Ins. Co., 5 Hill, 101.

[5] Schenck *v.* Ins. Co., 24 N. J. L. 447; Mellen *v.* Ins. Co., 5 Duer, 101; 17 N. Y. 609; Ayres *v.* Ins. Co., 17 Iowa, 170; 85 Am. Dec. 553; Sykes *v.* Ins. Co., 34 Pa. St. 79.

[6] People's Ins. Co. *v.* Spencer, 53 Pa. St. 353; 91 Am. Dec. 217; Liddle *v.* Market Fire Ins. Co., 4 Bosw. 179; Beal *v.* Park Ins. Co., 16 Wis. 241; 82 Am. Dec. 719; Kelley *v.* Troy Fire Ins. Co., 3 Wis. 254; Hough *v.* City Fire Ins. Co., 29 Conn. 10; 76 Am. Dec. 581; Keenan *v.* Missouri State Mutual Ins. Co., 12 Iowa, 126; Combs *v.* Hannibal Savings and Ins. Co., 43 Mo. 148; 97 Am. Dec. 383; Plumb *v.* Cattaraugus Mutual Ins. Co., 18 N. Y. 392; 72 Am. Dec. 526; Ashford *v.* Victoria Mutual Ins. Co., 20 U. C. C. P. 434; May *v.* Buckeye Mutual Ins. Co., 25 Wis. 291; 3 Am. Rep. 76; Peoria etc. Ins. Co. *v.* Hall, 12 Mich. 202; Campbell *v.* Ins. Co., 37 N. H. 35; 72 Am. Dec. 324; Phœnix Ins. Co. *v.* Hinesley, 75 Ind. 1. Where the agent who effects the insurance is apprised of the existence of an encumbrance, the company is estopped to complain that such fact is a breach of warranty: Breckinridge *v.* American Central Ins. Co., 87 Mo. 62. But a notice to a broker employed to solicit applications for insurance is not notice to the company for which he thus solicits: Devens *v.* Ins. Co., 83 N. Y. 168.

though he is not bound to charge his mind with all rumors or loose information coming to his knowledge.[1]

§ 2214. Waiver of Conditions in Policy.—A general agent has power to waive a condition in a policy that it shall not be binding until actual payment of the premium,[2] or to waive a forfeiture caused by present nonpayment of premium,[3] or a forfeiture caused by a misrepresentation,[4] or the condition in the policy requiring formal proof of loss,[5] or the condition forbidding "other insurance,"[6] or a condition requiring suits to be brought within a limited time,[7] or a condition in the policy that the premises insured shall not remain vacant,[8] or that petroleum shall not be kept on the premises.[9] So the agent has power to permit the insured to remove the insured property to another locality,[10] or to waive a forfeiture caused by the change of the residence of the insured without the license of the insurer.[11] An agent may waive a forfeiture where a claim for loss has been placed in his hands for adjustment. It will be presumed that he was authorized to do whatever was required to be

[1] Shafer *v.* Ins. Co., 53 Wis. 361.

[2] Sheldon *v.* Ins. Co., 26 N. Y. 460; Hotchkiss *v.* Ins. Co., 5 Hun, 91; Young *v.* Ins. Co., 45 Iowa, 377; 24 Am. Rep. 784; Bochen *v.* Ins. Co., 35 N. Y. 131; Agricultural Ins. Co. *v.* Montague, 38 Mich. 548; 31 Am. Rep. 326; Ins. Co. *v.* Norton, 96 U. S. 234; Bodine *v.* Ins. Co., 51 N. Y. 117; 10 Am. Rep. 566; O'Brien *v.* Ins. Co., 22 Fed. Rep. 586.

[3] Marcus *v.* Ins. Co., 68 N. Y. 625; Young *v.* Ins. Co., 45 Iowa, 377; 24 Am. Rep. 784; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345; 15 Am. Rep. 612.

[4] Fitzpatrick *v.* Ins. Co., 56 Conn. 116; 7 Am. St. Rep. 288.

[5] Lohnes *v.* Ins. Co., 121 Mass. 439; Little *v.* Ins. Co., 123 Mass. 380; 25 Am. Rep. 96; Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Lewis *v.* Ins. Co., 52 Me. 492; Ind. Ins. Co. *v.* Capehart, 108 Ind. 270. And this, in spite of a provision that no agent can change the terms or conditions, and the same shall not be changed or waived, except in writing signed by the president or secretary: Carson *v.* Jersey City Fire Ins. Co., 43 N. J. L. 300; 39 Am. Rep. 584.

[6] Schomer *v.* Ins. Co., 50 Wis. 575; American Ins. Co. *v.* Luttrell, 89 Ill. 314; Carrugi *v.* Ins. Co., 40 Ga. 135; 2 Am. Rep. 567; Hayward *v.* Ins. Co., 52 Mo. 181; 14 Am. Rep. 400.

[7] Dohn *v.* Ins. Co., 5 Lans. 275; Grant *v.* Ins. Co., 5 Ind. 23; 61 Am. Dec. 74; Little *v.* Ins. Co., 123 Mass. 380; 25 Am. Rep. 96; Peoria Ins. Co. *v.* Whitehill, 25 Ill. 470.

[8] St. Paul Ins. Co. *v.* Welles, 89 Ill. 314; Wheeler *v.* Ins. Co., 131 Mass. 1. *Contra*, Walsh *v.* Ins. Co., 73 N. Y. 5.

[9] Kruger *v.* Ins. Co., 72 Cal. 91; 1 Am. St. Rep. 42.

[10] New England etc. Ins. Co. *v.* Schettler, 33 Ill. 166.

[11] Wing *v.* Harvey, 27 Eng. L. & Eq. 141.

done in adjusting the loss.[1] But an agent cannot waive as to matters concerning which the policy distinctly states that he shall not.[2]

ILLUSTRATIONS.—A policy on a distillery provided that it should be void if the distillery should be run at night. It always had been and continued to be run at night, to the knowledge of the general agent who delivered the policy. *Held*, a waiver: *American Central Ins. Co.* v. *McCrea*, 8 Lea, 513; 41 Am. Rep. 647. The charter of a company provided that if the premises be encumbered the policy shall be void, unless the true title of the assured and the encumbrance on the premises be expressed therein. *Held*, that no officers or agents could waive the provision: *Leonard* v. *Ins. Co.*, 97 Ind. 299. A policy issued to a mortgagee contained a stipulation that if any change took place in the title or possession the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property, and satisfied the mortgage. *Held*, that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company having power to make contracts and issue policies, that such assigned policy shall have the force and effect of a new policy to the purchaser, will bind the company: *Amazon Ins. Co.* v. *Wall*, 31 Ohio St. 628; 27 Am. Rep. 533. Plaintiffs applied to A for insurance, believing him to be the agent of defendant company. He wrote the application, sent it to the company with his name as agent on it. The company received it, issued a policy in pursuance of it, wrote A's name on the back of the policy, sent it to him for delivery, and received the premium through him. *Held*, that A had authority to waive written assent to material alterations in the property insured: *Packard* v. *Ins. Co.*, 77 Me. 144.

§ 2215. Agents of Mutual Insurance Companies. — It is said that the agents and officers of companies organized with a capital stock divided into shares have greater powers in determining what shall be the terms of the contract, and in waiving a compliance with its stipulations, than those of companies organized on the mutual principle, in which the by-laws are made to fix and regulate by the same stipulations in every policy the rights of all the assured alike.[3]

[1] Brown v. State Ins. Co., 74 Iowa, 428; 7 Am. St. Rep. 495.

[2] Enos v. Sun Ins. Co., 67 Cal. 621.

[3] Brewer v. Ins. Co., 14 Gray, 203.

§ 2216. **Powers of Local or Special Agents.** — And a local or special agent of an insurer has restricted powers, and can only bind his principal by acts within his authority.[1] Thus it has been held that a local agent having power simply to receive proposals for insurance and to countersign and deliver policies has no authority to waive a condition in the policy as to proofs of loss,[2] or as to payment of premium,[3] or requiring assent of the company to any change in the situation of circumstances affecting the risk;[4] nor to cancel a policy;[5] nor to consent to additional insurance,[6] or an assignment of the policy.[7] An agent only empowered to take applications, receive and receipt for premiums, and deliver the policies to the assured when issued, cannot bind the company by a contract of insurance,[8] nor extend the time of payment of renewal premiums.[9] The medical examiner of a life insurance company is not, unless expressly authorized, the agent of the company in filling up an application for insurance, and the company is not bound by his acts therein, or estopped by his knowledge.[10] There is no presumption that the adjusting agent of an insurance company has authority to waive the forfeiture of a policy.[11]

§ 2217. **Powers of Subagents and Clerks.** — Agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies may confer upon a clerk or subordinate authority to exercise the same powers. The service is not of such a personal

[1] Merserean v. Ins. Co., 66 N. Y. 274; Stockton v. Ins. Co., 33 La. Ann. 577; 39 Am. Rep. 277.

[2] Bush v. Ins. Co., 63 N. Y. 531; Van Allen v. Ins. Co., 64 N. Y. 469.

[3] Willcutts v. Ins. Co., 81 Ind. 300.

[4] Kyte v. Commercial Union Assurance Co., 144 Mass. 43.

[5] Adams v. Ins. Co., 17 Fed. Rep. 630.

[6] Heath v. Ins. Co., 58 N. H. 414.

[7] Stringham v. Ins. Co., 4 Abb. App. 315; Strickland v. Ins. Co., 66 Iowa, 466.

[8] Armstrong v. State Ins. Co., 61 Iowa, 212.

[9] Critchett v. American Ins. Co., 53 Iowa, 404; 36 Am. Rep. 230.

[10] Flynn v. Equitable Life Assurance Society, 67 N. Y. 500; 23 Am. Rep. 134.

[11] Hollis v. State Ins. Co., 65 Iowa, 454.

character as may not be delegated.[1] A general agent authorized for several counties to receive applications, fix premium rates, receive money, countersign, issue, renew, and consent to the transfer of policies, has authority to appoint a subagent to receive applications and forward them to him.[2] So the general agent of a foreign insurance company in a state is presumed to have power to appoint subagents.[3] But a general agent, whose power in issuing policies of insurance calls for the exercise of discretion, cannot delegate the same to another.[4] Local agents of foreign insurance companies appointed by a general agent located without the state are to be considered general agents, and corporations represented by them are bound by their acts within the scope of the general authority they possess, though in violation of limitations upon that authority not brought home to the knowledge of the party dealing with them.[5] The principal clerk of an insurance company whose duties are to receive applications, fill out policies and renewals, and "generally attend to whatever is transacted behind the counter," has authority to bind the company by a parol contract, where the company has power to make such a contract.[6]

§ 2218. Insurance Agent is Agent of Insurer. — The agent of the insurer remains his agent, and the latter is bound by his acts and defaults, notwithstanding the policy or the by-laws of the company may state that the agent is considered and deemed the agent of the insured.[7] Where a policy provides "that any person

[1] May on Insurance, sec. 154; citing Bodine *v.* Ins. Co., 51 N. Y. 117; 10 Am. Rep. 566; Fahrenkrug *v.* Ins. Co., 68 Ill. 463; Continental Life Ins. Co. *v.* Goodhall, 5 Big. L. & Acc. Ins. Cas. 422; Mayers *v.* Mut. Life Ins. Co., 38 Iowa, 304; Planters' Ins. Co. *v.* Myers, 55 Miss. 479; 30 Am. Rep. 521; Cooke *v.* Ætna Ins. Co., 7 Daly, 555; Davis *v.* Ins. Co., 18 Hun, 230.

[2] Krumm *v.* Jefferson Fire Ins. Co., 40 Ohio St. 225.

[3] Kuney *v.* Ins. Co., 36 Hun, 66.

[4] McClure *v.* Mississippi Valley Ins. Co., 4 Mo. App. 148.

[5] Miller *v.* Phœnix Ins. Co., 27 Iowa, 203; 1 Am. Rep. 262.

[6] Cooke *v.* Ins. Co., 7 Daly, 555.

[7] Ins. Co. *v.* Wilkinson, 13 Wall. 222; Com. Ins. Co. *v.* Ives, 56 Ill. 402; Whited *v.* Ins. Co., 76 N. Y. 415; 32

other than the assured who may have procured this insurance to be taken shall be deemed to be the agent of the assured, and not of this company, under any circumstances whatever," etc., this does not refer to agents of the company, but only to insurance brokers.[1] So a provision in a policy that "if any broker . . . . has procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance," does not prevent showing that, as a fact, the broker acted for the company in delivering the policy and collecting the premium.[2]

§ 2219. Liability of Insurer for Misrepresentations of Agents. — The insurer may be bound by the false statements and misrepresentations of his agents.[3] Thus representations (false) as to the condition of the company and its ability to fulfill its contracts have been held binding on the insurer.[4] The execution by the insured of an instrument purporting to cancel a contract of insurance, induced by false information communicated by the agent of the insurers, does not estop the insured from recovering upon the policy.[5] But the following representations made by an agent (though false) have been held not binding on the company, viz.: That the company did

Am. Rep. 330; Eilenberger v. Ins. Co., 89 Pa. St. 464; Bebee v. Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Planters' Ins. Co. v. Myers, 55 Miss. 479; 30 Am. Rep. 521; Kausal v. Ins. Co., 31 Minn. 17; 47 Am. Rep. 776; Continental Ins. Co. v. Pierce, 39 Kan. 396; 7 Am. St. Rep. 557; Nassauer v. Ins. Co., 109 Pa. St. 507. *Contra*, Rohrback v. Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451.

[1] Alexander v. Ins. Co., 5 Thomp. & C. 208; 2 Hun, 655.

[2] Newark Fire Ins. Co. v. Sammons, 110 Ill. 166.

[3] May on Insurance, sec. 133. Most of these cases have arisen in actions against the holders of policies in mutual insurance companies, on their notes, the defense being that the contract was induced by the false representations of the company's agent. Where an agent of the insurer had cheated the insured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, it was held that the insured might prove the fact, and hold the principal to the contract as if he had committed the wrong: Eilenberger v. Ins. Co., 89 Pa. St. 464.

[4] Williams v. Pew, 2 Allen, 1; Jones v. Dana, 24 Barb. 335; Devendorf v. Beardsley, 23 Barb. 656.

[5] Holden v. Ins. Co., 46 N. Y. 1; 7 Am. Rep. 287.

not take risks in cities;[1] or that the insured will not be called on to pay any assessments on his premium note.[2] Nor will the agent's "highly colored statements as to the actual pecuniary condition and future prospects of the company, not absolutely and materially fraudulent, but allowable within the fair range of embellishment and chaffer in the matter of bargain, vitiate the policy, which the insured has been induced to accept under such promises and representations, unless calculated in the opinion of the jury to impose upon a careful and prudent man. If the representations are of such a character that they would vitiate other contracts, they will vitiate the contract of insurance; not otherwise."[3] A contract of life insurance, being not continuous from year to year, but an entire contract of insurance for life, subject to discontinuance or forfeiture, representations made by the officers of the company, subsequent to the execution of the original contract, and not upon a new consideration, would not enter into the original contract, nor be binding.[4]

§ 2220. **Mistakes or Omissions of Agent.**—Mistakes or omissions of an agent in drawing up or communicating the application to his principal, or describing the property insured, or otherwise, where he knew or could have ascertained the truth, and was not misled by the applicant, are binding on the insurer, and cannot be set up by the latter as a defense to the policy.[5] Where the

[1] Hackney v. Ins. Co., 4 Pa. St. 185.

[2] Keller v. Ins. Co., 28 Ind. 170; Farmers' etc. Ins. Co. v. Marshall, 29 Vt. 23.

[3] May on Insurance, sec. 133; Simons v. New York Life Ins. Co., 38 Hun, 309; Hale v. Continental Life Ins. Co., 20 Blatchf. 515.

[4] Knickerbocker Ins. Co. v. Heidel, 8 Lea, 488.

[5] Ayers v. Ins. Co., 21 Iowa, 185; Emery v. Ins. Co., 52 Me. 322; New England Ins. Co. v. Schettler, 38 Ill. 166; Ætna etc. Ins. Co. v. Olmstead, 21 Mich. 246; 4 Am. Rep. 483; Beebe v. Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Dayton Ins. Co. v. Kelley, 24 Ohio St. 345; 15 Am. Rep. 612; Piedmont etc. R. R. Co. v. Young, 58 Ala. 476; 29 Am. Rep. 770; Ins. Co. v. Thorpe, 22 Mich. 140; 7 Am. Rep. 638; Manhattan Fire Ins. Co. v. Weill, 28 Gratt. 389; 26 Am. Rep. 364; McArthur v. Ins. Co., 73 Iowa, 336; 5 Am. St. Rep. 684; Stone v. Ins. Co., 68 Iowa, 737; 56 Am. Rep. 870; Phœnix Ins. Co. v. Allen, 109 Ind. 273.

policy requires that certain facts must be stated in the application by the assured, and the facts are made known to the agent of the company, who omits to reduce them to writing, the company cannot escape liability on the ground that the requirement of the policy has not been complied with.[1] So a party insured is not liable for any misrepresentations in a survey of the premises made by an agent of the company who was as well acquainted with the premises as the insured himself.[2] So the insured is not affected by the omission of insurance agents to comply with instructions to transmit to the company copies of the written parts of all policies issued by the agents, and of any indorsements made thereon by them.[3] It has been held that the company was bound to the full extent, where a partner insured in his own name the partnership property, the agent being of opinion that this would cover the interest of the partnership as well as his share;[4] where the agent made a mistake as to the character of the insurable interest of the applicant, the facts being correctly stated to him, and set it down as an absolute instead of a qualified interest, which it really was;[5] where the agent told the applicant that an accidental omission of which he was informed made no difference;[6] where the agent, putting his own construction upon the facts, filled in the wrong person's name as the party's usual medical attendant;[7] where the agent told the applicant that it was not necessary to state in the application that he had had a sunstroke.[8] The insurer is estopped from availing itself of any omission or false

[1] Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53; 4 Am. Rep. 582.

[2] Roth *v.* City Ins. Co., 6 McLean, 324; Plumb *v.* Ins. Co., 18 N. Y. 392; 72 Am. Dec. 526.

[3] Gloucester Mfg. Co. *v.* Howard Ins. Co., 5 Gray, 497; 66 Am. Dec. 376.

[4] Manhattan Ins. Co. *v.* Webster, 59 Pa. St. 227; 98 Am. Dec. 332; Anson *v.* Ins. Co., 23 Iowa, 84. *Contra*, Peoria etc. Ins. Co. *v.* Hall, 12 Mich. 262.

[5] Atlantic Ins. Co. *v.* Wright, 22 Ill. 462. But see Blooming etc. Ins. Co. *v.* McAnenerney, 102 Pa. St. 335; 48 Am. Rep. 209.

[6] Fire & Mar. Ins. Co. *v.* Chestnut, 50 Ill. 111.

[7] Langdon *v.* Ins. Co., 14 Fed. Rep. 272.

[8] Boos *v.* Ins. Co., 6 Thomp. & C. 364; 4 Hun, 133.

statement in the application, where the matter has been prepared by the agent of the company, and the applicant signs the application as prepared by such agent, and makes no misrepresentations himself.[1]

ILLUSTRATIONS. — A woman not versed in legal terms was applied to by an agent of an insurance company to take a policy upon her house. She stated the facts relating to her title to the property, and the agent wrote in the application that she had a fee-simple title, when she had not, and also put other statements therein, he well knowing the facts, to enable himself to obtain the premium. *Held*, not to preclude a recovery: *Rockford Ins. Co.* v. *Nelson*, 75 Ill. 548. An application for insurance was written by an insurance broker in the office of the agent of the company. The company, requiring further information as to the ownership of the property, returned the application to the agent, who requested the broker "to go and get the reply." The broker knowingly gave false information, though the assured told him the truth. *Held*, that the company could not avoid liability: *Mullin* v. *Vermont Mutual Fire Ins. Co.*, 58 Vt. 113. The medical examiner, at the request of an agent of the defendant, who had acted to some extent as general agent, and occupied defendant's principal office, filled up an application for life insurance. The applicant made correct answers, but the medical examiner incorrectly and untruly stated some of them in the application. *Held*, that defendant was estopped from taking advantage of the mistakes: *Flynn* v. *Equitable Life Ins. Co.*, 78 N. Y. 568; 34 Am. Rep. 561. The medical examiner was required to give answers to the questions in his certificate in his own handwriting, and not allow any person to dictate any of them. In answer to a question, the applicant correctly stated the cause of the death of his sister. This answer was not filled in when the applicant signed the certifi-

[1] Plumb *v.* Ins. Co., 18 N. Y. 392; 72 Am. Dec. 526; Shoemaker *v.* Ins. Co., 60 Barb. 103; Baker *v.* Ins. Co., 2 Hun, 405; 43 N. Y. 289; Rowley *v.* Ins. Co., 36 N. Y. 550; Owens *v.* Ins. Co., 56 N. Y. 571; Ludgwig *v.* Ins. Co., 48 N. Y. 380; 8 Am. Rep. 556; Flynn *v.* Ins. Co., 7 Hun, 390; Taylor *v.* Ins. Co., 10 Hun, 55; Sarsfield *v.* Ins. Co., 61 Barb. 482; Hughes *v.* Ins. Co., 55 N. Y. 270; 14 Am. Rep. 254; Pitney *v.* Ins. Co., 65 N. Y. 23; Leroy *v.* Ins. Co., 39 N. Y. 59; Schoick *v.* Ins. Co., 68 N. Y. 438; Ins. Co. *v.* Williams, 39 Ohio St. 584; 48 Am. Rep. 474; North Am. Ins. Co. *v.* Throop, 22 Mich. 160; 7 Am. Rep. 638; Hough *v.* Ins. Co., 29 Conn. 10; 76 Am. Dec. 581; Planters' Ins. Co. *v.* Sorrels, 1 Baxt. 352; 30 Am. Rep. 521; Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302; 25 Am. Rep. 386; Grattan *v.* Ins. Co., 92 N. Y. 274; 44 Am. Rep. 372; McCall *v.* Ins. Co., 9 W. Va. 237; 27 Am. Rep. 558; Bennett *v.* Ins. Co., 15 Abb. N. C. 234; Rivera *v.* Ins. Co., 62 Miss. 720; Flynn *v.* Ins. Co., 15 Hun, 521; Jordan *v.* Ins. Co., 64 Iowa, 216. But see Ryan *v.* Ins. Co., 41 Conn. 168; 19 Am. Rep. 490; New York etc. Ins. Co. *v.* Fletcher, 117 U. S. 519.

cate certifying that the answers were true, and afterwards the medical examiner, without his knowledge, filled it in as "not known to applicant." *Held*, that the company was responsible for the error: *Grattan* v. *Metropolitan Life Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617. An insurance agent who, in filling up an application, erroneously stated that there was no encumbrance, was notified by the assured of the mistake before receipt of the policy, and on the same day wrote to the company information thereof. *Held*, that the right of recovery by the assured was not defeated: *Anson* v. *Winnesheik Ins. Co.*, 123 Iowa, 84. A policy of insurance was issued upon a dwelling-house occupied by a tenant, and the agent assured the owner that it would not matter if the premises should become vacant; but the policy contained a clause to the effect that if the building should become vacant at any time the policy should become void, and the agent kept the policy in his possession until after a loss, which occurred when the building was unoccupied, the owner having no knowledge of the existence of such a clause in the policy. *Held*, that the company was bound by the contract as made with the agent: *St. Paul etc. Ins. Co.* v. *Wells*, 89 Ill. 82.

TITLE XXIV.

CONTRACTS.

PART I.—FORMATION OF THE CONTRACT, §§ 2221–2380.

PART II.—PARTIES TO THE CONTRACT, §§ 2381–2391.

PART III.—MATTER OF THE CONTRACT, §§ 2392–2468.

PART IV.—DISCHARGE OF THE CONTRACT, §§ 2469–2582.

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TITLE XXIV.

CONTRACTS.

PART I.—THE FORMATION OF THE CONTRACT.

CHAPTER CVI.

THE FORMATION OF CONTRACTS GENERALLY.

§ 2221. The different kinds of contracts.
§ 2222. Agreement — Intentions must be expressed.
§ 2223. Promise defined — Promissory expressions not binding.
§ 2224. Representations, when binding.
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§ 2240. Offer not assignable.
§ 2241. At what time is contract considered made.
§ 2242. At what place is contract considered made.
§ 2243. Contract must be mutual.

§ 2221. The Different Kinds of Contracts.—Contracts are of three kinds, viz.: Simple contracts, contracts under

seal, and contracts of record.[1] According to the manner in which the agreement is formed, contracts are express and implied. An express contract is proved by words, written or spoken, expressing an actual agreement of the parties; an implied contract is proved by circumstantial evidence manifesting the intention of agreement. Contracts may also be of a mixed character in respect of the mode of making them; that is to say, partly expressed in words, and partly implied from acts and circumstances. "The only difference between an express and an implied contract is in the mode of proof. An express contract is proved by direct evidence; an implied contract, by circumstantial evidence. Whether the contract be proved by evidence, direct or circumstantial, the legal consequences resulting must be the same."[2] A promise will be implied where equity and good conscience require one, even though none was expressly made.[3] But a promise will not be implied where there is an express contract covering the subject-matter.[4] Nor will a contract be implied where an express contract would for any reason be invalid.[5]

§ 2222. Agreement — Intentions must be Expressed. — Agreement consists where two persons are of the same mind and intention concerning the subject-matter. This

[1] Whitehill *v.* Wilson, 3 Penr. & W. 405; 24 Am. Dec. 326. "Contracts are distinguishable in two classes: simple contracts and contracts by specialty; in other words, contracts by parol and contracts under seal. Contracts reduced to writing, but without seal, are comprehended under the first class, or simple contracts. There is no distinct class of contracts merely in writing": Perrine *v.* Cheeseman, 11 N. J. L. 388; 19 Am. Dec. 388. A certificate of permanent scholarship in a college is a valid contract: Trustees of Howard College *v.* Turner, 71 Ala. 429; 46 Am. Rep. 326.

[2] Leake on Contracts, 21; Marzetti *v.* Williams, 1 Barn. & Adol. 425; Day *v.* Caton, 119 Mass. 513; 20 Am. Rep. 347; Chilcott *v.* Trimble, 13 Barb. 502; Seals *v.* Edmondson, 73 Ala. 295; 49 Am. Rep. 51.

[3] Turner *v.* Jones, 1 Lans. 147.

[4] Phelps *v.* Sheldon, 13 Pick. 50; 23 Am. Dec. 659; King *v.* Woodruff, 23 Conn. 56; 60 Am. Dec. 625; North *v.* Nichols, 37 Conn. 375; Walker *v.* Brown, 28 Ill. 378; 81 Am. Dec. 287; Massachusetts General Hospital *v.* Fairbanks, 129 Mass. 78; 37 Am. Rep. 303.

[5] Chase *v.* R. R. Co., 97 N. Y. 384; 49 Am. Rep. 531.

state of mind or intention of one can be ascertained by another only by means of outward expressions, as words and acts. Therefore, the law excludes all questions concerning intentions unexpressed, and imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words and actions.[1] But as there must be a mutual communication between the parties of their intentions to agree, the law judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them; and an intention not so communicated, or withdrawn before communicated, or communicated only to a third person, is in general inoperative and immaterial to the question of agreement.[2] Though a contract is formal and complete, yet if understood by the parties as a jest, it is not binding.[3]

ILLUSTRATIONS. — A transaction consisted of the giving of a three-hundred-dollar check for a fifteen-dollar watch by way of mere frolic and banter, the one party not expecting to buy the watch, nor the other to sell it. *Held*, not to constitute a contract, and no recovery can be had upon the check, notwithstanding defendant retained the watch, and did not offer to return it until the trial: *Keller* v. *Holderman*, 11 Mich. 248; 83 Am. Dec. 737.

§ 2223. Promise Defined — Promissory Expressions not Binding. — The intention of one party to observe the matter in question expressed to and accepted by the other, for the purpose of creating a right to its observance, constitutes a promise.[4] But mere promissory expressions do

[1] Leake on Contracts, 12; citing Cornish *v.* Abington, 4 Hurl. & N. 549; 28 L. J. Ex. 262; Pickard *v.* Sears, 6 Ad. & E. 469; Freeman *v.* Cooke, 2 Ex. 654. "The rule of law is that stated in Freeman *v.* Cooke. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms": Per Blackburn, J., in Smith *v.* Hughes, L. R. 6 Q. B. 607; 40 L. J. Q. B. 227.

[2] Leake on Contracts, 13; Cox *v.* Troy, 5 Barn. & Ald. 474; White *v.* Corlies, 46 N. Y. 467; Ramaley *v.* Leland, 6 Robt. 358.

[3] Armstrong *v.* McGhee, Addis. 261.

[4] Leake on Contracts, 13.

not constitute a promise, and cannot make a contract.[1] A promise not assented to by the promisee is not binding upon the promisor.[2]

ILLUSTRATIONS. — An employer engages a servant, promising to give him such remuneration as he, the employer, shall think right. There is no legal liability to pay anything: *Taylor* v. *Brewer*, 1 Maule & S. 290; *Roberts* v. *Smith*, 4 Hurl. & N. 315; 28 L. J. Ex. 164; *Parker* v. *Ibbetson*, 4 Com. B., N. S., 346; 27 L. J., Com. P., 236. A person, in answer to a suitor for his daughter, wrote: "I shall allow her the interest on two thousand pounds, whether she remains single or marries. If the latter, I may bind myself to do it, and pay the principal at my death to her and her heirs." *Held*, not to create a contract: *Randall* v. *Morgan*, 12 Ves. 67. A brother-in-law wrote to the widow of his brother, living sixty miles distant, that if she would come and see him, he would let her have a place to raise her family. Shortly after, she removed to his residence, and he for two years furnished her with a comfortable residence, and then required her to give it up. *Held*, that the promise was a mere gratuity, and that an action would not lie for a violation of it: *Kirksey* v. *Kirksey*, 8 Ala. 131. A promised B that if she, a single woman, would live with him until her marriage, he would give her one hundred acres of land, without any reference to locality or value. *Held*, void for uncertainty: *Sherman* v. *Kitsmiller*, 17 Serg. & R. 45. A keeper of a watering-place telegraphed: "There are many cases of yellow fever here; send a physician

[1] Leake on Contracts, 14; Carson *v.* Lucas, 13 B. Mon. 213. In Stamper *v.* Temple, 6 Humph. 113, 44 Am. Dec. 296, the court say: "It appears that the defendant and his family were in deep affliction at the loss of his son; that he himself was laboring under the effect of severe wounds received from the same persons who had killed his son; that when the arresting of the persons who had perpetrated the outrage was spoken of, he observed that he would give two hundred dollars to have them arrested. But to a remark of one of the company that he did not want any of his money, he said he did not intend it for them. Whom did he intend it for, then? — for others, who were not present? How did he suppose they were to know it? He made no public offer; he authorized no one to make it for him. We are constrained to believe that what is called an offered reward of two hundred dollars was nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the distracted state of his own mind, and that of his family; as we frequently hear persons exclaim, 'Oh! I would give a thousand dollars if such an event were to happen,' or *vice versa*. No contract can be made out of such expressions; they are evidence of strong excitement, but not of a contracting intention": Stagg *v.* Compton, 81 Ind. 171.

[2] McKinley *v.* Watkins, 13 Ill. 140; Esmay *v.* Gorton, 18 Ill. 483; Brown *v.* Rice, 29 Mo. 322; Tuttle *v.* Love, 7 Johns. 470; Eliason *v.* Henshaw, 4 Wheat. 225; Bruce *v.* Pearson, 3 Johns. 534; Tucker *v.* Woods, 12 Johns. 190; 7 Am. Dec. 305; Shupe *v.* Galbraith, 32 Pa. St. 10; King *v.* Warfield, 67 Md. 246; 1 Am. St. Rep. 384.

this afternoon without fail." *Held*, not a contract to pay a physician to whom it was shown, and who thereupon went: *Williams* v. *Brickell*, 37 Miss. 682; 75 Am. Dec. 88. Upon the completion of a house, the builder said he would make a deduction if the mortar did not harden. *Held*, that the builder was not bound if the house-owner did not accede to the proposition: *Demoss* v. *Noble*, 6 Iowa, 530.

§ 2224. **Representations, when Binding.** — Expressions of intention or representations made by a person to another require to be distinguished according to their matter; as being representations as to future acts and conduct, which, if intended to be binding, constitute promises strictly so called; and representations concerning matters of fact. "There is a clear difference between a representation of fact and a representation that something will be done in the future. A representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise."[1]

§ 2225. **Representations on Which Another Acts — Estoppel.** — A representation concerning a matter of fact may also be made to another, although without any expressed or intended warranty of the truth, yet with the intention of inducing him to act upon it; and if the latter act upon it, and suffer loss by reason of it not being true, the party making the representation may be held responsible in law for the consequences; or he may be estopped from denying the truth of the representation.[2]

§ 2226. **Warranty Defined.** — A representation concerning a matter of fact, both expressed and intended as

[1] Beattie *v.* Ld. Ebury, L. R. 7 Ch. 804; 41 L. J. Ch. 808.

[2] Leake on Contracts, 15. "Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time": Pickard *v.* Sears, 6 Ad. & E. 469.

binding the person making it to its truth, is called a warranty, and produces a legal contract obligation.[1]

§ 2227. When Representations are not Warranties. — The representation may be made, not only without any warranty, but also without being intended, or accepted as intended, to be acted upon without further inquiry. In such case there is no warranty.[2]

§ 2228. Contracts by Letter. — A correspondence between two parties by letter may contain an agreement which will produce a contract as binding as if drawn up and signed by the parties, provided there is a proposal of terms, and such an acceptance as imports a consent of both parties.[3]

§ 2229. Offer and Acceptance Essential to Contract. —An agreement consists of an offer on one side, and the acceptance of the offer on the other.[4] An offer cannot become binding upon the party making it or the party to whom it is made without the latter's acceptance.[5] But acceptance may be implied.[6] Still, although circumstances may exist which will impose a contractual obligation by mere silence, yet such circumstances are exceptional in their character and of rare occurrence; and no legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech which was neglected to the harm of the other party.[7]

[1] See *post*, Chapter CXII., Warranties and Representations.

[2] Chandelor *v.* Lopus, Cro. Jac. 2; 1 Smith's Lead. Cas., 160; Tewksbury *v.* Bennett, 31 Iowa, 83. See *post*, Warranties; Omrod *v.* Huth, 14 Mees. & W. 664; Horton *v.* Green, 66 N. C. 596.

[3] Leake on Contracts, 26; Knight *v.* Cooley, 34 Iowa, 218.

[4] White *v.* Corlies, 46 N. Y. 467; Connor *v.* Remeker, 25 S. C. 514. As to offer and acceptance in auction sales, see Agency — Auctioneers; as to railroad tickets and time-tables and offers therein, see Bailments — Carriers.

[5] Leake on Contracts, 28; Haynes *v.* Haynes, 1 Drew. & S. 426; Stitt *v.* Huidekopers, 17 Wall. 384; Strasburg R. R. Co. *v.* Echternacht, 21 Pa. St. 220; 60 Am. Dec. 49; Oberoth *v.* Rugil, 71 Pa. St. 280; Rutledge *v.* Greenwood, 2 Desaus. Eq. 389; Gilman *v.* Kibler, 5 Humph. 19; Stuart *v.* R. R. Co., 32 Gratt. 146.

[6] Slocumb *v.* Linty, 1 Hemp. 431.

[7] Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6; 4 Am. St. Rep. 623.

ILLUSTRATIONS. — C. & E. ordered paper of K. & S., to be sent them at once, to which K. & S. replied they had none on hand, but offered to make it at the price offered. C. & E. again wrote as if their order was accepted, saying they wanted the paper to come right along. K. & S. replied a second time they could not send it right along, and if they were in a hurry they would better order it somewhere else. *Held*, not to constitute a contract: *Cornwells* v. *Krengel*, 41 Ill. 394. A negotiation for a contract had been broken off without any definite conclusion having been arrived at, and afterwards one of the parties wrote to the other, stating that he accepted a certain proposition made at the negotiation, and asking the latter to "acknowledge the acceptance of the above." *Held*, no contract: *Hough* v. *Brown*, 19 N. Y. 111. A carpet manufacturer offered carpets for sale, and received by mail, December 14th, an unconditional order for two carpets, specifying color, texture, and proportions, and mode of transmittal. Without replying, the manufacturer, December 21st, forwarded the carpets as per order; but the buyer ignored the express notification of their arrival, and bought elsewhere. *Held*, that the contract was complete: *Crook* v. *Cowan*, 64 N. C. 743. A, by letter, asked B what soldiers' additional homesteads were worth. B replied that he could furnish them on the day he wrote at three dollars per acre. Four days later, A telegraphed to send two. *Held*, not a contract for a sale at three dollars per acre: *Talbot* v. *Pettigrew*, 3 Dak. 141. A wrote to B, offering to buy a horse, and stating that if he received no reply he would assume the offer was accepted. *Held*, that B by not replying was not bound: *Felthouse* v. *Bindley*, 11 Com. B., N. S., 869.

§ 2230. Offer to Unascertained Person — Rewards. — If a promise is made to any one who will do a certain act, the person doing it is entitled to enforce it.[1] Thus where the defendants advertised that they would redeem certain bills of a bank, it was held a promise to every person who heard the representation.[2]

The publication of an advertisement offering a reward for information respecting a loss or a crime is a general offer to any person who is able to give the information asked; and the acceptance of it by giving such informa-

[1] Bull *v.* Talcot, 2 Root, 119; 1 Am. Dec. 62; Patton *v.* Hassinger, 69 Pa. St. 305; Babcock *v.* Raymond, 2 Hilt. 61; Walsh *v.* St. Louis Exposition etc. Ass'n, 90 Mo. 459; Long *v.* Battle Creek, 39 Mich. 323; 33 Am. Rep. 384.

[2] Tarbell *v.* Stevens, 7 Iowa, 163.

tion creates a valid contract.[1] The performance of the terms of the offer is a good consideration for the promise,[2] even where the offerer had no interest in the performance of the services.[3] It is generally held that a reward cannot be claimed by a public officer whose duty it was to do what the reward offered a premium for doing.[4] But it must be clear that the matter was within his official duty.[5] Under a statute giving a reward to "whosoever shall pursue and apprehend" any person who had stolen a horse, the owner of the horse is entitled thereto.[6] But one who assists a prisoner to escape cannot recover a reward offered for information of the prisoner's hiding-place, if he conceals the fact of his own aiding.[7]

The offer is, of course, a mere proposal, and may be revoked at any time before acceptance by performance.[8] In Massachusetts, it is held that an offer is only in force for a reasonable time after it is made,[9] while in other states it has been ruled that the offer continues open until it is revoked.[10] But it may be withdrawn at any time; and the fact that an individual who claims for services afterwards performed under it did not know of the withdrawal when he rendered the service, is immaterial.[11]

[1] Williams *v.* Carwardine, 4 Barn. & Adol. 621; Ryer *v.* Stockwell, 14 Cal. 134; 73 Am. Dec. 634; Reif *v.* Page, 55 Wis. 496; 42 Am. Rep. 731; Morrell *v.* Quarles, 35 Ala. 544; Harson *v.* Pike, 16 Ind. 140; Pierson *v.* Morch, 82 N. Y. 503; Janorin *v.* Exeter, 48 N. H. 83; 2 Am. Rep. 185; Besse *v.* Dyer, 9 Allen, 151; 85 Am. Dec. 747. Or the offer may be made orally: Hayden *v.* Souger, 56 Ind. 42; 26 Am. Rep. 1. But where an offer of a reward is made in a newspaper without authority, the alleged promisor is not estopped from denying his liability, although he knew of the publication, and did not object to it: Hugill *v.* Kinney, 9 Or. 250; 42 Am. Rep. 801.

[2] Morrell *v.* Quarles, 35 Ala. 544.

[3] Furman *v.* Parke, 21 N. J. L. 310.

[4] Stamper *v.* Temple, 6 Humph. 113; Hayden *v.* Souger, 56 Ind. 42; 26 Am. Rep. 1; Pool *v.* Boston, 5 Cush. 219; Means *v.* Hendershott, 24 Iowa, 78; Gilmore *v.* Lewis, 12 Ohio, 281; Hatch *v.* Mann, 15 Wend. 44; City Bank *v.* Banks, 2 Edw. Ch. 95; In re Russell, 51 Conn. 577; 50 Am. Rep. 55.

[5] Pilie *v.* New Orleans, 19 La. Ann. 274; Gregg *v.* Pierce, 53 Barb. 387; Davis *v.* Munson, 43 Vt. 676; 5 Am. Rep. 315; Chicago etc. R. R. Co. *v.* Sebring, 16 Ill. App. 181.

[6] Butler County *v.* Leibold, 107 Pa. St. 407.

[7] Hassan *v.* Doe, 38 Me. 45.

[8] Cunningham *v.* Gann, 52 Pa. St. 484; Harson *v.* Pike, 16 Ind. 140.

[9] Loring *v.* City of Boston, 7 Met. 409.

[10] Ryer *v.* Stockwell, 14 Cal. 134; 73 Am. Dec. 634; In re Kelly, 39 Conn. 159.

[11] Shuey *v.* United States, 92 U. S. 73.

There is a conflict in the cases on the question whether it is necessary that a person claiming a reward should have had notice at the time he performed the service that the reward had been offered, some decisions maintaining that it is,[1] others that it is not.[2]

The offerer may annex any condition he chooses, and one claiming a reward must prove a compliance with them.[3] Thus where one offers a sum of money for the arrest of two persons, both must be arrested before the reward can be claimed.[4] To entitle one to a reward for the "apprehension and conviction" of a criminal, his services must have been instrumental in procuring both.[5] But a substantial performance entitles the person to the reward.[6] Where a reward is offered for a parcel of lost bank bills, a finder of a part is entitled to a *pro rata* proportion of the reward offered.[7]

ILLUSTRATIONS. — A telegram was directed to the "sheriff of Centre County," describing a stolen horse, and saying, "a reward of fifty dollars will be paid for her recovery." *Held*, that this was a general offer, and bound the offerer to whomsoever recovered the horse: *Cummings* v. *Gann*, 52 Pa. St. 484. A man standing in front of a burning building shouted to the crowd: "I will give five thousand dollars to any person who will bring the body of my wife out of that building, dead or alive." *Held*, a sufficient offer: *Reif* v. *Paige*, 55 Wis. 496; 42 Am. Rep. 731. The sheriff of M. county offered a reward for delivery, in M., of a prisoner who had escaped from the jail of F. county; whereupon two persons captured the prisoner, but

[1] Howland *v.* Lounds, 51 N. Y. 604; 10 Am. Rep. 654; City Bank *v.* Bangs, 2 Edw. Ch. 95; Marion *v.* Treat, 37 Conn. 96; 9 Am. Rep. 307; Hewitt *v.* Anderson, 56 Cal. 476; 38 Am. Rep. 65; Stamper *v.* Temple, 6 Humph. 113; Fitch *v.* Snedaker, 38 N. Y. 248; 97 Am. Dec. 791.

[2] Dawkins *v.* Sappington, 26 Ind. 199; Crawshaw *v.* Roxbury, 7 Gray, 377; Eagle *v.* Smith, 4 Houst. 293; Russell *v.* Stewart, 44 Vt. 170; Auditor *v.* Ballard, 9 Bush, 572.

[3] Amis *v.* Conner, 43 Ark. 337; Gardner *v.* Hartford, 14 Conn. 195; Cornelson *v.* Sun Ins. Co., 7 La. Ann. 345; Jones *v.* Phœnix Bank, 8 N. Y; 228; Clanton *v.* Young, 11 Rich. 546. Austin *v.* Milwaukee County, 24 Wis. 278; Franklin *v.* Heiser, 6 Blatchf. 426; Burke *v.* Wells, 50 Cal. 218; Kincaid *v.* Eaton, 98 Mass. 139.

[4] Blain *v.* Pacific Express Co., 69 Tex. 74.

[5] Fitch *v.* Snedaker, 38 N. Y. 248; 97 Am. Dec. 791.

[6] Gilkey *v.* Bailey, 2 Harr. (Del.) 359; Brennan *v.* Hoff, 1 Hilt. 151; Bésse *v.* Dyer, 9 Allen, 151; 85 Am. Dec. 747.

[7] Symmes *v.* Frazier, 6 Mass. 344; 4 Am. Dec. 142.

upon demand of the sheriff of F. county, surrendered him therein, whence the sheriff of M. took him into M. *Held*, that the captors were entitled to the reward: *Stone* v. *Dysert*, 20 Kan. 123. D. offered a reward for the "capture and conviction" of each of certain criminals. P. captured two of them, who confessed their guilt; but the indictments against them were dismissed at the solicitation of D., in order to use them as witnesses against the others. *Held*, that P. was entitled to the reward: *Louisville and Nashville R. R. Co.* v. *Goodnight*, 10 Bush, 552; 19 Am. Rep. 80. A detective officer, knowing that M. had wrongful possession of plaintiff's watch, offered to recover it for fifty dollars, which plaintiff agreed to pay. Meantime M. sent the watch by express to plaintiff. The defendant, however, arrested M., and thus compelled him to recall the watch before delivery. *Held*, that he had no right to compensation, or lien on the watch therefor: *Hoffman* v. *Barthelmess*, 63 Ga. 759; 36 Am. Rep. 129. A reward was offered for the finding of a package of money and returning it to A. The money had been left in the fire-proof chest of A, and was afterwards found on the floor of the same chest by a clerk of A, who delivered it to B. *Held*, that the money was not lost, and that the clerk was not entitled to the reward: *Commercial Bank* v. *Pleasants*, 6 Whart. 375. A, whose sister had been murdered, offered to pay a city marshal a certain sum of money to obtain information to convict the murderer. *Held*, that A could not defeat a recovery by showing that, after the marshal had rendered services, the offer was withdrawn; and that it was no defense that plaintiff was the city marshal, it not being his duty, as such, to leave the city and county to detect a murderer: *Bronnenberg* v. *Coburn*, 110 Ind. 169. A man called upon a police-officer, inquired if any goods had been stolen lately, and told him if there had been, to let him know. Afterwards, information was given to the same officer of goods having been stolen, and he directed that a reward should be offered, and handbills printed and sent to him for distribution, which was done, and he carried one of them to the original informer, who gave such information that the thief was arrested and convicted, and the next morning gave up the goods. *Held*, that the informer was entitled to the reward unless before it was offered he had the goods in his possession knowing them to be stolen, or was connected with the felony: *Jenkins* v. *Kelren*, 12 Gray, 330; 74 Am. Dec. 596.

§ 2231. Offer must be Accepted as Made — Variance. An offer must be accepted as made. If the acceptance be made with a condition or a qualification, there is no con-

tract; or if there be a variance of any kind between the terms of the offer and the acceptance.[1] If an answer to an offer by letter proposes modifications, the party making the offer must state his acceptance of the modifications, if he proposes to hold the writer of the answer.[2] And the offer and acceptance must be between the persons who intend to contract. Thus an offer made to one person and accepted by another, unknown to the offerer, does not make a contract.[3] And to constitute a contract, the parties must assent to the same thing in the same sense; the minds of both must meet as to the same thing.[4] But the acceptance of an offer without objection or condition binds the party accepting; and the party making the offer has the right to understand that the acceptance was according to the terms of the offer.[5] Still, where one makes an offer with certain conditions, and accepts acceptance not responsive to the proposal, he is bound by the contract thus made, and cannot fall back on his proposal in case of subsequent disagreement.[6]

ILLUSTRATIONS.— A made a proposition to B; B declined to accept, but made a different one to A by a messenger, with which A was satisfied, but did not notify B of his assent. *Held*, that B was not bound: *Borland* v. *Guffey*, 1 Grant Cas. 394. A, in California, offered B, in Iowa, certain land at a certain price. B replied that he accepted, that the money was subject to A's order in bank in Iowa, and asked when he could expect deed. A made no reply. *Held*, there was no sale: *Sawyer* v. *Brossart*, 67 Iowa, 678; 56 Am. Rep. 371. Defendant wrote the plaintiff: "We are authorized to offer Michigan fine salt in full car-

[1] Baker *v.* Holt, 56 Kan. 100; Jenness *v.* Iron Co., 53 Me. 20; Myers *v.* Smith, 48 Barb. 614; Baker *v.* Johnson Co., 37 Iowa, 186; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80; Borland *v.* Guffey, 1 Grant Cas. 394; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262; Potts *v.* Whitehead, 23 N. J. Eq. 512; Beckwith *v.* Cheever, 21 N. H. 41; Carr *v.* Duval, 14 Pet. 77; Moxley *v.* Moxley, 2 Met. 309; Martin *v.* Fuel Co., 22 Fed. Rep. 596; Branch Bank *v.* Steele, 10 Ala. 915; North Western Iron Co. *v.* Meade, 21 Wis. 474; 94 Am. Dec. 557; Corcoran *v.* White, 117 Ill. 118; 57 Am. Rep. 858; Siebold *v.* Davis, 67 Iowa, 560.

[2] Nundy *v.* Matthews, 34 Hun, 74.

[3] Boulton *v.* Jones, 2 Hurl. & N. 564.

[4] Hartford etc. R. R. Co. *v.* Jackson, 24 Conn. 514; 63 Am. Dec. 177; People *v.* Auditor-General, 17 Mich. 183; McCotter *v.* New York, 37 N. Y. 325; Saltus *v.* Pruyn, 18 How. Pr. 512.

[5] Drew *v.* Edmunds, 60 Vt. 401; 6 Am. St. Rep. 122.

[6] Iron Works *v.* Douglas, 49 Ark. 355.

loads of eighty to ninety-five bbls., delivered in your city at eighty-five cents per bbl." Plaintiff telegraphed: "Your letter of yesterday received and noted. You may ship me two thousand bbls. of Michigan fine salt as offered in your letter." *Held*, not a binding contract: *Moulton* v. *Kershaw*, 59 Wis. 316; 48 Am. Rep. 516. A, as agent of B, told C that if he would dismiss a certain appeal B would pay him five hundred dollars, and A himself pay five hundred dollars. C agreed to this, except that he would not take the five hundred dollars from A, and dismissed the suit. *Held*, that B's offer was accepted, and he was bound: *Johnson* v. *Talley*, 10 Lea, 248. A signed a contract to deliver corn to be delivered in the future. It was understood that one thousand dollars was to be paid at once. B carried the contract away, on the understanding that he was to have until the next morning to pay the one thousand dollars. It was not paid. *Held*, that the contract was not binding: *Biederman* v. *O'Conner*, 117 Ill. 493; 57 Am. Rep. 876.

§ 2232. **Acceptance must be Communicated.** — Acceptance of the offer must be communicated to the offerer; an uncommunicated acceptance does not make a contract.[1] But where the acceptance reaches the person who made the offer, it is immaterial by what mode the acceptance was sent.[2]

§ 2233. **Acceptance by Post or Telegraph.** — As between the sender of a letter and the person to whom it is addressed, the post-office is the agent of the sender, although by the regulations of the office it cannot be recalled, and is deliverable only to the address. Therefore, the delivery of a letter to the post-office for transmission is, in general, no delivery or communication to the person to whom it is addressed until actually received by him.[3] But if a person make an offer of a contract to another, and at the same time require or authorize him, either expressly or impliedly, to send his answer by post, and an answer accepting that offer be duly and correctly

[1] Mozley v. Tinkler, 1 Cromp. M. & R. 692; Mactier v. Frith, 6 Wend. 103; 21 Am. Dec. 262.

[2] Perry v. Iron Co., 15 R. I. 380; 2 Am. St. Rep. 903.

[3] Leake on Contracts, 37; Frith v. Lawrence, 1 Paige, 434.

posted, then the conditions of acceptance are satisfied, and the person making such offer is bound, and the contract as against him is complete; and it is immaterial, as regards the contract, that afterwards the letter be delayed or altogether fail in reaching its destination, by default of the post-office or by accident in transmission. In general, a person making an offer by letter, respecting a matter of business usually conducted through the post, is presumed to authorize the communication of the acceptance by that agency.[1] So the sending of telegram accepting an offer made in that way is complete without regard to the time of its receipt by the other party.[2] Street letter-boxes are a legal part of the post-office system; and a letter deposited in one of these boxes is considered as being delivered or mailed at the post-office.[3] Where, by agreement, an insurance is to attach from the time of a deposit of a letter in the post-office, this implies a letter duly stamped.[4]

§ 2234. How Long Offer Continues. — An offer not limited in its continuance remains open for acceptance a reasonable time; and if not accepted in a reasonable time, the offer ceases.[5] To constitute a valid contract by letter, if no time for acceptance of the offer is fixed, it must be affirmatively shown that the acceptance was mailed within a reasonable time, and before any intimation of with-

[1] Leake on Contracts, 37; Tayloe *v.* Ins. Co., 9 How. 390; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262; Moore *v.* Pierson, 6 Iowa, 279; 71 Am. Dec. 409; Bryant *v.* Booze, 55 Ga. 438; Trevor *v.* Wood, 36 N. Y. 307; 93 Am. Dec. 511; Vassar *v.* Camp, 11 N. Y. 441; Chiles *v.* Nelson, 7 Dana, 281; Kempner *v.* Cohn, 47 Ark. 519; 58 Am. Rep. 775; Hunt *v.* Higman, 70 Iowa, 406; Linn *v.* McLean, 80 Ala. 360; Washburn *v.* Fletcher, 42 Wis. 152.

[2] Tuttle *v.* Jackson, 36 N. Y. 309; Minn. Oil Co. *v.* Collier Lead Co., 4 Dill. 431; Schorbey *v.* Cheney, 3 Hun, 677; Trevor *v.* Wood, 41 Barb. 255; 36 N. Y. 307; 93 Am. Dec. 511. And see note in 93 Am. Dec. 514–517; Calhoun *v.* Atchison, 4 Bush, 261; 96 Am. Dec. 299. See Haas *v.* Myers, 111 Ill. 421; 53 Am. Rep. 634.

[3] Wood *v.* Callaghan, 61 Mich. 402; 1 Am. St. Rep. 597.

[4] Blake *v.* Ins. Co., 67 Tex. 160; 60 Am. Rep. 15.

[5] Leake on Contracts, 41; Chicago etc. R. R. Co. *v.* Dane, 43 N. Y. 241; Loring *v.* City of Boston, 7 Met. 409; Sanford *v.* Howard, 29 Ala. 684; 68 Am. Dec. 101; McCurdy *v.* Rogers, 21 Wis. 197; Mizell *v.* Burnett, 4 Jones, 249; 69 Am. Dec. 744; Keck *v.* McKinley, 98 Pa. St. 616.

drawal was received.[1] What is a reasonable time depends upon the situation of the parties and the subject-matter of the contract.[2]

An offer may, in express terms, limit its own continuance; and it then comes to an end by mere lapse of time, or otherwise, according to its terms. An offer by letter may be made conditional upon an acceptance being given by return of post; and the offer must then be accepted within that interval.[3] So the offerer may prescribe the place or form of acceptance, and then the offer can only be accepted in that way.[4]

ILLUSTRATIONS.—A made an offer by letter to B, who lived in a distant city. B made no answer, but made up his mind to accept the offer, and left home to transact business in various places, and to visit A, at whose place he arrived a month afterwards. *Held*, no acceptance binding A: *Trounstine* v. *Sellers*, 35 Kan. 447.

§ 2235. Revocation of Offer.—An offer may be revoked at any time before acceptance; but the revocation must be communicated to the person to whom the offer was made before or at the time of his communicating an acceptance.[5] The offer may be revoked, although it expressly allows a certain time for accepting it,[6] but not when there is an agreement that the party may accept it within a certain time.[7]

ILLUSTRATIONS.—A written proposal was made for purchasing a house, stating, amongst other terms and conditions, that a definite answer was to be given within six weeks. *Held*, that

[1] Ferrier *v.* Storer, 63 Iowa, 484; 50 Am. Rep. 752.

[2] Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372. In Johnston *v.* Fessler, 7 Watts, 48, 32 Am. Dec. 738, the language of the court is to the effect that an acceptance must be made at the time the offer is made.

[3] Leake on Contracts, 40; Maclay *v.* Harvey, 90 Ill. 525; 32 Am. Rep. 35; Carr *v.* Duval, 14 Pet. 77.

[4] Eliason *v.* Henshaw, 4 Wheat. 225.

[5] Leake on Contracts, 43; Crocker *v.* R. R. Co., 24 Conn. 261; Boston etc. R. R. Co. *v.* Bartlett, 3 Cush. 224; Faulkner *v.* Hebard, 26 Vt. 452; Weiden *v.* Woodruff, 38 Mich. 130; McCotter *v.* N. Y., 35 Barb. 609; 37 N. Y. 325.

[6] Head *v.* Diggon, 3 Moody & R. 97; Dickenson *v.* Dodds, L. R. 2 Ch. D. 463; Eskridge *v.* Glover, 5 Stew. & P. 264; 26 Am. Dec. 344; Weiden *v.* Woodruff, 38 Mich. 130.

[7] Stitt *v.* Huidekopers, 17 Wall. 385.

it might be revoked at any time during the six weeks, and that an acceptance made after such revocation was inoperative: *Routledge* v. *Grant*, 4 Bing. 653. Defendant agreed to pay plaintiff a draft drawn on a certain day. A draft drawn on a different day being presented, defendant offered to plaintiff's agent to pay in fifteen days, giving the agent time to communicate with his principal. *Held*, that this offer was a continuing one, and could not be retracted after acceptance by plaintiff: *Wylie* v. *Bryce*, 70 N. C. 422.

§ 2236. **Revocation by Letter by Post.** — If an offer be sent by letter through the post, although by the regulations of the office the sender cannot recall his letter, yet he may by other means, if possible, withdraw the offer before it be accepted.[1] A second letter sent by the same post, and delivered at the same time with the first letter, revoking the offer, would be sufficient.[2] But a revocation of the offer not communicated to the person to whom the offer has been made, or communicated to him after he has accepted the offer, is altogether inoperative; as in the case of a letter of revocation not delivered until after the offer contained in a former letter has been accepted, although it may have been posted before the acceptance of the offer.[3]

§ 2237. **Revocation of Acceptance.** — An acceptance may be revoked by a communication to that effect before the acceptance is received, but not after.[4]

§ 2238. **Revocation of Offer by Death.** — An offer is revoked by the death, before its acceptance, of either the offerer[5] or the person to whom the offer is made.[6] The death of the party accepting, after the acceptance, but

[1] Newcombe v. De Roos, 2 El. & E. 271.
[2] Dinsmore v. Alexander, 9 Shaw & D. 190.
[3] Leake on Contracts, 43; Wheat v. Cross, 31 Md. 99; 1 Am. Rep. 28.
[4] Potter v. Saunders, 6 Hare, 1; Com. Ins. Co. v. Hallock, 27 N. J. L. 645; 72 Am. Dec. 380.
[5] Dickenson v. Dodds, L. R. 2 Ch. D. 475, per Mellish, L. J.
[6] Warner v. Humphreys, 2 Man. & G. 853.

before his letter reaches the offerer, does not affect the contract.[1]

§ 2239. **Effect of Refusal of Offer.** — If an offer made is rejected, the party making it is relieved from liability on that offer, and the party who has rejected the offer cannot afterwards, at his own option, convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the person who made the offer.[2]

ILLUSTRATIONS. — A person offered to sell his property to another for £1,000, in answer to which the latter offered to buy it for £950. The vendor wrote a letter refusing this offer, and upon receipt of the letter of refusal, the purchaser wrote to accept the original offer at £1,000. *Held*, there was no contract: *Hyde* v. *Wrench*, 3 Beav. 334.

§ 2240. **Offer not Assignable.** — An offer is not assignable.[3]

§ 2241. **At What Time is Contract Considered Made.** — A contract is considered as made at the time of the acceptance, and not at the time of the offer.[4]

§ 2242. **At What Place is Contract Considered Made.** — The contract is as a rule considered as entered into at the place where the acceptance is made.[5] Where an offer is made in one state, and accepted by telegraph in another, the contract is completed in the latter state by sending the telegram, notwithstanding it is to be performed in the former state.[6]

§ 2243. **Contract must be Mutual.** — Where an executory consideration comprises two promises, — mutual

[1] Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262.

[2] Sheffield Canal Co. *v.* R. R. Co., 3 Rail. Cas. 132; Davis *v.* Parish, Litt. Sel. Cas. 153; 12 Am. Dec. 287.

[3] Leake on Contracts, 48; Meynell *v.* Surtees, 3 Smale & G. 117.

[4] Leake on Contracts, 48; Felthouse *v.* Bindley, 11 Com. B., N. S., 869.

[5] Leake on Contracts, 49; Dod *v.* Bonnaffee, 6 La. Ann. 563; 54 Am. Dec. 573.

[6] Perry *v.* Mount Hope Iron Co., 15 R. I. 380; 2 Am. St. Rep. 902.

promises,—the contract must be binding on both parties, or the contract will be void for want of mutuality,[1] and will not sustain an action at law by either to recover for a breach thereof.[2] A contract binds both parties, or neither.[3] A contract by which one engages to deliver to the other such quantities of goods as he may require during the year, up to a specified limit, at a specified price, but containing no engagement on the part of the buyer to take or pay for any, is not enforceable against the promisor.[4] A promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee.[5] Where a party accepts and treats a written contract as binding, it is the same as if he had put his signature to it, and such contract is not void for want of mutuality.[6] Want of mutuality of contract is no objection in equity, if the agreement is signed by the party to be charged.[7]

ILLUSTRATIONS.— An agreement intended as a substitute for an existing agreement between the same parties was drawn up and sent to the defendant, who approved of it, and promised to execute it, but it was not executed by the plaintiff. *Held*, inoperative for want of mutuality: *Wood* v. *Edwards*, 19 Johns. 205. A merchant proposed to engage a ship-master to transport three cargoes, but the latter refused to contract for more than one, telling the former that when he had carried the first he would tell him whether he would carry the others. *Held*, that this right to rescind was mutual, and that the one could not be bound to furnish more than the other was bound to convey: *Bradley* v. *Denton*, 3 Wis. 557. A applied to B, agent of C, relative to the purchase of certain land, and B wrote to A, informing him that he could have the land provided he closed the trade within two weeks of the date of writing, setting forth at the time the terms of sale and a description of the property. *Held*, that the moment that the terms were accepted, the mutuality necessary to a complete contract was created: *Curtis* v.

[1] Railroad Co. *v.* Dane, 43 N. Y. 240; Chambliss *v.* Smith, 30 Ala. 366.
[2] Atlee *v.* Bartholomew, 69 Wis. 43; 5 Am. St. Rep. 103; King *v.* Warfield, 67 Md. 246.
[3] Hill *v.* Roderick, 4 Watts & S. 221; Hickman *v.* Glazebrook, 18 Ind. 210.
[4] Campbell *v.* Lambert, 36 La. Ann. 35; 51 Am. Rep. 1.
[5] Willets *v.* Sun Mutual Ins. Co., 45 N. Y. 45; 6 Am. Rep. 31.
[6] Attix *v.* Pelan, 5 Iowa, 336.
[7] Getchell *v.* Jewett, 4 Me. 350.

Blair, 26 Miss. 309; 59 Am. Dec. 257. P. leased his farm to B. for one year, at an agreed rent of one third in kind, and further agreed "that if said B. shall conclude to purchase of said P. one undivided half of said farm on or before the first day of March, 1865, he is to have a deed therefor from said P. upon payment" of a sum named. *Held*, not wanting in mutuality: *Crawford* v. *Paine*, 19 Iowa, 172. One firm promised to supply another with all the Lake Superior pig-iron they needed, and they in turn promised to purchase from this other firm all the iron they might want during a certain period. *Held*, not to establish a valid contract, since it did not establish an absolute mutuality of engagement giving each party the right to hold the other to a positive agreement: *Bailey* v. *Austrian*, 19 Minn. 535. M., the proprietor of large hotels in New Orleans, agreed to take and pay for all the ice he might require for the use of his hotels, and S. agreed to furnish the ice so required at a certain price. *Held*, that the contract was not invalid for want of mutuality, as M. could not dispense entirely with the use of ice in his hotels: *Smith* v. *Morse*, 20 La. Ann. 220.

CHAPTER CVII.

THE CONSIDERATION.

§ 2244. Consideration necessary to make valid contract — What is a consideration.
§ 2245. Exceptions — Contracts under seal, and negotiable paper.
§ 2246. Adequacy of consideration immaterial.
§ 2247. In equity.
§ 2248. "Good" and "valuable" consideration distinguished.
§ 2249. Moral obligation insufficient.
§ 2250. Promise to do what party is already legally bound to do insufficient.
§ 2251. Payment of part of debt — Compromise — Exceptions.
§ 2252. Compositions between debtor and creditors — Requisites of.
§ 2253. Forbearance to sue.
§ 2254. Incurring legal liability for another.
§ 2255. Marriage as a consideration.
§ 2256. Consideration partly void.
§ 2257. Consideration is either executed or executory.
§ 2258. Past consideration insufficient.
§ 2259. Aliter where there is a previous request.
§ 2260. Money paid upon request.
§ 2261. Services rendered without request — No liability to pay.
§ 2262. Exceptions.
§ 2263. Consideration obtained by fraud.
§ 2264. Failure of consideration.
§ 2265. Partial failure of consideration.

§ 2244. Consideration Necessary to Make Valid Contract — What is a Consideration. — An agreement, in order to constitute a contract, must include a consideration as well as a promise. A promise made without any consideration — i. e., a gratuitous promise — is not binding.[1] A promise without consideration originally will not be supported by the fact that the party to whom it was made has sustained special damages.[2] Thus where A and B

[1] Rann *v.* Hughes, 7 Term Rep. 350; Whitehill *v.* Wilson, 3 Penr. & W. 405; 24 Am. Dec. 326; Carson *v.* Clark, 1 Scam. 113; 25 Am. Dec. 79; Smith *v.* Rankin, 4 Yerg. 1; 26 Am. Dec. 213; Jones *v.* Holliday, 11 Tex. 412; 62 Am. Dec. 487; Wilson *v.* Baptist Soc., 10 Barb. 308; Read *v.* Vanarsdale, 2 Leigh, 567; Bolles *v.* Couli, 12 Minn. 113; Michaud *v.* Lagarde, 4 Minn. 43; Ashe *v.* De Rosset, 8 Jones, 240; Richardson *v.* Williams, 49 Me. 558; Pomeroy *v.* Slade, 16 Vt. 220; Mills Co. Bank *v.* Perry, 72 Iowa, 15; 2 Am. St. Rep. 228.

[2] Thorne *v.* Deas, 4 Johns. 84.

were joint owners of a vessel, and A voluntarily undertook to get her insured, but neglected so to do, and the vessel was lost, it was held that B could not sustain an action against A for his neglect.[1] The consideration for a contract need not appear upon its face, but may be proved by parol, or inferred from the terms of the agreement.[2] The alleged payment of a certain sum of money as the consideration of a contract may be proved either by evidence of payment in money or of payment by a note for that sum, which was received and accepted as money by the other party.[3]

A consideration has been well defined as consisting of "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant."[4] Therefore, where the defendant derived no

[1] Thorne *v.* Deas, 4 Johns. 84.

[2] Attix *v.* Pelan, 5 Iowa, 336; Tingley *v.* Cutler, 7 Conn. 291; Mouton *v.* Noble, 1 La. Ann. 192; Cummings *v.* Dennett, 26 Me. 397; Patchin *v.* Swift, 21 Vt. 292; Thompson *v.* Blanchard, 3 N. Y. 335.

[3] Morehouse *v.* Northrop, 33 Conn. 380; 89 Am. Dec. 211.

[4] Tindal, C. J., in Laythoarp *v.* Bryant, 3 Scott, 250; Fisher *v.* Bartlett, 8 Me. 122; 22 Am. Dec. 225; Hind *v.* Holdship, 2 Watts, 104; 26 Am. Dec. 107; Chick *v.* Trevett, 20 Me. 462; 37 Am. Dec. 68; Reddick *v.* Jones, 6 Ired. 107; 44 Am. Dec. 68; Holt *v.* Robinson, 21 Ala. 106; 56 Am. Dec. 240; Tompkins *v.* Phillips, 12 Ga. 52; Molyneux *v.* Collier, 17 Ga. 46; Doyle *v.* Knapp, 4 Ill. 334; Warren *v.* Whitney, 24 Me. 561; 41 Am. Dec. 406; Doyle *v.* Dixon, 97 Mass. 208; 93 Am. Dec. 80; Bank of Hanover *v.* Bridgers, 98 N. C. 67; 2 Am. St. Rep. 317; Alabama etc. R. R. Co. *v.* R. R. Co., 84 Ala. 570; 5 Am. St. Rep. 401. In Bishop on Contracts, section 441, it is said that "a consideration in the law of contracts must be a thing in some sense of pecuniary value." But has money value anything to do with it? If A promise B to pay him five dollars if he will not eat a dinner or not wear his best coat for a day, is not the consideration of B's abstaining sufficient to support A's promise? But is not eating a dinner or not wearing a certain coat capable of being reduced to a money value? Money value, we conclude, has nothing to do with the consideration, which is always the doing, or promising to do, something not illegal, at the request of the promisee, which you are not already under a legal obligation to him to do. Thus in a recent case in Kentucky it was held that the abandonment of the use of tobacco is sufficient consideration to support an agreement to pay the promisee five hundred dollars if he would never take another chew of tobacco or smoke another cigar during the life of the promisor: Talbott *v.* Stemmons, Sup. Ct. Ky., 1889.

benefit, and the plaintiff suffered no possible loss or detriment, the undertaking is without consideration, and is *nudum pactum*.[1] It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.[2] So mutual promises may be made, and in such a case the one promise furnishes a good consideration to support an action upon the other.[3]

Thus the following have been held to constitute a sufficient consideration to uphold a promise, viz.: The confidence induced by undertaking a service for another;[4] the promise to pay the debts of a firm;[5] canceling a written agreement;[6] the substitution of a sixty days' note in place of cash;[7] making a payment on a promissory note before it is legally demandable;[8] an adjournment of a suit in a justice's court;[9] the relinquishment by a child of all claim upon his father's estate;[10] a contract between two indorsers

[1] Ferrell *v.* Scott, 2 Spear, 344; 42 Am. Dec. 371.

[2] Brown *v.* Ray, 10 Ired. 72; 51 Am. Dec. 379; Jones *v.* Ashburner, 4 East, 463; Hilton *v.* Southwick, 17 Me. 303; 35 Am. Dec. 253; Carr *v.* Card, 34 Mo. 513; Underhill *v.* Gibson, 2 N. H. 352; 9 Am. Dec. 82; Powell *v.* Brown, 3 Johns. 100; Forster *v.* Fuller, 6 Mass. 58; 4 Am. Dec. 87; Townsley *v.* Sumrall, 2 Pet. 182; Lent *v.* Padelford, 10 Mass. 230; 6 Am. Dec. 119; Seaman *v.* Seaman, 12 Wend. 381; Watkins *v.* James, 5 Jones, 105; Dorwin *v.* Smith, 35 Vt. 69; Dyer *v.* McPhee, 6 Col. 174; Pitt *v.* Gentle, 49 Mo. 74; New Hanover Bank *v.* Bridgers, 98 N. C. 57; 2 Am. St. Rep. 317.

[3] Howe *v.* O'Mally, 1 Murph. 287; 3 Am. Dec. 693; Babcock *v.* Wilson, 17 Me. 372; 35 Am. Dec. 263; James *v.* Fulcrod, 5 Tex. 512; 55 Am. Dec. 743; Davis *v.* Calloway, 30 Ind. 112; 95 Am. Dec. 671; Funk *v.* Hough, 29 Ill. 145; Downey *v.* Hinchman, 25 Ind. 453; Nunnally *v.* White, 3 Met. 584; Whitehead *v.* Potter, 4 Ired. 257; Appleton *v.* Chase, 19 Me. 74; Byrd *v.* Fox, 8 Mo. 574; Society in Troy *v.* Perry, 6 N. H. 164; George *v.* Harris, 4 N. H. 533; 17 Am. Dec. 446; Commissioners *v.* Perry, 5 Ohio, 58; White *v.* Denielt, 2 Hall, 405; Briggs *v.* Lizer, 30 N. Y. 647; Forney *v.* Shipp, 4 Jones, 527; Nott *v.* Johnson, 7 Ohio St. 270. But mutual promises, to be obligatory, must be simultaneous; it will not be sufficient if alleged to be made at different times on the same day: Livingston *v.* Rogers, 1 Caines, 583; Keep *v.* Goodrich, 12 Johns. 397; Tucker *v.* Woods, 12 Johns. 190; 7 Am. Dec. 305; James *v.* Fulcrod, 5 Tex. 512; 55 Am. Dec. 743.

[4] Hammond *v.* Hussey, 51 N. H. 40; 12 Am. Rep. 41.

[5] Shoher and Carqueville Lithographing Co. *v.* Kerting, 107 Ill. 344.

[6] Weld *v.* Nichols, 17 Pick. 538.

[7] Smucker *v.* Larimore, 21 Ill. 267.

[8] Newsam *v.* Finch, 25 Barb. 175.

[9] Stewart *v.* McGuin, 1 Cow. 99; Richardson *v.* Brown, 1 Cow. 255.

[10] Weston *v.* Hight, 18 Me. 281.

of a note, that they will divide the loss between them;[1] the desire of a party to have a contract discharged, and mutual promises to deliver up obligations held by each;[2] becoming surety in an executor's bond;[3] the indorsement of a promissory note;[4] service to be rendered by a promisee in securing a loan for the promisor;[5] an agreement to pay the expenses of another person if he will take a trip to Europe, in no way connected with the promisor's business;[6] payment of interest in advance;[7] giving permission to a party to assume and manage a defense in suit;[8] the sale of an equitable title to land;[9] the assignment of a lease, subject to be avoided by re-entry, upon the part of the grantor;[10] the benefit to a bank from the use of money collected on a note;[11] a conveyance of land to another upon the latter's promise to sell it, and pay over the price received above a certain sum;[12] the delivery and acceptance of goods;[13] an agreement to settle and arrange matters to prevent a suit from being brought against the promisor;[14] services by one not bound in law to render them in aiding a party in interest in his preparation for trial by disclosing who were informed upon material points and what they testify to.[15] A subscription to a common object with others, though gratuitous, creates a legal liability.[16] The endowment of institutions of learning;

[1] Phillips *v.* Preston, 5 How. 278.
[2] Leach *v.* Keach, 7 Iowa, 232.
[3] Perkins *v.* Mayfield, 5 Port. 182.
[4] Litchfield *v.* Falconer, 2 Ala. 280.
[5] Barley *v.* Buell, 70 Cal. 335.
[6] Devecmon *v.* Shaw, 69 Md. 109; 9 Am. St. Rep. 422.
[7] Dickerson *v.* Ripley Co., 6 Ind. 128; 63 Am. Dec. 373.
[8] Goodspeed *v.* Fuller, 46 Me. 141; 71 Am. Dec. 573.
[9] Whitbeck *v.* Whitbeck, 9 Cow. 266; 18 Am. Dec. 503.
[10] Spear *v.* Fuller, 8 N. H. 174; 28 Am. Dec. 391.
[11] Thompson *v.* Bank, 3 Hill, 77; 30 Am. Dec. 354.
[12] Linscott *v.* McIntire, 15 Me. 201; 33 Am. Dec. 603.
[13] McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574.
[14] Cobb *v.* Cowdery, 40 Vt. 25; 94 Am. Dec. 370.
[15] Cobb *v.* Cowdery, 40 Vt. 25; 94 Am. Dec. 370.
[16] Norton *v.* Janvier, 5 Harr. 346; McDonald *v.* Gray, 11 Iowa, 508; 79 Am. Dec. 509; Comstock *v.* Howd, 15 Mich. 237; State Treasurer *v.* Cross, 9 Vt. 289; 31 Am. Dec. 626; Parsonage Fund *v.* Ripley, 6 Me. 442; Williams College *v.* Danforth, 12 Pick. 541; Ohio College *v.* Love, 16 Ohio St. 20; Doyle *v.* Glasscock, 24 Tex. 200. But see Cottage St. Meth. Church *v.* Kendall, 121 Mass. 528; 23 Am. Rep. 286; University of Des Moines *v.* Livingston, 57 Iowa, 307; 42 Am. Rep. 42; Johnson *v.* University, 41 Ohio St. 527;

the expense, liability, and trouble of officers of such institutions in raising endowments; or the undertaking of such officers to give "free tuition to twenty students forever,"—constitute a sufficient consideration upon which to base a contract.[1]

But a promise to bear part of the expense of suit made by one not interested in and not a party to the suit is not a good consideration;[2] nor is an agreement by a postmaster's successor to redeliver a certain letter-case owned by the postmaster, if on writing to Washington the latter found that the department did not claim it;[3] nor an agreement to convey land when it shall be paid for from the profits to be realized by the purchaser;[4] nor a written agreement to give A the refusal of a farm, with no agreement on the part of A to take it.[5]

ILLUSTRATIONS. — CONSIDERATION PRESENT. — A cotton-factor advanced money to A, who agreed to repay, with interest, and to ship a certain quantity of cotton to the factor, otherwise to pay commissions. *Held*, that A's promise was based on a sufficient consideration: *Norwood* v. *Faulkner*, 22 S. C. 367; 53 Am. Rep. 717. D. failed to fulfill a contract to construct a steam-engine for M. within a specified time. He then refused to deliver it unless M. would take it in satisfaction of the contract, and M. agreed so to receive it. *Held*, that this agreement was supported by a sufficient consideration, as D., although liable to damages for his breach of the contract, had the option of refusing to deliver the engine: *Moore* v. *Detroit etc. Works*, 14 Mich. 266. By parol an intestate agreed with a married woman that if she would change her place of residence, and remove and reside with her husband near the intestate for the residue of his life, she should receive a certain amount upon his death. *Held*, valid and founded upon sufficient consideration: *Adams* v. *Honness*, 62 Barb. 326. A being an indorser on certain notes, some of which are due and some not, B, in consideration that he will pay those notes, promised to pay him a certain sum. A paid the notes. *Held*, a consideration, binding B to fulfill his promise: *L'Amoreux* v. *Gould*, 7 N. Y. 349;

[1] Burlington University *v.* Barrett, 22 Iowa, 60; 92 Am. Dec. 377.
[2] Whitson *v.* Fowlkes, 1 Head, 533; 73 Am. Dec. 185.
[3] Smith *v.* Force, 31 Minn. 119.
[4] Beall *v.* Clark, 71 Ga. 818.
[5] Barnett *v.* Bisco, 4 Johns. 235.

57 Am. Dec. 524. A and B, being in failing circumstances, and about to make an assignment to the defendant for the benefit of creditors, expressed a wish to prefer their workmen, but did not carry it into effect, in consequence of a promise by the defendant that they should be paid at any rate. *Held*, that the defendant was liable on this promise: *Hind* v. *Holdship*, 2 Watts, 104; 26 Am. Dec. 107. A agreed to pay an agent a certain sum if he sold a farm, and half that sum if the owner sold it outside his influence. *Held*, a good consideration: *Hoskins* v. *Fogg*, 60 N. H. 402.

ILLUSTRATIONS (CONTINUED). — CONSIDERATION ABSENT. — F. held a note of a deceased, which he gave up to A.'s sons upon their promise to pay the amount. A. left no property, and there was no administrator. *Held*, without consideration, and not enforceable: *Schroeder* v. *Fink*, 60 Md. 436. A and B executed an agreement for the payment of the amount of a note previously given by C to D for the accommodation of B and another. *Held*, that, as against A, the agreement was without consideration, and could not be enforced: *Farnsworth* v. *Clark*, 44 Barb. 601. By agreement between A and B, B was substituted in A's place as a bidder at an auction sale, and B's title being called in question, B, foreseeing some expense in the defense of the suit, persuaded A to promise to share it equally with him. *Held*, that there was no consideration for the agreement: *Whitson* v. *Fowlkes*, 1 Head, 533; 73 Am. Dec. 184. A purchaser at a sheriff's sale afterwards promised the wife of the debtor to secure to her the balance, if any, of the price he should obtain for the property after reimbursing himself. *Held*, that the promise was *nudum pactum*, and void: *Heathman* v. *Hall*, 3 Ired. Eq. 414. H. purchased a quantity of tin in boxes for one F. at his request, and delivered it to him in the same condition, unopened; afterwards, on opening the boxes, it was found that the tin was materially damaged, of which H. had reasonable notice, and thereupon promised F. to make him an equitable allowance therefor. *Held*, that the promise was void for want of a consideration: *Hawley* v. *Farrar*, 1 Vt. 420. The parties to a controversy having agreed in writing to submit it to the determination of arbitrators, two other persons, not interested, promised, in writing, that, in consideration of said submission, they would pay whatever sum should be awarded against one of the parties. *Held*, that the promise was without consideration, and not binding: *Barlow* v. *Smith*, 4 Vt. 139. An attorney receives a claim for collection, and is directed to detain out of the moneys collected a sum due him; and the owner afterwards assigns the whole claim to another, and the attorney

promises to pay it to the latter. *Held*, that the attorney might, notwithstanding, retain the amount due to him, his promise being *nudum pactum*: *Taylor* v. *Bates*, 5 Cow. 376.

§ 2245. **Exceptions — Contracts under Seal, and Negotiable Paper.** — If the parties use the solemnities of a deed in which to record their agreement, a consideration will be presumed.[1] But a mere written agreement is no different from an oral contract, and requires a consideration to support it.[2] By the law merchant, negotiable instruments are presumed to have been given for a consideration.[3]

§ 2246. **Adequacy of Consideration Immaterial.** — So long as it is something of real value in the eye of the law, whether or not the consideration is adequate to the promise is immaterial.[4] The slightest consideration is

[1] Page *v.* Trufant, 2 Mass. 159; 3 Am. Dec. 41, McClanahan *v.* Henderson, 2 A. K. Marsh. 388; 12 Am. Dec. 412; Cusack *v.* White, 2 Mill, 279; 12 Am. Dec. 669; Smith *v.* Smith, 36 Ga. 184; 91 Am. Dec. 761.

[2] Crawford's Appeal, 61 Pa. St. 52; 100 Am. Dec. 609; Cook *v.* Bradley, 7 Conn. 57; 18 Am. Dec. 79; People *v.* Shall, 9 Cow. 778; Burnett *v.* Bisco, 4 Johns. 235; Thacher *v.* Dinsmore, 5 Mass. 301; Brown *v.* Adams, 1 Stew. 51; 18 Am. Dec. 36; Beverleys *v.* Holmes, 4 Munf. 95; Clark *v.* Small, 6 Yerg. 418; Roper *v.* Stone, Cooke, 497; Perrine *v.* Cheeseman, 11 N. J. L. 174; 19 Am. Dec. 388; Mosby *v.* Leeds, 3 Call, 439.

[3] Conine *v.* R. R. Co., 3 Houst. 288; 89 Am. Dec. 230.

[4] Anson on Contracts, 63; Lawrence *v.* McCalmont, 2 How. 426; Hind *v.* Holdship, 2 Watts, 104; 26 Am. Dec. 107; Spann *v.* Baltzell, 1 Fla. 301; 46 Am. Dec. 346; Duffey *v.* Shockey, 11 Ind. 70; 71 Am. Dec. 348; Goodspeed *v.* Fuller, 46 Me. 141; 71 Am. Dec. 573; Givan *v.* Swadley, 3 Ind. 484; Bryan *v.* Dyer, 28 Ill. 188; Shepard *v.* Rhodes, 7 R. I. 470; 84 Am. Dec. 573. "A very slight advantage to one party, or a trifling inconvenience to the other, is sufficient consideration to support a contract": Black, C. J., in Harlan *v.* Harlan, 20 Pa. St. 305; Davis *v.* Steiner, 14 Pa. St. 275; 53 Am. Dec. 547. In Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453, a wife having died and leaving a will, but no property out of which to pay legacies bequeathed by her, her husband, after her decease, agreed to pay the legatees the several sums bequeathed by her. The court said: "The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay six hundred dollars: 1. A promise on the part of the plaintiffs to pay him one cent; 2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property; 3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified. The consideration of one cent will not support the promise of Schnell. It is true that, as a general proposition, in-

sufficient to support the most onerous obligation, and courts will not limit the measure of value in such cases, when neither fraud, mistake, nor illegality is shown.[1] The surrender of an old note is sufficient consideration for a new one executed by the surety, who, knowing the facts, but mistaking the law, erroneously supposed himself liable when in fact he was discharged.[2] But the execution of a deed which conveys nothing is not a sufficient consideration to support a promise by the grantee to the grantor.[3]

ILLUSTRATIONS. — A, in consideration that B will permit him to weigh two boilers belonging to B, promises B, etc. *Held*, that the consideration is sufficient: *Bainbridge* v. *Firmstone*, 8 Ad. & E. 743. C promises to do a certain thing in consideration

adequacy of consideration will not vitiate an agreement: Baker *v.* Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value for money, or perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken; as it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush, upon its face, if it be regarded as an earnest one: Hardesty *v.* Smith, 3 Ind. 39. The consideration of one cent is plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him on that ground. A moral consideration only will not support a promise: Ind. Dig. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is equally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding: Spahr *v.* Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations: Ind. Dig., 13; 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money."

[1] Darrow *v.* Walker, 48 N. Y. Sup. Ct. 6.

[2] Churchill *v.* Bradley, 58 Vt. 403; 56 Am. Rep. 563.

[3] Murphy *v.* Jones, 7 Ind. 529. But see Allen *v.* Pegram, 16 Iowa, 163.

of D's giving him up a certain guaranty. The guaranty is invalid, and not enforceable at law. *Held*, that the consideration is sufficient: *Haigh* v. *Brooks*, 10 Ad. & El. 309. A promised the husband of a favorite niece that he would pay five thousand dollars towards the price of a farm, if the husband would buy it instead of removing to another state, and the husband did buy it and live there. *Held*, that there was a good consideration for A's promise: *Berry* v. *Graddy*, 1 Met. (Ky.) 553. An employer gave to his employee a writing reciting that she had been in his employ twenty-three years as saleswoman, and had been faithful, and that he wished to give her "additional compensation," and agreeing to give her a due bill for three thousand dollars, payable within a year from his death; and on the same day he executed and delivered a due bill accordingly, expressed to be for "additional compensation." He died two months after. She accepted six dollars as a compensation for one week's wages after his death, and had frequently done so before. There was no direct proof that the previous compensation was in full. *Held*, that she might recover on the due bill: *Bentley* v. *Lamb*, 112 Pa. St. 480; 56 Am. Rep. 330.

§ 2247. **In Equity.**—Mere inadequacy of consideration is not a ground upon which equity will set aside a contract, or even refuse a decree for specific performance, or an injunction to restrain a breach.[1] But great inadequacy in the consideration may be material evidence of fraud or imposition, and so support a claim for relief.[2]

§ 2248. **"Good" and "Valuable" Consideration Distinguished.**—A good consideration is such as that of blood, or of natural love and affection, when a man grants an

[1] Holmes *v.* Fresh, 9 Mo. 201; Mann *v.* Betterly, 21 Vt. 326; Judge *v.* Wilkins, 19 Ala. 765; Potter *v.* Everett, 7 Ired. Eq. 152; Maddox *v.* Simmons, 31 Ga. 512; Chaires *v.* Brady, 10 Fla. 133; Woodfolk *v.* Blount, 3 Hayw. 147; 9 Am. Dec. 736; Beard *v.* Campbell, 2 A. K. Marsh. 125; 12 Am. Dec. 362.

[2] Coles *v.* Trecothick, 9 Ves. 246. In Borell *v.* Dann, 2 Hare, 450, Wigram, V. C., says: "Mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, and still less can it be a ground for rescinding an executed contract. The only exception is where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case": Gifford *v.* Thorn, 9 N. J. Eq. 702; Beard *v.* Campbell, 2 A. K. Marsh. 125; 12 Am. Dec. 362; Cruise *v.* Christopher, 5 Dana, 181; Davidson *v.* Little, 22 Pa. St. 245; 60 Am. Dec. 81; Feigley *v.* Feigley, 7 Md. 537; 61 Am. Dec. 375.

estate to a near relation, being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as marriage, money, or the like, which the law esteems an equivalent given for the grant."[1] Therefore a promise founded on a "good" consideration is a gratuitous promise, and void.[2] Deeds made upon good consideration only are considered as merely voluntary; and although they may be valid at law between the parties, are not aided in equity; and they are liable to be held void as against creditors and purchasers for value.[3]

§ 2249. **Moral Obligation Insufficient.** — A promise made under a sense of moral obligation is not made upon a sufficient consideration, and is not legally binding.[4]

[1] 2 Bla. Com. 297.

[2] Leake on Contracts, 615; Priester *v.* Priester, Rich. Eq. Cas. 26; 23 Am. Dec. 191; Holley *v.* Adams, 16 Vt. 296; 42 Am. Dec. 508; Kennedy *v.* Ware, 1 Pa. St. 445; 44 Am. Dec. 145; Keefer *v.* Grayson, 76 Va. 517; 44 Am. Rep. 171; Kirkpatrick *v.* Taylor, 43 Ill. 207.

[3] 2 Bla. Com. 297.

[4] Eastwood *v.* Kenyon, 11 Ad. & El. 438; Shepard *v.* Rhodes, 7 R. I. 470; 84 Am. Dec. 573; Cobb *v.* Cowdry, 40 Vt. 25; 94 Am. Dec. 370; Updike *v.* Titus, 13 N. J. Eq. 151; Valentine *v.* Foster, 1 Met. 520; 35 Am. Dec. 377; Schnell *v.* Nell, 17 Ind. 29; 79 Am. Dec. 453; Porterfield *v.* Butler, 47 Miss. 165; 12 Am. Rep. 329; Geer *v.* Archer, 2 Barb. 420. See State *v.* Reigart, 1 Gill. 1; 39 Am. Dec. 628. In Mills *v.* Wyman, 3 Pick. 208, Parker, C. J., says: "It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases, we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation which has become inoperative by positive law to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo;* and according to the principles of natural justice, the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing, — not naked pacts, — but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought

Where services are rendered gratuitously, a subsequent promise to pay for them is not binding.[1] Where a debt has been voluntarily released, an express promise does not revive it, nor does it form a sufficient consideration to support a new promise.[2] Where a mortgage of a homestead is void because the wife's acknowledgment is defective, the husband's agreement, after default, to pay rent to the mortgagee is without consideration, and void.[3] There is no such obligation upon children to pay debts of their father, from whose estate they have not received any benefit, as will constitute a moral consideration which will sustain a new note given by a child for the principal of the father's note after it has been discharged in bankruptcy.[4]

But in certain cases a moral obligation has been considered a sufficient consideration to support a promise; as, for example, the moral obligation to pay legal interest on a usurious bond has been held sufficient consideration to support a new bond with legal interest.[5] So where a person beat and turned his slave out of doors, a person who furnished the slave with food and medicine was allowed to recover of the master, the court holding that the moral obligation of the latter to support the slave would uphold an implied promise on his part to recompense the plaintiff;[6] so where a mistake was made in a deed, and the party subsequently promised to make a new deed to conform with the contract.[7] A debt barred by the statute of limitations, or by operation of law not affecting the right, is a sufficient consideration for a new promise to pay it.[8]

to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called."

[1] Allen *v.* Bryson, 67 Iowa, 591; 56 Am. Rep. 358.

[2] Shepard *v.* Rhodes, 7 R. I. 470; 84 Am. Dec. 573.

[3] Strauss v. Harrison, 79 Ala. 324.

[4] McElven *v.* Sloan, 56 Ga. 208.

[5] Kilbourn *v.* Bradley, 3 Day, 356; 3 Am. Dec. 273.

[6] Fairchild *v.* Bell, 2 Brev. 129; 3 Am. Dec. 702.

[7] Cardwell *v.* Strother, Litt. Sel. Cas. 429; 12 Am. Dec. 326.

[8] Lonsdale *v.* Brown, 4 Wash. 86; McKelvey *v.* Tate, 3 Rich. 339; Womack *v.* Womack, 8 Tex. 397; 58 Am. Dec. 119; Jamison *v.* Ludlow, 3 La.

ILLUSTRATIONS. — A son promised a person who had furnished his father with necessaries to pay him. *Held*, not a legal consideration, and the promise was not enforceable: *Cook* v. *Bradley*, 7 Conn. 57; 18 Am. Dec. 79. A man having seduced a woman promised to pay her an annuity of three hundred dollars a year. *Held*, not enforceable: *Beaumont* v. *Reeve*, 8 Q. B. 483. A son promised to indemnify a constable on the sale of goods levied on as the property of his father. *Held*, not enforceable: *Nixon* v. *Vanhise*, 5 N. J. L. 491; 8 Am. Dec. 619. On a debtor making an agreement, his creditors give him a release of their claims. The debtor subsequently promises to pay a debt in full. *Held*, no consideration to support the promise: *Warren* v. *Whitney*, 24 Me. 561; 41 Am. Dec. 406. A minor child purchased goods on his father's credit, but without his knowledge. The latter afterwards agreed to pay for them. *Held*, without consideration, and unenforceable: *Freeman* v. *Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399. Money was paid, and a receipt taken, and the creditor sued for the same debt, and recovered, the debtor not being able to produce the receipt; and subsequently the original creditor promised to refund upon his debtor's producing the receipt. *Held*, that the moral and equitable obligation to refund was sufficient to support the promise: *Bentley* v. *Morse*, 14 Johns. 468. A guardian was morally, though perhaps not legally, bound to make good a loss which his ward had suffered. A promissory note, executed by him to his ward for the amount of the loss, *held*, founded on a sufficient consideration, and binding upon him: *Scott* v. *Carruth*, 9 Yerg. 418. A son, who was of full age, and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff, promising to pay the expenses incurred. *Held*, that the promise would not sustain an action: *Mills* v. *Wyman*, 3 Pick. 207.

§ 2250. Promise to do What Party is already Legally Bound to do Insufficient. — A promise to perform what a person is under a previous legal obligation to perform forms no new matter for a consideration, and cannot support a promise.[1] The voluntary restoration of that to which one is entitled is not a good consideration;[2] nor is

Ann. 492; Shepard *v.* Rogers, 7 R. I. 470; 84 Am. Dec. 573; Scouton *v.* Eislord, 7 Johns. 36; Erwin *v.* Saunders, 1 Cow. 249; 13 Am. Dec. 520; Shippey *v.* Henderson, 14 Johns. 178; 7 Am. Dec. 458; Maxim *v.* Morse, 8 Mass. 127; Katz *v.* Moore, 13 Md. 566; Feeny *v.* Daly, 8 Cal. 84.

[1] Ellison *v.* Jackson Co., 12 Cal. 542.

[2] McDonald *v.* Neilson, 2 Cow. 139; 14 Am. Dec. 431.

the refraining from an illegal act;[1] nor the payment of a debt clearly due.[2] The promise of a surety to pay a debt for which he is already liable will not support a mortgage.[3] An agreement between the plaintiff and the constable who has the execution for a compensation greater than that allowed by law is void.[4] So is a promise to a jailer by a prisoner to pay for services and attention to his prisoner which the law made it his duty to perform is not obligatory. But a promise to pay for extraordinary attention and services in his sickness, which the law did not make it the duty of the jailer to perform, is binding.[5]

ILLUSTRATIONS.—A promises to pay a witness for his loss of time if he will attend a trial and testify. The witness has already been subpœnaed and been paid his legal fees. The contract is void for want of consideration: *Willis* v. *Peckham*, 1 Ball & B. 515; *Collins* v. *Godefroy*, 1 Barn. & Adol. 949. A promises to pay B, a sheriff, for doing something which the law makes it his duty to do. The promise is void: *Smith* v. *Whildin*, 10 Pa. St. 39; 49 Am. Dec. 572. A sailor agreed to work a certain voyage for a certain sum. On the voyage, the sailor refused to work unless the captain would agree to pay him more, which he did. The promise is void: *Stilk* v. *Myrick*, 2 Camp. 317. A person agreed to go to the war for a bounty of $250. Afterwards, another township offering him more, he refused to carry out his agreement until the former offered him $350. The promise was void: *Reynolds* v. *Nugent*, 25 Ind. 328. A lessee was in default under a covenant to repair. *Held*, that a promise by him to repair at a future day was no consideration for a promise by the lessor to give time for the repairs and forbear bringing an action until that day: *Bayley* v. *Homan*, 3 Bing. N. C. 915.

§ 2251. Payment of Part of Debt—Compromise—Exceptions.—Payment of, or a promise to pay, part of a certain and immediate debt is, alone, no consideration for the discharge or forbearance of the residue.[6] But to this

[1] Voorhees *v.* Reed, 17 Ill. App. 21.
[2] Swaggard *v.* Hancock, 25 Mo. App. 596.
[3] Harris *v.* Cassady, 107 Ind. 158.
[4] Downs *v.* McGlynn, 2 Hilt. 14.
[5] Trundle *v.* Riley, 17 B. Mon. 396.
[6] Cumber *v.* Wane, 1 Strange, 426; 1 Smith's Lead. Cas. 439. See article in 17 Central Law Journal, 302, where it is stated that this old common-law rule has been adopted in nearly every state in the Union, excepting

rigid rule the courts have made a number of exceptions. Thus the agreement has been held sufficiently supported, where it is made before the maturity of the debt;[1] or at a different place than the original debt was made payable, or was in law payable;[2] or by a person other than the debtor;[3] or to a person other than the original creditor;[4] or the agreement is under seal;[5] or the creditor receives some additional advantage in the shape of additional

Maine and Pennsylvania, citing: *Alabama:* Leverich *v.* Bates, 6 Ala. 480; Agee *v.* Steele, 8 Ala. 948; Wilson *v.* Bank, 9 Ala. 847; Barrow *v.* Vandervort, 13 Ala. 232; Pearson *v.* Thomason, 15 Ala. 700. *Arkansas:* Pope *v.* Tunstall, 2 Ark. 209. *California:* Gavin *v.* Arnan, 2 Cal. 494; Delano *v.* Heilt, 27 Cal. 611; 87 Am. Dec. 102. *Connecticut:* Warren *v.* Skinner, 20 Conn. 559; Rose *v.* Hall, 26 Conn. 395; 68 Am. Dec. 402. *Georgia:* Molyneaux *v.* Collier, 13 Ga. 406. But compare Brown *v.* Ayer, 24 Ga. 478. *Indiana:* Markel *v.* Spielter, 28 Ind. 488; Stone *v.* Lewman, 28 Ind. 97. *Iowa:* 4 G. Greene, 544; Norris *v.* Slaughter, 3 G. Greene, 116; State *v.* Clark, 12 Iowa, 335. *Kansas:* Royal *v.* Lindsay, 15 Kan. 591. *Kentucky:* Cutter *v.* Reynolds, 8 B. Mon. 598; Williams *v.* Langford, 15 B. Mon. 569; Fenwick *v.* Phillips, 3 Met. (Ky.) 8. In the later cases, Ricketts *v.* Hall, 2 Bush, 249, and Arnold *v.* Park, 8 Bush, 6, the position of the court is doubtful, the leaning of the court being apparently against the rule. *Maryland:* Geiser *v.* Kirchner, 4 Gill & J. 305; 23 Am. Dec. 566; Jones *v.* Ricketts, 7 Md. 103; Campbell *v.* Booth, 8 Md. 107; 15 Md. 569; Gurley *v.* Hiteshue, 5 Gill, 218; Obernorff *v.* Union Bank, 31 Md. 126; 1 Am. Rep. 31. *Minnesota:* Sage *v.* Valentine, 23 Minn. 102. *Mississippi:* Jones v. Perkins, 29 Miss. 139. *Missouri:* Price *v.* Cannon, 3 Mo. 453; Riley *v.* Kershaw, 52 Mo. 224. *Massachusetts:* Harriman *v.* Harriman, 12 Gray, 341; Brooks *v.* White, 2 Met. 285; 37 Am. Dec. 95; Smith *v.* Bartholomew, 1 Met. 276; 35 Am. Dec. 365; Twitchell *v.* Shaw, 10 Cush. 46; 57 Am. Dec. 80; Potter *v.* Green, 6 Allen, 442; Jennings *v.* Chase, 10 Allen, 526; Curran *v.* Rummell, 118 Mass. 482; Lathrop *v.* Page, 129 Mass. 21. *New Hampshire:* Blanchard *v.* Noyes, 3 N. H. 518; Fisher *v.* Willard, 20 N. H. 121; Matthewson *v.* Strafford Bank, 45 N. H. 107. *New Jersey:* Daniels *v.* Hatch, 21 N. J. L. 391; 47 Am. Dec. 169. See 16 N. J. L. 275. *New York:* Harrison *v.* Close, 2 Johns. 448; 3 Am. Dec. 444; Seymour *v.* Minturn, 17 Johns. 169; 8 Am. Dec. 380; Dederick *v.* Leman, 9 Johns. 333; Mechanics' Bank *v.* Hazard, 13 Johns. 353; Johnson *v.* Brannan, 5 Johns. 268, 271; Moss *v.* Shannon, 1 Hilt. 177; Blum *v.* Hartmann, 3 Daly, 47; Keeler *v.* Salisbury, 33 N. Y. 648; 13 Abb. Pr. 101; 1 Hilt. 515. *Maine:* White *v.* Jordan, 27 Me. 370. *North Carolina:* McKenzie *v.* Culbreth, 66 N. C. 534; Bryan *v.* Foy, 69 N. C. 45; Hayes *v.* Davidson, 70 N. C. 573. *South Carolina:* Eve *v.* Moseley, 2 Strob. 203. *Ohio:* Harper *v.* Graham, 20 Ohio, 105. *Wisconsin:* Stone *v.* Scammon, 6 Wis. 497. As to *Maine*, see Maine statutes of June 3, 1851. As to *Pennsylvania*, see Hall *v.* Speer, 2 Am. L. J. 186; Milliken *v.* Brown, 1 Rawle, 381.

[1] Bowker *v.* Childs, 3 Allen, 434.

[2] Pinnel's Case, 5 Coke, 117 a; Jones *v.* Perkins, 29 Miss. 139; 64 Am. Dec. 136; Blanchard *v.* Noyes, 3 N. H. 518.

[3] Whelan *v.* Edwards, 29 Ga. 315; Riley *v.* Kershaw, 52 Mo. 224.

[4] Morton *v.* Burn, 7 Ad. & E. 26. In Scotson *v.* Pegg, 6 Hurl. & N. 295, the court said: "If a man has already contracted with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual; but it is possible to make a valid promise to another to do the same thing."

[5] Chitty on Contracts, 11th Am. ed., 7.

security;[1] or the part payment is made, not in money, but in other property;[2] or where the debt discharged is unliquidated, or the amount thereof disputed.[3] A compromise of a doubtful right is sufficient foundation for an agreement.[4] An agreement by beneficiaries under a will with an heir at law, who is cut off by the will, and threatens to contest it on the ground of undue influence, to pay him money in consideration of his desisting, is valid, if the heir at law honestly thought he had reasonable ground for setting up that claim.[5]

§ 2252. **Compositions between Debtors and Creditors — Requisites of.** — In an arrangement between a debtor and his creditors, or some of them, to make a composition of his debts, the giving up a part of their claims by the other creditors, parties to the agreement, is a valid consideration for each one giving up a part and accepting the composition in discharge of his whole debt.[6] But it is essential that there shall be a mutual agreement between the creditors. An agreement by one creditor that he will accept in satisfaction of his debt a sum less than the amount due, provided that no other creditor shall receive a larger per cent on his claim, is not binding.[7] If one creditor

[1] See article in 17 Cent. L. J. 303.

[2] Cumber *v.* Wane, 1 Strange, 426; 1 Smith's Lead. Cas. 439; Jones *v.* Bullet, 2 Litt. 49.

[3] See 17 Cent. L. J. 304; Kidder *v.* Blake, 45 N. H. 330; Pitkin *v.* Noyes, 48 N. H. 294; 2 Am. Rep. 218.

[4] Swem *v.* Green, 9 Col. 358.

[5] Bellows *v.* Sowles, 55 Vt. 391; 45 Am. Rep. 621.

[6] Steinman *v.* Magnus, 11 East, 390; Norman *v.* Thompson, 4 Ex. 755; Boyd *v.* Hind, 1 Hurl. & N. 938; Eaton *v.* Lincoln, 13 Mass. 424; Gifford *v.* Allen, 3 Met. 255; Henry *v.* Patterson, 57 Pa. St. 346.

[7] Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103, the court saying: "In this case the exceptions do not show that there was any such natural agreement between the creditors. The defense indicated by the most important ruling of the court appears to be based entirely upon the legal effect of the agreement between the plaintiff and defendant, as indorsed upon the notes in suit. That agreement affects no other party. Its reference to the like settlement of other debts is merely in the nature of a condition attached to the plaintiff's promise to discharge the notes. It does not make it any the more binding. The defendant's undertaking that he would not pay others more than the plaintiff would not prevent others from enforcing their claims in full; and is not such a promise as would afford any consideration for the agreement of the plaintiff. It is neither a benefit to the plaintiff nor disadvantage to the defendant. So far as the exceptions show, the release of

orally agree to sign the composition, and the others thereupon sign, and then he refuses to do so, he is nevertheless bound.[1]

A creditor may insist upon any condition before affixing his signature, and such conditions must be literally fulfilled before the release takes effect.[2] And if the debtor fails to fulfill the condition as to one creditor, all the creditors are released from their obligations, though they have accepted their percentage.[3] If the creditors sign upon the condition that their agreement shall be void unless all the creditors take the same percentage, the debtor must procure the signatures of all creditors, secured and unsecured, however large or small their claims may be.[4] Any misrepresentation by the debtor as to the amount of his indebtedness or his assets will avoid the composition.[5] The creditors are entitled to the fullest disclosure of the state of his affairs.[6] So of a false statement to one that all the others have promised to sign if he will;[7] or that the others have accepted his terms.[8]

§ 2253. Forbearance to Sue. — The waiver of a legal right is a sufficient consideration for a promise made on

their claims by the other creditors had no connection with the agreement. The agreement itself shows no legal consideration to give it effect as a contract."

[1] Mellen *v.* Goldsmith, 47 Wis. 573; 32 Am. Rep. 781.

[2] Magee *v.* Mast, 49 Cal. 141; Warburg *v.* Wilcox, 2 Hilt. 118.

[3] Greer *v.* Shriver, 53 Pa. St. 259; Shipton *v.* Casson, 5 Barn. & C. 378; Garrat *v.* Woolner, 8 Bing. 258; Wenhun *v.* Fowle, 3 Dowl. 43; Rosling *v.* Muggeridge, 16 Mees. & W. 181; Evans *v.* Powis, 1 Ex. 601; Culter *v.* Reynold, 8 B. Mon. 509; Makepeace *v.* Harvard College, 10 Pick. 298; Penniman *v.* Elliott, 27 Barb. 315; Dauchy *v.* Goodrich, 20 Vt. 127.

[4] Kinsing *v.* Bartholomew, 1 Dill. 155; Paulin *v.* Kaighn, 27 N. J. L. 503; Durgin *v.* Ireland, 14 N. Y. 322; Acker *v.* Phœnix, 4 Paige, 305; Spooner *v.* Whiston, 8 Moore, 580.

[5] Kahn *v.* Roberts, 9 Ind. 430; Droon *v.* Smith, 17 Ind. 172; Stafford *v.* Bacon, 1 Hill, 532; 37 Am. Dec. 366; 25 Wend. 384; Dolson *v.* Arnold, 10 How. Pr. 528; Huntington *v.* Clark, 39 Conn. 540; Seving *v.* Cole, 28 Ind. 486; Carter *v.* Connell, 1 Whart. 392; Jackson *v.* Hodges, 24 Md. 468; Elfert *v.* Snow, 2 Saw. 94; Armstrong *v.* Bank, 6 Biss. 520.

[6] Hefter *v.* Cahn, 73 Ill. 296; O'Shea *v.* White Lead Co., 42 Mo. 397; 97 Am. Dec. 332.

[7] Cooling *v.* Noyes, 6 Term Rep. 263.

[8] Whiteside *v.* Hyman, 17 N. Y. Sup. Ct. 218; Bartlett *v.* Blaine, 83 Ill. 25; 25 Am. Rep. 346. Compare Argall *v.* Cook, 43 Conn. 160.

account of the waiver.[1] Forbearance of legal proceedings by a person entitled to sue is a valid consideration for a promise,[2] even where the forbearance is as to the debt of a third person,[3] or although the defendant might have prevailed in the suit;[4] and an extension of time for the payment of a debt, or the performance of an agreement, forms a sufficient consideration to support a contract.[5] Thus a composition of a prosecution for bastardy is a sufficient consideration to support a promissory note.[6] Withdrawing opposition by a debtor to bankruptcy proceedings, and consenting to amendments and an adjudication of bankruptcy, is sufficient as a consideration to support a valid agreement.[7] Giving time for the payment of a judgment is a good consideration for a note given by the defendant to the plaintiff's attorney for his fees.[8] An agreement to postpone the sale of mortgaged premises for four months after an order or decree of sale is a good consideration for a promissory note from a party claiming the premises, and his sureties.[9] A

[1] Vogel *v.* Meyer, 23 Mo. App. 427.

[2] Hockenbury *v.* Meyers, 34 N. J. L. 346; Tuttle *v.* Bigelow, 1 Root, 108; 1 Am. Dec. 35; Hamaker *v.* Eberley, 2 Binn. 568; 4 Am. Dec. 477; Sage *v.* Wilcox, 6 Conn. 81; Silvis *v.* Ely, 3 Watts & S 420; Robinson *v.* Gould, 11 Cush. 55; Vinal *v.* Richardson, 13 Allen, 521; Abbott *v.* Fisher, 124 Mass. 414; Rood *v.* Jones, 1 Doug. 188; Martin *v.* Black, 20 Ala. 309; Calkins *v.* Chandler, 36 Mich. 320; 24 Am. Rep. 593; Sanford *v.* Huxford; 32 Mich. 313; 20 Am. Rep. 647; Newton *v.* Carson, 80 Ky. 309; Ford *v.* Rehman, Wright, 434; Miller *v.* Hawker, 66 Ill. 185; Snell *v.* Bray, 56 Wis. 156; Scott *v.* Warner, 3 Lans. 49; Beadle *v.* Whillock, 64 Barb. 287; Spangle *v.* Springer, 22 Pa. St. 454; Keeler *v.* Salisbury, 27 Barb. 485; Collins *v.* Barnes, 83 Pa. St. 15.

[3] Jennison *v.* Stafford, 1 Cush. 168; 48 Am. Dec. 594; Brice *v.* Clark, 8 Pa. St. 301; Cook *v.* Duval, 9 Gill, 460.

[4] Flannagan *v.* Kilcome, 58 N. H. 443; Hund *v.* Geier, 72 Ill. 393.

[5] Underwood *v.* Hossack, 38 Ill. 208; Raymond *v.* Smith, 5 Conn. 555; Leamester *v.* Burckhart, 2 Bibb, 25; Boyd *v.* Freize, 5 Gray, 553; Lowe *v.* Weatherly, 4 Dev. & B. 212; Ford v. Rehman, Wright, 434; Bank of Muskingham *v.* Carpenter, Wright, 729; Nicholson *v.* May, Wright, 669; Silvis *v.* Ely, 3 Watts & S. 429; Watson *v.* Randall, 20 Wend. 201; Clark *v.* Russell, 3 Watts, 213; 27 Am. Dec. 348. Sidwell *v.* Evans, 1 Pa. 385; 21 Am. Dec. 387; Hamaker *v.* Eberley, 2 Binn. 506; 4 Am. Dec. 477; Allen *v.* Morgan, 5 Humph. 624; Templeton *v.* Bascom, 33 Vt. 132; Hill *v.* Smith, 34 Vt. 535.

[6] Ashburne *v.* Gibson, 9 Port. 549; Coleman *v.* Frum, 4 Ill. 378; Abshire *v.* Mather, 27 Ind. 381; Thompson *v.* Nelson, 28 Md. 431; Clarke *v.* McFarland, 5 Dana, 45.

[7] Sanford *v.* Huxford, 32 Mich. 313; 20 Am. Rep. 647.

[8] Brainard *v.* Harris, 14 Ohio, 107; 45 Am. Dec. 525.

[9] Hancock *v.* Hodgson, 4 Ill. 329.

release of an attachment lien or an agreement to stay an execution is a good consideration for a promise by a third person to pay the debt,[1] or by the debtor to pay the debt of another.[2] Forbearance to eject a tenant at will for non-payment of rent is a good consideration to a guarantor of past and future rent.[3] The withdrawal of exceptions and dismissing a suit are sufficient consideration for an agreement, although they were not well founded.[4]

A general forbearance is presumed to be a perpetual forbearance,[5] but a forbearance for a time is a sufficient consideration.[6] The promise cannot be enforced where the forbearance is general, if the original debtor be subsequently sued.[7] Mere forbearance to sue without any agreement to that effect is not a sufficient consideration for the promise of another to pay the debt of the person liable, although the act of forbearance was induced by such promise.[8] An agreement made by the holder of a promissory note not to sue on the note for a limited time is no bar to a suit brought before the expiration of the time given.[9] In order to constitute a valid contract of forbearance of suit, it is necessary that it should be definite and certain as to the terms of forbearance and the period of it.[10] The future forbearance by the depositors of a banker can form no consideration for an absolute agreement by guarantors to pay the depositors, made without reference to such forbearance.[11]

There must be a legal cause of action,[12] though it is

[1] Smith *v.* Weed, 20 Wend. 184; 32 Am. Dec. 525; Stern *v.* Drinker, 2 E. D. Smith, 403.

[2] Giles *v.* Ackles, 9 Pa. St. 147; 49 Am. Dec. 551.

[3] Vinal *v.* Richardson, 13 Allen, 521.

[4] Byrne *v.* Cummings, 41 Miss. 192.

[5] Sidwell *v.* Evans, 1 Penr. & W. 383; 21 Am. Dec. 387; Clark *v.* Russell, 3 Watts, 213; 27 Am. Dec. 348.

[6] Sidwell *v.* Evans, 1 Penr. & W. 383; 21 Am. Dec. 387.

[7] Clark *v.* Russel, 3 Watts, 213; 27 Am. Dec. 348.

[8] Manter *v.* Churchill, 127 Mass. 31.

[9] Thalman *v.* Barbour, 5 Ind. 178.

[10] Garnett *v.* Kirkman, 33 Miss. 389.

[11] Steadman *v.* Guthrie, 4 Met. 147.

[12] Palfrey *v.* R. R. Co., 4 Allen, 55; Sidwell *v.* Evans, 1 Penr. & W. 383; 21 Am. Dec. 387; New Hampshire Sav. Inst. *v.* Colcord, 15 N. H. 119; 41 Am. Dec. 685; Newell *v.* Fisher, 11 Smedes & M. 431; 49 Am. Dec. 66; O. & C. R. R. Co. *v.* Potter, 5 Or. 228; Cline *v.* Templeton, 78 Ky. 550; Martin *v.* Black, 20 Ala. 309. Forbearance to contest probate of a will is not

held that giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise.[1] And forbearing to sue for or releasing a *bona fide* claim, respecting which a reasonable doubt exists in fact or in law, although no proceedings have been commenced, is a good consideration.[2] And though a court of law will not enforce a bare equity, the forbearance to enforce one is a sufficient consideration.[3] But an executory promise to pay a sum of money to be released from a bargain which is void by the statute of frauds is without consideration and void.[4] The mere existence of a controversy which has not assumed the form of a pending suit is not necessarily a sufficient consideration for a contract of compromise.[5] The dismissal of suits palpably unjust forms no consideration for a promise. To make the settlement of assumed rights a sufficient consideration, there must be at least an appearance of right sufficient to raise a possible doubt in favor of the party asserting the claim.[6]

§ 2254. Incurring Legal Liability for Another. — If a person incur a liability, at the request of another, as by entering into a contract with a third party, such liability is a sufficient consideration to support a promise by the person at whose request it is incurred.[7]

a consideration where there were no reasonable grounds on which to base a contest: Prater *v.* Miller, 25 Ala. 320; 60 Am. Dec. 521.

[1] Longridge *v.* Dorville, 5 Barn. & Ald. 117; Haigh *v.* Brooks, 10 Ad. & E. 309; Atlee *v.* Backhouse, 3 Mees. & W. 633; Ex parte Lucy, 4 De Gex, M. & G. 356; 22 L. J. C. 732; Orrell *v.* Coppock, 26 L. J. C. 269; Pierce *v.* N. O. Building Co., 9 La. 397; 29 Am. Dec. 448; Adams *v.* Wilson, 12 Met. 138; 45 Am. Dec. 240; Weed *v.* Terry, 2 Doug. (*Mich.*) 344; 45 Am. Dec. 257.

[2] Cook *v. Wright*, 1 Best & S. 559.

[3] Noblet *v. Green*, 2 Dev. 517; 21 Am. Dec. 347.

[4] Silvernail *v.* Cole, 12 Barb. 680.

[5] Ware *v.* Morgan, 67 Ala. 461.

[6] Long *v.* Towl, 42 Mo. 545; 97 Am. Dec. 355; Pitkin *v.* Noyes, 48 N. H. 294; 97 Am. Dec. 615.

[7] Skidmore *v.* Bradford, L. R. 8 Eq. 134; Mound City etc. Ass'n *v.* Slauson, 65 Cal. 425; Callahan *v.* Linthicum, 43 Md. 97; 20 Am. Rep. 106. "Where a person is under a legal obligation to pay money, and another pays it for him without request, the law raises an implied *assumpsit* to refund, without any express promise on his part": McMorris *v.* Herndon, 2 Bail. 56; 21 Am. Dec. 515.

§ 2255. Marriage as a Consideration. — Marriage is considered a valuable consideration between the parties to the marriage, and will support a contract made in consideration of it; as a contract of mutual promises to marry;[1] and marriage is a sufficient consideration to support a promise by a third party to the husband or wife.[2] Thus a promise to convey land in consideration of the plaintiff's marrying the defendant's niece is binding.[3] The promise of an infant to marry is a good consideration for a corresponding promise.[4] But expectation on the part of the promisee that the promisor would marry her is not a sufficient consideration for a promise.[5]

§ 2256. Consideration Partly Void. — Where the consideration in a contract consists of several matters and is partly void, if any valid considerations remains, it is, in general, sufficient to support the promise; as where part of the stated consideration is impossible, or unintelligible, or immaterial, it may be rejected, and the promise supported by that which is valid.[6] But where any part of the consideration is illegal, it generally renders the whole transaction illegal, and the promise induced in any degree by such consideration is wholly void.[7] But if the promise be divisible, and apportionable to the several parts of the consideration, the promise, so far as not attributable to the illegal consideration, is valid.[8]

[1] Wood *v.* Jackson, 8 Wend. 9; 22 Am. Dec. 603.

[2] Shadwell *v.* Shadwell, 9 Com. B., N. S., 159; Chichester *v.* Vass, 1 Munf. 98; 4 Am. Dec. 531; Dugan *v.* Gittings, 3 Gill, 138; 43 Am. Dec. 306; Gurvin *v.* Cromartie, 11 Ired. 174; 53 Am. Dec. 406; Wall *v.* Scales, 1 Dev. Eq. 472; Scott *v.* Osborne, 2 Munf. 413.

[3] Barr *v.* Hill, Add. Ecc. 276.

[4] Willard *v.* Stone, 7 Cow. 22; 17 Am. Dec. 496.

[5] Raymond *v.* Sellick, 10 Conn. 480.

[6] Shackwell *v.* Rosier, 2 Bing. N. C. 646; Ring *v.* Roxbrough, 2 Cromp. & J. 418; King *v.* Sears, 2 Cromp. M. & R. 48; Guthing *v.* Lynn, 2 Barn. & Adol. 232; Thomas *v.* Thomas, 2 Q. B. 851; Jarvis *v.* Peck, 1 Hoff. Ch. 479; Cobb *v.* Cowdery, 40 Vt. 25; 94 Am. Dec. 370.

[7] Bishop *v.* Palmer, 146 Mass. 469; 4 Am. St. Rep. 339.

[8] Shackwell *v.* Rosier, 2 Bing. N. C. 634; Jarvis *v.* Peck, 1 Hoff. Ch. 479; Cobb *v.* Cowdery, 40 Vt. 25; 94 Am. Dec. 370.

§ 2257. Consideration is Either Executed or Executory. — The consideration of a promise may be executed or executory. An executed consideration is some act performed or some value given at the time of making the promise, and in return for the promise then made.[1] An executory consideration is a promise to do or give something in return for the promise then made.[2]

§ 2258. Past Consideration Insufficient. — The matter of the consideration must be something done or given, or promised to be done or given, at the time of the making of the promise, in return for it; and any matter already done, given, or promised, before the making of the promise, does not constitute a valid consideration. A promise made in respect of such past matter, though induced by the moral obligation of gratitude, or any other motive of compensation, is purely gratuitous and voluntary, and will not create a contract, unless under seal.[3] A contract reciting that "in consequence of the annexed note not being paid at maturity, I promise to pay," etc., is void for want of consideration.[4] A promise by the defendant, in consideration that the plaintiff had before that time sold and conveyed to him a certain farm, to pay for it, without alleging that it was conveyed at the request of the defendant, is founded on a past consideration, and is void.[5]

ILLUSTRATIONS. — A and B gave a writing to the plaintiff, as follows: "In consideration of your having indorsed the undermentioned notes, drawn by S. and T. in your favor, we hereby hold ourselves accountable to you for them in the same manner as though said notes were drawn by us." *Held*, that the consideration was past and therefore insufficient: *Bulkley* v. *Landon*, 2 Conn. 404.

§ 2259. Aliter where there is a Previous Request. — Where, however, the past consideration was founded on a

[1] Leake on Contracts, 18.
[2] Leake on Contracts, 18.
[3] Bulkley *v.* Landon, 2 Conn. 404; Boston *v.* Dodge, 1 Blackf. 19; 12 Am. Dec. 205.
[4] Shealy *v.* Toole, 56 Ga. 210.
[5] Comstock *v.* Smith, 7 Johns. 87.

previous request, a promise made upon this consideration will constitute a valid contract.[1]

§ 2260. **Money Paid upon Request.** — If one request another to pay money for him, in a manner importing an undertaking to repay it, the amount, when paid, becomes a debt, — the request to pay and the payment according to the request forming a contract to pay the amount, which is technically described in law as a debt "for money paid by the plaintiff for the defendant at his request."[2]

§ 2261. **Services Rendered without Request — No Liability to Pay.** — Where there is no request, either express or implied, there is no contract to pay for services rendered, even though they may be beneficial to the party,[3] and the mere acceptance of beneficial services rendered without a request implies no promise to pay for them.[4] So no agreement can be implied from a consideration performed against the will of the other party, though for his benefit.[5] A person cannot make another his debtor, for money advanced or services rendered, without the consent of the party benefited. There must be a previous request, express or implied, or an assent or sanction given after the money is paid or the act done.[6] Services rendered by a member of a family are presumed to be gratuitous.[7] So for services rendered gratuitously, or without

[1] Lampleigh *v.* Braithwait, Hob. 105; 1 Smith's Lead. Cas. 135; Chadwick *v.* Knox, 31 N. H. 226; 64 Am. Dec. 329.

[2] Leake on Contracts, 55.

[3] Bartholomew *v.* Jackson, 20 Johns. 28; 11 Am. Dec. 237; Taylor *v.* Laird, Hurl. & N. 266; Kenan *v.* Holloway, 16 Ala. 53; 50 Am. Dec. 162; Chadwick *v.* Knox, 31 N. H. 226; 64 Am. Dec. 329. See *ante*, Title I., Agency; Force *v.* Haines, 17 N. J. L. 385; White *v.* Jones, 14 La. Ann. 681; James *v.* O'Driscoll, 2 Bay, 101.

[4] Tascott *v.* Grace, 12 Ill. App. 639.

[5] Stokes *v.* Lewis, 1 Term Rep. 20; British Empire Shipping Co. *v.* Somes, El. B. & E. 353; Frear *v.* Hardenbergh, 5 Johns. 272; 4 Am. Dec. 356.

[6] Watkins *v.* Trustees of Richmond College, 41 Mo. 302; Williams *v.* Miller, 1 Wash. 105; Davis *v.* Breon, 1 Ariz. 240; Alton *v.* Mulledy, 21 Ill. 76.

[7] Keegan *v.* Malone, 62 Iowa, 208; Webster *v.* Wadsworth, 14 Ind. 283. See *ante*, Title I., Agency.

any view to compensation, except the hope of a legacy or devise, no compensation can be recovered.[1]

ILLUSTRATIONS. — A and B were sued for false imprisonment, and A successfully defended the action, although B had employed C to look after his interests. *Held*, that there was no implied contract on the part of B to pay A for his services: *Muscott* v. *Stubbs*, 24 Kan. 520. A, without authority from the District of Columbia, dumped earth, which he desired to deposit somewhere, in an old canal which the district wanted filled. *Held*, that the service being a voluntary one, no recovery therefor could be had: *Boston* v. *District of Columbia*, 19 Ct. of Cl. 31.

§ 2262. **Exceptions.** — But where a consideration is offered in a manner importing the intention of being paid for it, the acceptance of the consideration may operate as a promise to pay for it on the terms of the offer; as where goods are offered for sale and accepted, or where a loan of money, or services, are offered and accepted. A previous request on the part of the promisor is immaterial, the acceptance of the consideration showing an agreement to create a contract.[2] If a person continues to receive a paper or periodical sent through the post-office, he is liable for the subscription price.[3] Where one loses a piece of property, there is an implied request from him to everybody else to aid him in recovering it; and any one who finds and restores it may recover of the owner upon the implied *assumpsit*, at least an indemnity for his time and expenses.[4]

§ 2263. **Consideration Obtained by Fraud.** — Where by his own fraud a person has obtained a benefit, he cannot set up such fraud to show that he had made no previous request.[5] But where the consideration has been

[1] Davison *v.* Davison, 13 N. J. Eq. 246; Little *v.* Dawson, 4 Dall. 111; Lee *v.* Lee, 6 Gill & J. 316. See *ante*, Title I., Agency.

[2] Leake on Contracts, 57.

[3] Ward *v.* Powell, 3 Harr. (Del.) 379; Fogg *v.* Portsmouth Atheneum, 44 N. H. 115; 82 Am. Dec. 191.

[4] Reeder *v.* Anderson, 4 Dana, 193.

[5] Leake on Contracts, 60. See *ante*, Title I., Agency.

obtained by means of a contract, although induced by fraud, the plaintiff cannot assert any other contract than that in fact made. He may affirm that contract, or, disaffirming it, he may recover his property, or damages for the fraud, as a substantive wrong.[1]

§ 2264. **Failure of Consideration.**—Total failure of consideration is a good defense to a suit upon contract.[2] Where the patentability of an invention affords the sole consideration for a contract, and a patent cannot be obtained, the consideration fails.[3] But the mere failure of an object for the accomplishment of which an unconditional subscription was made, does not exonerate the subscriber.[4] The transfer of shares in corporate stock is a good consideration for a promise to pay money, although the project of the corporation fails and the shares prove of no value, no indication of fraud appearing.[5] Illegality in the consideration cannot be pleaded as a "failure of consideration." The plea in such cases should be "want of consideration."[6]

§ 2265. **Partial Failure of Consideration.**—A partial failure of consideration is a good defense *pro tanto*.[7]

[1] Leake on Contracts, 62; Barkhamsted *v.* Case, 5 Conn. 528; 13 Am. Dec. 92.

[2] Jones *v.* Buffum, 50 Ill. 277; Morrow *v.* Hanson, 9 Ga. 398; 54 Am. Dec. 347; Hodgkins *v.* Moulton, 100 Mass. 311.

[3] Westervelt *v.* Mfg. Co. 14 Daly, 352.

[4] Smith *v.* Gower, 2 Duvall, 17.

[5] Gore *v.* Mason, 18 Me. 84.

[6] Wilkins *v.* Riley, 47 Miss. 306.

[7] Folsom *v.* Mussey, 8 Me. 400; 23 Am. Dec. 522; Smith *v.* Busby, 15 Mo. 387; 57 Am. Dec. 207; Marston *v.* Swett, 66 N. Y. 206; 23 Am. Rep. 43.

CHAPTER CVIII.

CONTRACTS UNDER SEAL.

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§ 2266. What is a Deed — Different Parts of Deeds. — A deed is a writing upon paper or parchment, signed, sealed, and delivered by the parties thereto, by which lands, tenements, and hereditaments may be conveyed.[1] The title to real property cannot be transferred by parol; it must be done by deed.[2] While no prescribed form is essential to the validity of a deed, there must be enough to show the intention to convey.[3] A writing intended as a reconveyance, but not sealed or acknowledged, is wholly inoperative.[4] And an assignment of a deed indorsed thereon does not convey any interest in the lands therein described;[5] nor does the canceling of a deed revest property which has once passed.[6] When a deed is made in pursuance of a prior engagement, the agreement is thereby made a nullity, and the rights of the parties are controlled by the deed.[7]

The several parts of a deed are formally distinguished by early writers as the premises, the *habendum*, the *tenendum*, the *reddendum*, condition, warranty, and covenant.[8] "Premises," in a deed, technically means everything which precedes the *habendum*. The office of the *habendum* is to name the grantee and to limit the certainty of estate.[9] Nothing can be limited in the *habendum* which has not been given in the premises.[10] The *habendum* is void if repugnant to the estate granted in the premises.[11] The estate conveyed in the premises is not divested by the

[1] Thompson *v.* Gregory, 4 Johns. 81; 4 Am. Dec. 255; Stewart *v.* Clark, 13 Met. 79; Whitney *v.* Swett, 22 N. H. 10; 53 Am. Dec. 228; Jackson *v.* Wood, 12 Johns. 73; McCabe *v.* Hunter, 7 Mo. 355; Taylor *v.* Morton, 5 Dana, 365; Ins. Co. *v.* Avery, 60 Ind. 566.

[2] Crowell *v.* Maughs, 7 Ill. 419; 43 Am. Dec. 62; McCabe *v.* Hunter, 7 Mo. 355; Whitney *v.* Swett, 22 N. H. 10; 53 Am. Dec. 228.

[3] Bell *v.* McDuffie, 71 Ga. 264; Berridge *v.* Glassey, 112 Pa. St. 442; 56 Am. Rep. 322.

[4] Arms *v.* Burt, 1 Vt. 303; 18 Am. Dec. 680.

[5] Bentley *v.* Deforest, 2 Ohio, 221; 15 Am. Dec. 546.

[6] Farrar *v.* Farrar, 4 N. H. 191; 17 Am. Dec. 410.

[7] Kerr *v.* Calvit, Walk. (Miss.) 115; 12 Am. Dec. 536.

[8] 1 Co. Litt. 6 a, 7 a; Shep. Touch. 74; 2 Greenl. Cruise, 327, 328; 2 Washburn on Real Property, 311.

[9] Berry *v.* Billings, 44 Me. 416; 69 Am. Dec. 107.

[10] Brown *v.* Manter, 21 N. H. 528; 53 Am. Dec. 223.

[11] Hafner *v.* Irwin, 4 Dev. & B. 433; 34 Am. Dec. 390.

fact that another and different grantee is named in the *habendum*.[1] But the elaborate deeds of the old conveyancers are not in favor in the United States, and by statute in some states brief forms of deeds are prescribed.[2] In America each successive grantor of realty is presumed to give to his grantee only his deed of conveyance, retaining the immediate deed to himself to rely upon its covenants in case of failure of title. In England the title deeds go with the land to the purchaser.[3] A deed is not in itself evidence of seisin.[4]

§ 2267. Deeds of Release and Quitclaim. — In the United States, contrary to the common-law rule,[5] a deed of release, or "quitclaim" deed, is effectual to transfer the title or interest of the transferrer, although the transferee has no prior interest in or possession of the land.[6] If the grantor has a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty.[7] In

[1] Hafner *v.* Irwin, 4 Dev. & B. 433; 34 Am. Dec. 390.

[2] Thus by the California Code, sec. 1092, a grant of an estate in real property may be made in substance as follows: "I, A B, grant to C D all that property situated in [insert name of county] county, state of California, bounded [or described] as follows [here insert description; or if the land sought to be conveyed has a descriptive name, it may be described by the name, as, for instance, 'The Norris Ranch.'] Witness my hand this [insert day] day of [insert month], 18—. A. B."

[3] White *v.* Hutchings, 40 Ala. 253; 88 Am. Dec. 766.

[4] Bell *v.* Peabody, 63 N. H. 233; 56 Am. Rep. 506.

[5] In England a deed of release would not operate as a conveyance, unless the party taking it was in possession or had an estate of some kind to be enlarged: Burton on Real Property, 15; Bennett *v.* Irwin, 3 Johns. 313; Branham *v.* Mayor, 24 Cal. 606; Kerr *v.* Freeman, 33 Miss. 292.

[6] Rogers *v.* Hillhouse, 3 Conn. 398; Dart *v.* Dart, 7 Conn. 255; Sherwood *v.* Barlow, 19 Conn. 471; Potter *v.* Tuttle, 22 Conn. 512; Jackson *v.* Bradford, 4 Wend. 619; Gazley *v.* Price, 16 Johns. 267; Ketchum *v.* Everston, 13 Johns. 359; 7 Am. Dec. 384; Brown *v.* Jackson, 3 Wheat. 452; Touchard *v.* Crow, 20 Cal. 150; 81 Am. Dec. 108; Sullivan *v.* Davis, 4 Cal. 291; Downer *v.* Smith, 24 Cal. 123; Carpentier *v.* Williamson, 25 Cal. 168; Rowe *v.* Beckett, 30 Ind. 162; 95 Am. Dec. 676; Bogy *v.* Shoab, 13 Mo. 380; Kyle *v.* Kavanaugh, 103 Mass. 359; 4 Am. Rep. 560; Hall *v.* Ashby, 9 Ohio, 96; 34 Am. Dec. 424; McConnel *v.* Reed, 4 Scam. 117; Hamilton *v.* Doolittle, 27 Ill. 478; Kerr *v.* Freeman, 33 Miss. 292; Jackson *v.* Hubble, 1 Cow. 613; Thornton *v.* Mulquinne, 12 Iowa, 549; 79 Am. Dec. 548; Ely *v.* Stannard, 4 Conn. 533, the court saying: "A quitclaim, or release deed, is one of the regular modes of conveying property known to the law, and it is almost the only mode in practice where a party sells property and does not wish to warrant the title."

[7] Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560.

several states by statute a deed of release and quitclaim passes all the estate that could be conveyed by a deed of bargain and sale.[1] The operative words of such a deed are "release, devise, and quitclaim." The mere absence of a covenant of warranty does not constitute a deed a quitclaim deed.[2] A quitclaim deed does not convey more than the present interest of the grantor, and will not pass an after-acquired title,[3] and hence no estoppel arises from a deed of quitclaim.[4] A party accepting a quitclaim deed of land runs the risk of the goodness of the title, and if it fails, he cannot recover the purchase-money unless he can show fraud in the sale,[5] or unless the title fails for want of authority in the person who makes the deed to act in the capacity in which he professes to act.[6] But a quitclaim deed will pass to the grantee the covenants running with the land.[7] If from a contingent remainderman to a tenant in tail in possession, it enlarges the latter's estate to a fee-simple.[8] If from a devisee for life with a power in him to sell the entire interest, it conveys only his life estate, and does not amount to an execution of the power of sale.[9] If from a residuary devisee, it passes his interest

[1] Indiana, Florida, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Oregon, Wisconsin, Wyoming: Stimson's American Statute Law, sec. 1472. And see McConnel *v.* Reed, 4 Scam. 117; 38 Am. Dec. 124.

[2] Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Rep. 304.

[3] Morse *v.* Godfrey, 3 Story, 365; Webster *v.* Webster, 33 N. H. 22; 66 Am. Dec. 705; Bragg *v.* Paulk, 42 Me. 517; Bruce *v.* Luke, 9 Kan. 201; 12 Am. Rep. 491; Bogy *v.* Shoab, 13 Mo. 380; Jackson *v.* Weidman, 1 Cow. 613; Bell *v.* Twilight, 26 N. H. 401; McCracken *v.* Wright, 14 Johns. 193; Woodman *v.* Hubble, 9 Cow. 613; Comstock *v.* Smith, 13 Pick. 116; 23 Am. Dec. 670; Miller *v.* Ewing, 6 Cush. 34; Simpson *v.* Greeley, 8 Kan. 586; Young *v.* Clippinger, 14 Kan. 150; Van Rensselaer *v.* Kearney, 11 How. 322; Field *v.* Columbet, 4 Saw. 523; Frink *v.* Darst, 14 Ill. 304; 58 Am. Dec. 575. But it will convey land thereafter patented if the grantor has already bought and paid for it, and obtained a land-office certificate that passes everything but the formal title: Frost *v.* Methodist Episcopal Missionary Society, 56 Mich. 62. A contract to give a quitclaim deed has reference to the title at the time the contract was entered into, not to one subsequently acquired: Woodcock *v.* Bennet, 1 Cow. 711; 13 Am. Dec. 568.

[4] San Francisco *v.* Lawton, 18 Cal. 465; 79 Am. Dec. 187.

[5] Snyder *v.* Laframboise, Breese, 343; 12 Am. Dec. 187.

[6] Earle *v.* Bickford, 6 Allen, 549; 83 Am. Dec. 651.

[7] Brady *v.* Sprinck, 27 Ill. 478.

[8] Smith *v.* Pendell, 19 Conn. 107; 48 Am. Dec. 146.

[9] Towle *v.* Ewing, 23 Wis. 336; 99 Am. Dec. 179.

as such devisee in the granted premises, although the deed makes no reference to the will, if otherwise the deed would wholly be inoperative.[1] Deeds given by public officers, such as sheriffs, administrators, etc., to purchasers at judicial sales belong to the class of quitclaim deeds, and the purchaser takes only such interest as the debtor or decedent actually had.[2]

A quitclaim deed does not entitle one who claims under it to the rights of a *bona fide* purchaser without notice.[3] But in the hands of an innocent purchaser for value, a recorded quitclaim takes precedence of a prior unrecorded deed of the same premises from the same grantor.[4]

[1] Wimberly *v.* Hurst, 33 Ill. 166; 83 Am. Dec. 295.

[2] Boone on Real Property, sec. 324; Love *v.* Jones, 4 Watts, 473; Hamilton *v.* Doolittle, 37 Ill. 473; Ennis *v.* Lead, 1 Ired. Eq. 416; Wilson *v.* Cochran, 14 N. H. 397; Dwight *v.* Newell, 3 N. Y. 185; White *v.* Brocam, 14 Ohio St. 339; Osterman *v.* Baldwin, 6 Wall. 119; Furnival *v.* Coombes, 5 Man. & G. 736; Evens *v.* Dendy, 2 Spear, 9; 42 Am. Dec. 356.

[3] Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Rep. 304; Marshall *v.* Roberts, 18 Minn. 405; 10 Am. Rep. 201; Rodgers *v.* Burchard, 34 Tex. 441; 7 Am Rep. 383; Adams *v.* Cuddy, 13 Pick. 460; 25 Am. Dec. 330; Martin *v.* Brown, 4 Minn. 291; Oliver *v.* Piatt, 3 How. 363; May *v.* Le Claire, 11 Wall. 232; Springer *v.* Bartle, 46 Iowa, 688; Ridgeway *v.* Holliday, 59 Mo. 455; Thorn *v.* Newsom, 64 Tex. 161; 53 Am. Rep. 747; Villa *v.* Rodriguez, 12 Wall. 333; United States *v.* Sliney, 21 Fed. Rep. 894. A grantee under a recorded quitclaim deed is subordinate to a prior unrecorded mortgage by his grantor: Snow *v.* Lake, 20 Fla. 656; 51 Am. Rep. 625.

[4] Brown *v.* Banner Coal Co., 97 Ill. 214; 37 Am. Rep. 105; Pettingill *v.* Devlin, 35 Iowa, 354; Chapman *v.* Sims, 53 Miss. 154; Fash *v.* Blake, 38 Ill. 363; Rowe *v.* Beckett, 30 Ind. 154; 95 Am. Dec. 676; Graff *v.* Middleton, 43 Cal. 341; Cutler *v.* James, 64 Wis. 173; 54 Am. Rep. 603; Willingham *v.* Hardin, 75 Mo. 429; Boogher *v.* Neece, 75 Mo. 383; Marshall *v.* Roberts, 18 Minn. 405; 10 Am. Rep. 201. In Fox *v.* Hall, 74 Mo. 315, 41 Am. Rep. 316, the court say: "The chief question in this case is, whether one who takes a quitclaim deed without notice of a prior unrecorded conveyance from the same grantor acquires a good title. This precise question has never been passed upon by this court. The provisions of our statute requiring conveyances to be recorded, and declaring the effect of unrecorded deeds, are as follows: Section 691: 'Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged, and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.' Section 693: 'No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same be deposited with the recorder for record.' It has been held in several cases that where one takes a title to land by quitclaim, which, in the hands of the grantor, is subject to equities, to which the recording act does not apply, the grantee by quitclaim will take the land subject to such equities: Stoffel *v.* Schroeder, 62 Mo. 147; Stivers *v.* Horne, 62 Mo. 473; Mann *v.* Best, 62 Mo. 491; *vide* also Oliver *v.* Piatt, 3 How. 383; May *v.* Le Claire, 11 Wall.

§ 2268. Parties — The Grantor. — The parties to a deed must be correctly and certainly described.[1] Where one signs, seals, and delivers an instrument supposed to be a perfect deed, but his name appears in no other part thereof, his interest in the premises described in such instrument is not thereby conveyed. A deed must contain words expressive of an intention to be bound.[2] But if this be complied with, it is not essential that the grantor should be named in the body of the deed.[3] A grantor making a deed by a different name than his own is bound by the name he adopts.[4] The law knows but one christian

232; Springer *v.* Bartle, 46 Iowa, 688. And in Ridgeway *v.* Holliday, 59 Mo. 444, a quitclaim deed from one whose title had been transferred by adverse possession was held to pass no right as against the adverse occupant to whom such title had been so transferred, for the reason that such title by possession was not subject to the recording acts, and could not be recorded, and the grantee in the quitclaim deed took only what the grantor could lawfully convey. It has been repeatedly decided by this court that a grantee in a sheriff's deed, made in pursuance of a sale under execution, is a purchaser within the meaning of the recording act, and it is equally well settled that by virtue of such conveyance he takes only such interest as the judgment debtor had: Draper *v.* Bryson, 26 Mo. 108; 69 Am. Dec. 483; Dickson *v.* Desire, 23 Mo. 166; Mann *v.* Best, 62 Mo. 491. In other words, a grantee in a sheriff's deed acquires precisely the same rights which he would have acquired by a quitclaim deed from the judgment debtor, except in cases where the judgment debtor has made fraudulent conveyances before judgment, in which cases the purchaser at execution sale acquires the additional right to set such conveyance aside. Numerous decisions lay down the rule that a *bona fide* purchaser of property who has failed to record his deed until after a judgment has been recovered against his vendor, but who records it prior to sale under the judgment, can hold it against the person purchasing under the judgment: Davis *v.* Ownsby, 14 Mo. 170; 55 Am. Dec. 105; Valentine *v.* Havener, 20 Mo. 133; Stillwell *v.* McDonald, 39 Mo. 282; Potter *v.* McDowell, 43 Mo. 93; Reed *v.* Ownby, 44 Mo. 204; Black *v.* Long, 60 Mo. 181. These cases all proceed upon the theory that unless the conveyance of the judgment creditor be recorded before the sale under execution, the purchaser at such sale, if he have no actual notice of such conveyance, will acquire the title. We are of opinion that the principle established by the cases cited is applicable to the case at bar, and that a grantee for value in a quitclaim deed, with the exception above noted, acquires the same rights against an unrecorded deed of which he has no actual notice as a purchaser at execution sale."

[1] Middleton *v.* Findla, 25 Cal. 76; Finch's Case, 6 Rep. 65; Hoffman *v.* Porter, 2 Brock. 156; Newton *v.* McKay, 29 Mich. 1; Boone *v.* Moore, 14 Mo. 420; Scott *v.* McAlpin, N. C. Term Rep. 155; 7 Am. Dec. 703.

[2] Peabody *v.* Hewett, 52 Me. 33; 83 Am. Dec. 486; Catlin *v.* Ware, 9 Mass. 218; 6 Am. Dec. 56.

[3] Hrouska *v.* Janke, 66 Wis. 252; Elliot *v.* Sleeper, 2 N. H. 525.

[4] David *v.* Williamsburgh etc. Ins. Co., 83 N. Y. 265; 38 Am. Rep. 418; Fallon *v.* Kehoe, 38 Cal. 44; 99 Am. Dec. 347; In re Snook, 2 Hilt. 566, the court saying: "There are numerous cases both in this country and in England holding that where a man enters

name; the omission or insertion of the middle name, or a mistake therein, is immaterial; for either the deed itself or the party may show that he is as well known without as with the middle name, or that he is the person intended.[1] A variance in the middle initial letter of the name of the grantor as written in the body and in the signature to a deed will not vitiate it.[2] A deed is well executed by a married woman signing by her christened name alone, her full name appearing in the body of the instrument and the acknowledgment.[3] If the true name of the grantor is recited in the deed, his signing it by a wrong name does not invalidate it.[4] If there is a variance between the names of the grantors as they appear in the body of the deed and in the signatures, the identity of the persons will be presumed, until rebutted, where the deed has been properly acknowledged.[5]

§ 2269. **Parties — The Grantee.** — If the grantee be sufficiently described to identify him, he need not be named.[6] Similarity of name is ordinarily sufficient evidence of identity.[7] Where the description of a party in a deed suits two persons, it is incumbent upon a person claiming under the deed to show that he is the person intended.[8] So where the grantee had possession of a

into a contract or does any act in a particular name, he may be sued by the name that he used, whatever his true name may be, and generally that wherever a man has done an act in a particular name, or where he makes a grant, it may always be shown in support of the validity of the act that he was known by that name at or about the time when the act was done, though he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established, the act will be binding upon him and upon others": Wakefield *v.* Brown, 38 Minn. 361; 8 Am. St. Rep. 671.

[1] Games *v.* Stiles, 14 Pet. 322; McDonald *v.* Morgan, 27 Tex. 503; Dunn *v.* Games, 1 McLean, 321; Franklin *v.* Tallmadge, 5 Johns. 84; Jackson *v.* Root, 18 Johns. 60; Banks *v.* Lee, 73 Ga. 25.

[2] Erskine *v.* Davis, 25 Ill. 251.

[3] Zann *v.* Haller, 71 Ind. 136; 36 Am. Rep. 193.

[4] Middleton *v.* Findla, 25 Cal. 76; Tustin *v.* Faught, 23 Cal. 237.

[5] Lyon *v.* Kain, 36 Ill. 362.

[6] Hogan *v.* Page, 2 Wall. 605; Ready *v.* Kearsley, 14 Mich. 225; Morse *v.* Carpenter, 19 Vt. 613; Newton *v.* McKay, 29 Mich. 1.

[7] Chamblee *v.* Tarbox, 27 Tex. 139; 84 Am. Dec. 614.

[8] Grand Gulf R. R. & Banking Co. *v.* Bryan, 8 Smedes & M. 234.

deed in which his christian name was left blank, he was permitted to show *aliunde* who was intended.[1] So where a deed ran to Louis S., but it appeared that no person of that name was known to exist, and the circumstances of the transaction clearly showed that the intended grantee was Arnold S., who had possession of the deed, it was held that the deed passed the title to Arnold S.[2]

A deed naming or designating no grantee is void.[3] So is a deed to a fictitious grantee;[4] or to a dead person;[5] or to one unborn or not *in esse;*[6] or containing nothing more than a surname to indicate him by;[7] or to "the inhabitants of a neighborhood";[8] or "for the use of a school-house, if the neighboring inhabitants see cause to build a school-house thereon."[9] A grantor cannot covenant with a stranger to a deed,[10] and a person who is not a party to a deed cannot take anything by it unless by way of remainder.[11] A deed to the heirs of a living person is ordinarily void;[12] yet if such intent be apparent from the instrument, who are the beneficiaries may be shown.[13] A deed to the joint heirs of A and B, the

[1] Fletcher *v.* Mansur, 5 Ind. 269.

[2] Staak *v.* Sigelkow, 12 Wis. 234.

[3] Chase *v.* Palmer, 29 Ill. 306; Garnett *v.* Garnett, 7 T. B. Mon. 545.

[4] Muskingum Tp. *v.* Ward, 13 Ohio, 120; 43 Am. Dec. 191; Thomas *v.* Wyatt, 25 Mo. 24; 69 Am. Dec. 446; 31 Mo. 188; 77 Am. Dec. 640; Smith *v.* Bridges, Breese, 2; Phelps *v.* Call, 7 Ired. 262; 47 Am. Dec. 327; Barr *v.* Schroeder, 32 Cal. 607. But where the owner of real estate executed a deed thereof to a fictitious grantee, and then under the name of such grantee executed another deed thereof to another person, it was held that the latter got good title: David *v.* Williamsburgh etc. Ins. Co., 83 N. Y. 265; 38 Am. Rep. 418.

[5] Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; Galloway *v.* Finley, 12 Pet. 264; McCracken *v.* Beall, 3 A. K. Marsh. 208.

[6] Lillard *v.* Ruckers, 9 Yerg. 64; Newsom *v.* Thompson, 2 Ired. 277; Dupree *v.* Dupree, Busb. Eq. 164; 59 Am. Dec. 590; Hall *v.* Thomas, 3 Strob. 101.

[7] Fanshawe's Case, F. Moore, 229. A deed to a partnership in the company name, in which only the surnames of a part of the company are mentioned, they being well known members, cannot take as grantees; those named can and will hold in trust for themselves and their associates: Beaman *v.* Whitney, 20 Me. 413.

[8] Thomas *v.* Marshfield, 10 Pick. 368.

[9] Bailey *v.* Kilburn, 10 Met. 176; 43 Am. Dec. 423.

[10] Hornbeck *v.* Westbrook, 9 Johns. 73.

[11] Hornbeck *v.* Westbrook, 9 Johns. 73.

[12] Hall *v.* Leonard, 1 Pick. 27; Morris *v.* Stephens, 46 Pa. St. 200; Winslow *v.* Winslow, 52 Ind. 8; Newsom *v.* Thompson, 2 Ired. 277.

[13] Hogg *v.* Odom, Dud. (Ga.) 185; Martin *v.* Youngblood, 8 Humph. 581; Gearhart *v.* Tharp, 9 B. Mon. 34;

grantor's daughter and son-in-law, was held good as to the two children of A and B then living, but not as to any subsequently born.[1] But a deed to one or his heirs or legal representatives is good;[2] or to the heirs of a deceased person;[3] or to a person under an assumed name.[4]

§ 2270. **Signing and Sealing.**—The general rule is, that a deed, to be good, must be signed and sealed by the person whose deed it is.[5] But at common law signing is not essential to it.[6] However, under the statute of frauds, signing is required;[7] and by the statutes of most of the states, all deeds of real estate are required to be in writing.[8] The grantor's name may be written by the hand of another, in his presence, and by his direction, or his hand may be guided by the hand of another.[9] "A person physically unable or too illiterate to write his name may sign by making a cross, a straight or a crooked line, a dot, or any other symbol. Simply making a mark by bringing the pen in contact with the paper is sufficient."[10] One is bound by his acknowledgment and delivery of a deed to which his name has been signed by the grantee,[11] or in his absence.[12] Any contemporaneous writing, though not under seal, showing that a party has adopted a sealed instrument as his own is as good as

Huss *v.* Stephens, 51 Pa. St. 282; Huss *v.* Morris, 63 Pa. St. 367; Flint *v.* Steadman, 36 Vt. 210; Hickman *v.* Quinn, 6 Yerg. 95; Epperson *v.* Mills, 19 Tex. 65; Cole *v.* Lake Co., 54 N. H. 242.

[1] Holeman *v.* Fort, 3 Strob. Eq. 66; 51 Am. Dec. 665.

[2] Hogan *v.* Page, 2 Wall. 605; Ready *v.* Kearsley, 14 Mich. 225.

[3] Shaw *v.* Loud, 12 Mass. 447; Gearhart *v.* Tharp, 9 B. Mon. 31; Boone *v.* Moore, 14 Mo. 420.

[4] Thomas *v.* Wyatt, 31 Mo. 188; 77 Am. Dec. 640.

[5] 2 Bla. Com. 306; Clark *v.* Graham, 6 Wheat. 579; McDill *v.* McDill, 1 Dall. 64; Chiles *v.* Conley, 2 Dana, 21.

[6] 1 Chitty on Contracts, 4; Addison on Contracts, 19; Wright *v.* Wakeford, 17 Ves. 459; Mut. Ben. Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Sicard *v.* Davis, 6 Pet. 124.

[7] See Chapter CX., Statute of Frauds.

[8] 1 Stimson's American Statute Law, sec. 1560.

[9] See Title I., Principal and Agent, sec. 14; Pierce *v.* Hakes, 23 Pa. St. 231; Mut. Life Ass'n *v.* Brown, 30 N. J. Eq. 193; Lovejoy *v.* Richardson, 68 Me. 386; Nye *v.* Lowry, 82 Ind. 316.

[10] Mut. Ben. Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

[11] Clough *v.* Clough, 73 Me. 487; 40 Am. Rep. 386.

[12] Bartlett *v.* Drake, 100 Mass. 174; 1 Am. Rep. 101. But see Adams *v.* Measher, 25 W. Va. 127.

setting the party's hand and seal to a deed.[1] Whether a deed prepared to be signed by several, but not signed by all, is to be regarded as the deed of those who do sign it depends on whether it was signed and delivered as an escrow only until signed by the others, or was delivered as the deed of the parties who signed it.[2] The grantee, where the deed contains no covenants on his part, need not sign; his signature in such case would simply show his assent to the grant, and this is always presumed.[3] A grantee, though he does not sign the deed, is bound by the covenants and stipulations contained therein.[4]

A seal is necessary to a deed.[5] A deed will be presumed to have been sealed where it recites a sealing, though no impression of a seal is visible.[6] An instrument having a seal affixed is a deed, though the affixing of a seal is not mentioned in it.[7] A deed not under seal is insufficient to convey title, where such deed is executed under a statute requiring a seal, but is not recorded until after the passage of a statute abolishing private seals.[8] By a seal at common law is meant "an impression upon wax or wafer, or some other tenacious substance capable of being impressed."[9] A piece of paper affixed to an instrument with mucilage, and stamped with a permanent impression, is good as a common-law seal.[10] So is a piece of paper cut and affixed to a wafer on the deed.[11] A seal is sufficient, whether

[1] Ingoldsby *v.* Juan, 12 Cal. 564.
[2] Haskins *v.* Lombard, 16 Me. 140; 33 Am. Dec. 645.
[3] Burton on Real Property, 441.
[4] Earle *v.* Mayor, 38 N. J. L. 52; Finley *v.* Simpson, 22 N. J. L. 252; 53 Am. Dec. 252.
[5] 2 Black, 306; Chiles *v.* Conley, 2 Dana, 21; Clark *v.* Graham, 6 Wheat. 579; McDill *v.* McDill, 1 Dall. 64; Elwell *v.* Shaw, 16 Mass. 47; 8 Am. Dec. 126; Taylor *v.* Glaser, 2 Serg. & R. 502; Jackson *v.* Wood, 12 Johns. 73; Floyd *v.* Ricks, 14 Ark. 286; 58 Am. Dec. 374; Taylor *v.* Morton, 5 Dana, 365; Davis *v.* Brandon, 2 Miss. 154; Jones *v.* Crawford, 1 McMull. 373.
[6] In re Sandilands, L. R. 6 Com. P. 411; Talbot *v.* Hodson, 7 Taunt. 251; McCarley *v.* Tippah Co., 58 Miss. 483; 38 Am. Rep. 338; but see same case in 58 Miss. 749.
[7] Wing *v.* Chase, 35 Me. 260; Long *v.* Ramsay, 1 Serg. & R. 72; Taylor *v.* Glaser, 2 Serg. & R. 502.
[8] Switzer *v.* Knapps, 10 Iowa, 72; 74 Am. Dec. 375.
[9] 4 Kent's Com. 452; Warren *v.* Lynch, 5 Johns. 245; Perrine *v.* Cheeseman, 11 N. J. L. 174; 19 Am. Dec. 388; Tasker *v.* Bartlett, 5 Cush. 359.
[10] Gillespie *v.* Brooks, 2 Redf. 349.
[11] Pease *v.* Lawson, 33 Mo. 35; Hughes *v.* Debnam, 8 Jones, 127.

pressed upon the paper or the wax attached thereto.[1] A printed impression of a seal on a paper is not a seal;[2] nor a scrawl with a pen;[3] nor a slit in the parchment with a ribbon run through it.[4] In some states by statute a scrawl is sufficient,[5] while in some the necessity of a seal has been abolished.[6] Several persons may bind themselves by one seal.[7] So a single scroll may serve as a seal of both parties, if the intent to adopt it as such is evinced by the instrument.[8] Where a deed declares that the grantors have affixed their seals, one against whose name no seal appears will be presumed to have adopted that opposite another's.[9] A recorded copy of a deed without any mark indicating a seal is evidence that there was none in the original.[10] But if it be stated on the face of the record that it was made under the official seal of the officer, it will be good, though a copy of the impression of the official seal does not appear on it.[11] Where a written contract has a scroll annexed thereto opposite the signature, and the word "seal" is written in the scroll, but in the body of the instrument there is no recognition of the scroll as a seal, it is a simple contract, and not a deed.[12]

§ 2271. Attesting Witnesses — When Required. — In the absence of a statute or the terms of a power requiring

[1] Pierce *v.* Indseth, 106 U. S. 546.

[2] Mitchell *v.* Union Life Ins. Co., 45 Me. 105; 71 Am. Dec. 529; Richard *v.* Boller, 6 Daly, 460.

[3] Warren *v.* Lynch, 5 Johns. 245; Hendricks *v.* Briggs, 15 Neb. 469.

[4] Duncan *v.* Duncan, 1 Watts, 322.

[5] Stimson's American Statute Law, sec. 1565; Michigan, Wisconsin, New Jersey, Minnesota, Virginia, West Virginia, California, Oregon, Colorado, Missouri, Florida, Mississippi, Illinois: Lewis *v.* Overby, 28 Gratt. 627.

[6] Stimson's American Statute Law, sec. 1565; Ohio, Indiana, Iowa, Kansas, Nebraska, Tennessee, Texas, Dakota, Kentucky, Mississippi: Pierson *v.* Armstrong, 1 Iowa, 282; 63 Am. Dec 440. In some states a seal may be by an impression on paper as well as upon wax or affixing wafer: Connecticut, Ohio, Rhode Island, Idaho.

[7] Mackay *v.* Bloodgood, 9 Johns. 285; Carter *v.* Chaudron, 21 Ala. 72; Williams *v.* Greer, 12 Ga. 459; Mapes *v.* Newman, 2 Ark. 469; Bohannons *v.* Lewis, 3 T. B. Mon. 376; Bank of Cumberland *v.* Bugbee, 19 Me. 27; Bowman *v.* Robb, 6 Pa. St. 302; Lambden *v.* Sharp, 9 Humph. 224; Yale *v.* Flanders, 4 Wis. 96.

[8] Norwell *v.* Walker, 9 W. Va. 447.

[9] Burnett *v.* McCluey, 78 Mo. 676.

[10] Switzer *v.* Knapps, 10 Iowa, 72; 74 Am. Dec. 375.

[11] Griffin *v.* Sheffield, 38 Miss. 359; 77 Am. Dec. 646.

[12] Cromwell *v.* Tate, 7 Leigh, 301; 30 Am. Dec. 506.

them, one or more attesting witnesses are not necessary to the validity of a deed.[1] In cases where there are no subscribing witnesses to a deed, the execution may be proved by proving the handwriting of the party.[2] If, however, a deed purports to be executed in presence of attesting witnesses, then, by a general rule applicable to to deeds and all other written instruments, the attesting witnesses must be called or their absence accounted for. When there are none, the deed is proved by proving the handwriting of the party.[3] It has been laid down that the deed should be attested by witnesses as a matter of caution, and for the easier proof of the deed.[4] And in a number of states, by statute, witnesses are necessary to the validity of a deed between the parties.[5] Where this statutory requisite exists, such attestation is essential to a valid conveyance.[6] Where a statute requires deeds to be executed in the presence of two witnesses, a deed executed in the presence of one only is void.[7] Under such a statute, a deed bearing the signature of one attesting witness is not properly attested, although another person was in and out of the room during the signing, but not for the purpose of being a witness.[8] A deed attested by two witnesses will be presumed to have been duly witnessed, and the grantors will be presumed to have been together, although it purports to have been acknowledged by some

[1] 4 Kent's Com. 451; Long *v.* Ramsay, 1 Serg. & R. 72; Dole *v.* Thurlow, 12 Met. 166; Menley *v.* Zeigler, 23 Tex. 88; Reinhart *v.* Miller, 22 Ga. 402; 68 Am. Dec. 506.

[2] Swin *v.* Bell, 5 Law Rec. 371; 1 Phillips on Evidence, pt. 2, c. 8, sec. 1.

[3] Roscoe on Evidence, 64, 65; 1 Starkie on Evidence, 330.

[4] Dale *v.* Thurlow, 12 Met. 166.

[5] Stimson's American Statute Law, sec. 1566; Connecticut, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, New Hampshire, Nebraska, Ohio, Oregon, Washington, Utah, Wisconsin; or where there is no acknowledgment: Alabama, Arkansas, North Carolina, Texas, New York, Massachusetts, Maine, Vermont, New Jersey, Iowa, Delaware, Kentucky, Virginia, West Virginia, California, Colorado, Tennessee, Dakota.

[6] Meighen *v.* Strong, 6 Minn. 177; 80 Am. Dec. 441; Chamberlin *v.* Spangier, 22 Hun, 437; Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430. That the deed is nevertheless valid *inter partis*, see Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139.

[7] Clark *v.* Graham, 6 Wheat. 577. See Stewart *v.* Beard, 69 Ala. 470.

[8] Kenyon *v.* Segar, 14 R. I. 490.

of them on different days, in different counties, and before different officers.[1] And a deed, defective in having but one witness, where the law requires two, is evidence of an agreement to execute a valid deed.[2] The words "sealed and delivered in presence of" the subscribing witness constitute a sufficient attestation of a deed.[3] A person who cannot write, but who makes his mark, or uses any other device by which he or others may identify him with the transaction, is a competent attesting witness.[4] If the subscribing witness cannot recollect his attestation, but recognizes his handwriting, and declares it was his practice never to attest without hearing the acknowledgment of the parties, this is evidence to be left to the jury as to the execution of the deed.[5] But when the witness who is produced cannot remember whether or not the other witnesses subscribed their names in the presence of the grantor, but presumes that they did so, as he would not have subscribed as a witness if the law had not been complied with, and the other witnesses are living and are within the state, the proof is insufficient, because it presents secondary evidence of a fact of which better evidence is within the party's reach.[6]

§ 2272. **Acknowledgment of Deeds — In General.** — The statutes of all the states require that a deed shall be acknowledged before it can be lawfully placed on record,[7] though it is valid as between the parties, or except as against purchasers for value without notice, or creditors.[8] The statutory requirements in the different states vary somewhat, but all have similar features. They require a

[1] Hrouska *v.* Janke, 66 Wis. 252.
[2] Vermont Mining etc. Co. *v.* Windham Co. Bank, 44 Vt. 489.
[3] Fosdick *v.* Risk, 15 Ohio, 84; 45 Am. Dec. 562.
[4] Tatom *v.* White, 95 N. C. 453.
[5] Allen *v.* Trimble, 4 Bibb, 21; 7 Am. Dec. 726.
[6] Jackson *v.* Vickory, 1 Wend. 406; 19 Am. Dec. 522.
[7] 1 Stimson's American Statute Law, secs. 1570 et seq.; Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Rep. 304. As to separate acknowledgment of deeds by married women, see Title IV., Husband and Wife.
[8] 1 Stimson's American Statute Law, sec. 1571.

certificate of the acknowledgment by the officer taking it to be attached or indorsed on the deed, signed and sealed by the officer. The certificate must show that the identity of the grantor was known to or proved to the officer. The officer taking the acknowledgment may be a justice of the peace, a commissioner of deeds, a judge, a notary public, a mayor of a city, a clerk of a court, or other officer specially pointed out by the statute.[1] The authenticity of the certificate of this officer must be in some states certified to by the clerk of the county court, or judge, and attested by his seal.[2] The body of a deed may be referred to to support a defective certificate of acknowledgment.[3]

§ 2273. **Who may Take — Who may Make.** — An acknowledgment before the grantor or grantee himself is void;[4] or before one of the parties thereto;[5] or one interested in obtaining the conveyance;[6] or a trustee.[7] An officer is not disqualified because he is related to the parties,[8] or is a justice of the peace *de facto*.[9] An attesting witness may take the acknowledgment.[10] A United States judge, empowered to take acknowledgments, may do so in any part of the Union, if the land lies in his own district.[11] But an acknowledgment taken in one county before a justice of the peace of another county, where the land lies, is held to be void.[12] A commissioner appointed by the governor of a state to take acknowledgments of

[1] 1 Stimson's American Statute Law, sec. 1582.

[2] 1 Stimson's American Statute Law, sec. 1582.

[3] Bradford *v.* Dawson, 2 Ala. 203.

[4] Davis *v.* Beazley, 75 Va. 491; Groesbeck *v.* Seeley, 13 Mich. 329; Beaman *v.* Whitney, 21 Me. 413; Wasson *v.* Connor, 54 Miss. 351; Wilson *v.* Truer, 20 Iowa, 233; Stevens *v.* Hampton, 46 Mo. 404; Green *v.* Abraham, 43 Ark. 420. The deed, however, is binding between the parties or their heirs, and its execution may be established by common-law evidence: Hogans *v.* Carruth, 18 Fla. 587.

[5] Hainey *v.* Alberry, 73 Mo. 427.

[6] Withers *v.* Baird, 7 Watts, 227; 32 Am. Dec. 754; Brown *v.* Moore, 38 Tex. 648.

[7] Brown *v.* Moore, 38 Tex. 645. *Contra*, Bennett *v.* Shipley, 82 Mo. 448.

[8] Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

[9] Brown *v.* Lunt, 37 Me. 423.

[10] Baird *v.* Evans, 58 Ga. 350.

[11] Moore *v.* Vance, 1 Ohio, 12.

[12] Share *v.* Anderson, 7 Serg. & R. 43; 10 Am. Dec. 421.

deeds, etc., in another state is an officer of the state from which he derives his appointment.[1] An acknowledgment before a commissioner appointed by the governor is not impaired by the fact that the latter had gone out of office at the time the acknowledgment was taken.[2] So an acknowledgment by a sheriff after the expiration of his term of a deed executed while in office is good.[3] So a deed executed by a commission empowered to convey public land of a state may be lawfully acknowledged by the commissioners after their authority has been revoked.[4] The right of an officer to take an acknowledgment does not depend on the length of his acquaintance with the person, nor upon the manner in which his knowledge is acquired.[5] Where the officer taking an acknowledgment of a deed styles himself such in his certificate, that is *prima facie* evidence of the fact that he is such an officer.[6]

The officer of a corporation affixing the corporate seal is the proper person to make the acknowledgment of a deed.[7] An authority to execute a deed of trust gives the power, by implication, to acknowledge it.[8] A person who appears before a magistrate and duly acknowledges execution of a deed to which his name was subscribed by another in his absence, thereby recognizes and adopts the signature as his own.[9]

§ 2274. Requisites, Construction, and Effect of Certificate. — A certificate of acknowledgment is liberally construed,[10] and a defect in it can be taken advantage of only by purchasers for value.[11] It is essential that the certifi-

[1] Smith *v.* Van Gilder, 26 Ark. 527.
[2] Thorn *v.* Frazer, 60 Tex. 259.
[3] Doe *v.* Dugan, 8 Ohio, 87; 31 Am. Dec. 433.
[4] New Hampshire Land Co. *v.* Tilton, 19 Fed. Rep. 73.
[5] Wood *v.* Bach, 54 Barb. 134.
[6] Tuten *v.* Gazan, 18 Fla. 751.
[7] Kelly *v.* Calhoun, 95 U. S. 710.
[8] Robinson *v.* Mauldin, 11 Ala. 977.
[9] Bartlett *v.* Drake, 100 Mass. 174; 97 Am. Dec. 92.
[10] Johnson *v.* Bridger Mill Co., 13 Nev. 351; Ingraham *v.* Grigg, 13 Smedes & M. 22; Morse *v.* Clayton, 13 Smedes & M. 373; Crowley *v.* Wallace, 12 Mo. 143; Chandler *v.* Spear, 22 Vt. 388; Angier *v.* Schieffelin, 72 Pa. St. 106; 13 Am. Rep. 659.
[11] Mastin *v.* Halley, 61 Mo. 196. The rule that presumptions are in favor of the regularity of the acts of public officers applies to acknowledgments of deeds: Addis *v.* Graham, 88 Mo. 197.

cate shall show the fact of the acknowledgment;[1] that he whose name appeared acknowledged that he executed the deed;[2] that the party acknowledging is personally known or proved to the certifying officer to be the party who executed the deed;[3] that the grantors were informed of the contents of the conveyance;[4] that he has signed the acknowledgment;[5] that he has affixed his notarial or official seal;[6] that the certificate shall show the official designation or title of the officer;[7] that he was an officer authorized by law to take the acknowledgment;[8] and the county of the officer.[9] The place of acknowledgment need not fully appear in the certificate, provided it can be ascertained from the whole instrument;[10] nor the date;[11] nor the formula, "Given under my hand and seal," etc., his official seal being in fact appended;[12] nor the name of the grantor, when it sufficiently appears that he, and no one else, appeared and acknowledged the deed.[13] A certificate of acknowledgment stating that the grantor is "personally known" to the officer is a compliance with a statute requiring such certificate to show that the grantor is a person with whom the officer is "personally acquainted."[14] But a statement that the officer saw the grantor sign the deed is not sufficient proof of his identity.[15] The acknowledgment of a deed must appear upon it, and cannot be proved by parol evidence.[16] A certificate is of no value

[1] Bryan *v.* Ramirez, 8 Cal. 461; 68 Am. Dec. 340; Spitnazle *v.* Vanhessah, 13 Neb. 338.

[2] Huff *v.* Webb, 64 Tex. 284.

[3] Wolf *v.* Fogarty, 6 Cal. 224; 65 Am. Dec. 509.

[4] Roney *v.* Moss, 76 Ala. 491.

[5] Carlisle *v.* Carlisle, 78 Ala. 542.

[6] Wetmore *v.* Laird, 5 Biss. 160.

[7] Johnson *v.* Haines, 2 Ohio, 55; 15 Am. Dec. 533.

[8] Cassell *v.* Cooke, 8 Serg. & R. 268; 11 Am. Dec. 610; Livingston *v.* McDonald, 9 Ohio, 168.

[9] Willard *v.* Cramer, 36 Iowa, 22.

[10] Brooks *v.* Chaplin, 3 Vt. 281; 23 Am. Dec. 209; Furhman *v.* Loudon, 13 Serg. & R. 386; 15 Am. Dec. 608; Chiniquy *v.* Catholic Bishop of Chicago, 41 Ill. 149; Graham *v.* Anderson, 42 Ill. 514; 92 Am. Dec. 89; Bradley *v.* West, 60 Mo. 33. A venue to a certificate of acknowledgment, simply "county of New York," with no indication of the state in the body of the deed, held insufficient: Hardin *v.* Kirk, 49 Ill. 153; 95 Am. Dec. 581.

[11] Rockleff *v.* Norton, 19 Me. 274; Galusha *v.* Sinclear, 3 Vt. 394; Webb *v.* Huff, 61 Tex. 677; Carter *v.* Chaudron, 21 Ala. 72.

[12] Webb *v.* Huff, 61 Tex. 677.

[13] Wilcoxon *v.* Osborn, 77 Mo. 621.

[14] Kelly *v.* Calhoun, 95 U. S. 710.

[15] Jackson *v.* Osborn, 2 Wend. 555; 20 Am. Dec. 649.

[16] Pendleton *v.* Button, 3 Conn. 406.

as to a fact stated in it if the law did not intrust the officer to certify to this fact.[1]

The officer taking an acknowledgment acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance actually is the grantor; and in determining further whether the person thus adjudged to be the grantor does actually and truly acknowledge that he executed the instrument. By his certificate he makes an official record of his adjudication.[2] The certificate of a magistrate or other officer of the acknowledgment of a deed or mortgage is a judicial act, and in the absence of fraud or duress, conclusive as to the facts therein stated.[3] A purchaser, *bona fide* and without notice of fraud, is protected against it; but as to all others, parol evidence is admissible to show either that there was no acknowledgment or that there was fraud or duress connected with the acknowledgment.[4] The officer cannot subsequently amend the certificate in the absence of the grantor.[5]

§ 2275. Deeds Executed in Blank. — The contents of a deed must be all written before the execution of it. A deed executed in blank, or with a material omission in the contents, cannot be completed by subsequently filling in the blank, without a re-execution and redelivery, or what is equivalent thereto.[6] A subsequent acknowledg-

[1] Draper *v.* Bryson, 17 Mo. 71; 57 Am. Dec. 257.

[2] Wasson *v.* Connor, 54 Miss. 351.

[3] Heeter *v.* Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Miller *v.* Wentworth, 82 Pa. St. 280; Williams *v.* Baker, 71 Pa. St. 476; McNeely *v.* Rucker, 6 Blackf. 391; Kerr *v.* Russell, 69 Ill. 666; 18 Am. Rep. 634; Singer Mfg. Co. *v.* Rook, 84 Pa. St. 442; 24 Am. Rep. 204; White *v.* Graves, 107 Mass. 325; 9 Am. Rep. 38; Johnston *v.* Wallace, 53 Miss. 331; 24 Am. Rep. 699.

[4] Heeter *v.* Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Miller *v.* Wentworth, 82 Pa. St. 280; Johnson *v.* Van Velsor, 43 Mich. 208. And see Williams *v.* Robson, 6 Ohio St. 510; Hourtienne *v.* Schnoor, 33 Mich. 274; Hays *v.* Hays, 5 Rich. 31; Van Orman *v.* McGregor, 23 Iowa, 300; Wannell *v.* Kern, 57 Mo. 478.

[5] Enterprise Transit Co. *v.* Sheedy, 103 Pa. St. 492; 49 Am. Rep. 130.

[6] Shep. Touch. 54; Perkins on Conveyancing, sec. 118; Hibblewhite *v.* McMorine, 6 Mees. & W. 200; Burns *v.* Lynde, 6 Allen, 305; Bragg *v.* Fessenden, 11 Ill. 544; Enthoven *v.* Hoyle, 13 Com. B. 373; Davidson *v.* Cooper,

ment of the deed when complete may operate as a redelivery.[1] And a deed may be signed and sealed and then filled up, if this is done before delivery.[2] It has been held in Michigan that where a woman and her husband executed a deed to property of the husband's, leaving the name of the grantee blank, and the person with whom it was left to use for her benefit had the name of her brother inserted as grantee, and delivered the deed to him, the deed was valid.[3] A deed in due form signed and acknowledged by the grantor does not become his deed until the name of a grantee is inserted therein; and an agent of the grantor cannot insert the name of a grantee in the absence of the grantor, unless his authority is in writing.[4]

11 Mees. & W. 793; Duncan v. Hodges, 4 McCord, 239; 17 Am. Dec. 734; Smith v. Fellows, 9 Jones & S. 36; Ingram v. Little, 14 Ga. 173; 58 Am. Dec. 549; Bashford v. Pearson, 9 Allen, 387; 85 Am. Dec. 764. As to alterations in deeds, see Chapter CXVII.

[1] Hudson v. Revett, 5 Bing. 372.

[2] Duncan v. Hodges, 4 McCord, 237; 17 Am. Dec. 734. See Swartz v. Ballou, 47 Iowa, 188; 29 Am. Rep. 470; Lamar v. Simpson, 1 Rich. Eq. 71; 42 Am. Dec. 345.

[3] In Lockwood v. Bassett, 49 Mich. 546, Cooley, J., said: "Many cases hold that a deed executed and delivered with a necessary part left in blank is ineffectual as a conveyance, though afterwards the blank is filled: Hibblewhite v. McMorine, 6 Mees. & W. 200; United States v. Nelson, 2 Brock. 64; Chase v. Palmer, 29 Ill. 306; Whitaker v. Miller, 83 Ill. 381; Williams v. Crutcher, 6 Miss. 71; 35 Am. Dec. 422; Davenport v. Sleight, 2 Dev. & B. 381; 31 Am. Dec. 420; Cross v. State Bank, 5 Ark. 525; Viser v. Rice, 33 Tex. 139; Heath v. Nutter, 50 Me. 378; Wunderlin v. Cadogan, 50 Cal. 613; Burnes v. Lynde, 6 Allen, 305; Ingram v. Little, 14 Ga. 173; 58 Am. Dec. 549; Lindsley v. Lamb, 34 Mich. 509. But other cases hold that if the filling of the blank is by express authorization of the grantor, this is sufficient, even though the authority is by parol: Ex parte Kerwin, 8 Cow. 118; Vliet v. Camp, 13 Wis. 198; Van Etta v. Evenson, 28 Wis. 33; Schintz v. McManamy, 33 Wis. 299; Ragsdale v. Robinson, 48 Tex. 379; Pence v. Arbuckle, 22 Minn. 417; Field v. Stagg, 52 Mo. 534; 4 Am. Rep. 435. In Iowa, where there are like decisions, importance is attached to the fact that the statute does not make a seal essential to a deed: Swartz v. Ballou, 47 Iowa, 188; 29 Am. Rep. 470; McClain v. McClain, 52 Iowa, 274. In this state the statute declares that a deed shall not be invalid for want of a seal: Comp. Laws, sec. 6194. But in this case it is not necessary to decide whether a parol authority to fill a blank after delivery is or is not sufficient, for the facts do not raise the question. The blank in this case was filled before delivery; and when the delivery is by the grantor himself, or by his direction, the deed as then completed is adopted by him. No one does or can dispute this. Even if the blank were filled up after delivery, the grantor, if he claimed the benefit of accompanying and related contracts, would thereby make the deed as completed his own, and preclude himself from objecting to the invalidity afterwards: Duncan v. Hodges, 4 McCord, 239."

[4] Upton v. Archer, 41 Cal. 85; 10 Am. Rep. 266; Preston v. Hull, 23 Gratt. 600; 14 Am. Rep. 153.

ILLUSTRATIONS. — A deed was executed with a blank left therein for the name of the grantee, and in that condition placed in the hands of an agent, with verbal authority to fill the blank. The agent did fill the blank with the name of a grantee, in the absence of the grantor, and delivered the deed. *Held*, that the deed was valid: *Field* v. *Stagg*, 52 Mo. 534; 14 Am. Rep. 435; *Vose* v. *Dolan*, 108 Mass. 155; 11 Am. Rep. 331; *Van Etta* v. *Evenson*, 28 Wis. 33; 9 Am. Rep. 486; *Owen* v. *Perry*, 25 Iowa, 412; 96 Am. Dec. 49. A mortgagee of land executed an assignment of the mortgage in blank as to the assignee, and orally authorized his son to find a purchaser, write in his name as grantee, and deliver the assignment. The son did so, the assignee not knowing that the son was acting as agent in any respect except to deliver the assignment. *Held*, that the assignment was valid: *Phelps* v. *Sullivan*, 140 Mass. 36; 54 Am. Rep. 442.

§ 2276. Delivery and Acceptance — Date. — Delivery is essential to give effect to a deed, whether it be founded on a consideration or not.[1] Without delivery all the preceding formalities are unavailable.[2] With delivery the deed becomes absolute, and cannot be defeated by the grantor by any subsequent act, unless by virtue of some power contained in it, or for fraud or the like.[3] A deed delivered to one of two grantees named therein, without saying anything of the other, is void as to the latter.[4] A deed cannot be delivered and accepted partially for the

[1] Van Amringe *v.* Morton, 4 Whart. 382; 34 Am. Dec. 517; Jones *v.* Jones, 6 Conn. 111; 16 Am. Dec. 35; Rutledge *v.* Montgomery, 30 Ga. 641; Fisher *v.* Hall, 41 N. Y. 421, 422; Younge *v.* Gailbeau, 3 Wall. 641; Critchfield *v.* Critchfield, 24 Pa. St. 100; Stiles *v.* Brown, 16 Vt. 563; Armstrong *v.* Stovall, 26 Miss. 275; Frisbie *v.* McCarty, 1 Stew. & P. 56; Miller *v.* Physick, 24 Ark. 224; Fitch *v.* Bunch, 30 Cal. 208; Merrills *v.* Swift, 18 Conn. 261; 46 Am. Dec. 315; Oliver *v.* Stone, 24 Ga. 63; Fletcher *v.* Mansur, 5 Ind. 267; Whitaker *v.* Miller, 83 Ill. 381; Mitchell *v.* Skinner, 17 Kan. 565; Hughes *v.* Easten, 4 J. J. Marsh. 573; 20 Am. Dec. 230; Carey *v.* Dennis, 13 Md. 1; Brown *v.* Brown, 66 Me. 316; Berkshire Fire Ins. Co. *v.* Sturgis, 13 Gray, 178; Heffron *v.* Flannigan, 37 Mich. 274; Green *v.* Yarnall, 6 Mo. 326; Davis *v.* Lumpkin, 57 Miss. 506; Patrick *v.* McCormick, 10 Neb. 15; Crawford *v.* Bertholf, 1 N. J. Ch. 458; Hammell *v.* Hammell, 10 Ohio, 17; McPherson *v.* Featherstone, 37 Wis. 632; Dikes *v.* Miller, 24 Tex. 417; Church *v.* Gilman, 15 Wend. 656; 30 Am. Dec. 82. An undelivered deed, though it may tend to prove the fact of a purchase, has no force as a conveyance or evidence of title: Nay *v.* Mograin, 24 Kan. 75. See Betts *v.* Union Bank, 1 Har. & J. 175; 18 Am. Dec. 283.

[2] Younge *v.* Gailbeau, 3 Wall. 641; Fisher *v.* Beckworth, 30 Wis. 55; Brown *v.* Brown, 66 Me. 316.

[3] Boone on Real Property, sec. 295.

[4] Hannah *v.* Swarner, 8 Watts, 9; 34 Am. Dec. 442.

purpose of conveying title to the grantee, and yet so as not to give effect to its conditions, recitals, and limitations.[1] But it may in its operation be made to relate back to the time of the contract for purchase, so far as affects the parties and for the furtherance of justice, but not if affecting the rights of others.[2] A deed informally executed and delivered, or delivered without authority, will be made good by the grantor subsequently accepting and claiming the benefit of the contract growing out of it.[3]

Delivery may be made by merely handing over the possession of the deed to the other party, or by authorizing the other party to take possession of the deed. A deed proved to have been signed and sealed by the one party, and appearing in the possession of the other party, may be presumed to have been duly delivered.[4] Delivery may also be made by giving the possession of the deed to a stranger for the use and benefit of the other party, the intention being sufficiently expressed or subsequently ratified; a delivery to a stranger without any explanation of intention or subsequent ratification would be inoperative.[5] Delivery may also be effected by mere expression of intention, although the party making the deed retain it in his own possession or in the possession of his attorney or agent.[6] The delivery is good, though it does not reach the grantee until after the grantor's death, if it has been previously left with a third person for his use.[7]

[1] Warren *v.* Jacksonville, 15 Ill. 236; 58 Am. Dec. 610.

[2] Jackson *v.* Bard, 4 Johns. 230; 4 Am. Dec. 267.

[3] Duncan *v.* Hodges, 4 McCord, 239; 17 Am. Dec. 734; Van Amringe *v.* Morton, 4 Whart. 382; 34 Am. Dec. 517.

[4] Hall *v.* Bainbridge, 12 Q. B. 699; Chandler *v.* Temple, 4 Cush. 285; Jones *v.* Swazee, 42 N. J. L. 279; Newlin *v.* Beard, 6 W. Va. 110; Ward *v.* Dougherty, 7 Am. St. Rep. 151.

[5] Doe *v.* Knight, 5 Barn. & C. 671; Tompkins *v.* Wheeler, 16 Pet. 106; Verplank *v.* Sterry, 12 Johns. 536; 7 Am. Dec. 348; Cin. etc. R. R. Co. *v.* Iliff, 13 Ohio St. 235; Eckman *v.* Eckman, 55 Pa. St. 269; Brown *v.* Brown, 66 Me. 316; Fisher *v.* Hall, 41 N. Y. 423; Hatch *v.* Bates, 54 Me. 136; Stilwell *v.* Hubbard, 20 Wend. 44; Hinson *v.* Bailey, 5 Am. St. Rep. 700.

[6] Walker *v.* Walker, 42 Ill. 311; 89 Am. Dec. 445; Doe *v.* Knight, 5 Barn. & C. 671; Farrar *v.* Bridges, 5 Humph. 411; 42 Am. Dec. 439. But see Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592.

[7] Thatcher *v.* St. Andrews Church, 37 Mich. 264; Goodell *v.* Pierce, 2 Hill, 659; Foster *v.* Mansfield, 3 Met. 412, 37 Am. Dec. 154; McLean *v.* Nelson, 1 Jones, 396.

Where the grantor delivers it to a third person as his deed, to be delivered to the grantee at his death, and the deed is accordingly delivered to the grantee upon the grantor's death, the title passes to the grantee as of the date of the first delivery.[1]

No particular form is required in the delivery. It may be by acts or by words, or by both combined.[2] It may be made by the grantor, or by another person with the grantor's assent, precedent or subsequent.[3] It need not be placed in the actual control of the grantee or his agent; it may remain with the grantor, if there are other acts and declarations sufficient to show an intention to treat it as delivered.[4] Where it is delivered to another person for

[1] Ball *v.* Foreman, 37 Ohio St. 132; 63 Am. Dec. 243; Latham *v.* Udell, 38 Mich. 238; Hatch *v.* Hatch, 9 Mass. 307; 6 Am. Dec. 67.

[2] Thoroughgood's Case, 9 Rep. 136; Verplank *v.* Sterry, 12 Johns. 536; 7 Am. Dec. 348; Hatch *v.* Bates, 54 Me. 139; Mills *v.* Gore, 20 Pick. 29; McClure *v.* Colclough, 17 Ala. 89; Burkholder *v.* Casad, 47 Ind. 418; Warren *v.* Sweet, 31 N. H. 332; Brown *v.* Brown, 66 Me. 316; Cannon *v.* Cannon, 26 N. J. Eq. 319; Gumell *v.* Cockerell, 84 Ill. 319; Hughes *v.* Easten, 4 J. J. Marsh. 572; 20 Am. Dec. 230; Chess *v.* Chess, 1 Penr. & W. 32; 21 Am. Dec. 350; Wellborn *v.* Weaver, 17 Ga. 267; 63 Am. Dec. 235.

[3] Duncan *v.* Hodges, 4 McCord, 239; 17 Am. Dec. 734; Brown *v.* Brown, 66 Me. 316; Foster *v.* Mansfield, 3 Met. 412; 37 Am. Dec. 154; Marsh *v.* Austin, 1 Allen, 238; Hathaway *v.* Payne, 34 N. Y. 92; Duncan *v.* Pope, 47 Ga. 445; Stone *v.* Duvall, 77 Ill. 475; Morgan *v.* Hazelhurst Lodge, 53 Miss. 674; Stephens *v.* Rinehart, 72 Pa. St. 434; Mather *v.* Corliss, 103 Mass. 568; Fisher *v.* Hall, 41 N. Y. 416; Doe *v.* Knight, 5 Barn. & C. 671; Chess *v.* Chess, 1 Penr. & W. 32; 21 Am. Dec. 350; Church *v.* Gilman, 15 Wend. 656; 30 Am. Dec. 82; Morrison *v.* Kelly, 22 Ill. 610; 74 Am. Dec. 169.

[4] Regan *v.* Howe, 121 Mass. 424; Moore *v.* Hazelton, 9 Allen, 102; Dearmond *v.* Dearmond, 10 Ind. 191; Sedgewood *v.* Gault, 2 Lea, 643; Farrar *v.* Bridges, 5 Humph. 411; 42 Am. Dec. 439; Canning *v.* Pinkham, 1 N. H. 353; Sonnerke *v.* Anden, 1 Johns. Ch. 240; Wall *v.* Wall, 30 Miss. 91; 64 Am. Dec. 147; Hart *v.* Rust, 46 Tex. 556; Rushin *v.* Shields, 11 Ga. 636. Non-delivery of the deed will not be presumed from the fact that the deed remained in the possession of the grantor several months after it had been recorded: Howard *v.* Patrick, 38 Mich. 795. In Cannon *v.* Cannon, 26 N. J. Eq. 319, the court say: "To make delivery of a deed, it is not necessary it should actually be handed over to the grantee, or to another person for him. It may be effected by words without acts, or by acts without words, or by both acts and words. Indeed, it may be made though the deed remains in the custody of the grantor. Thus if both parties are present when the usual formalities of execution take place, and the contract is fully carried out, and nothing remains to be done except the empty ceremony of passing the deed from the grantor to the grantee, the law, regarding the substance, and disregarding mere form, will adjudge the title has passed to the grantee, and that the deed is good and valid to him, though it should remain in the custody of the grantor. However, in cases where there is not an actual transfer of the deed, it must satisfactorily appear,

the grantee, it takes effect from such delivery, without waiting for the subsequent delivery by him to the grantee.[1] But, to constitute a good delivery, the grantor must part with all authority and dominion over the deed, either absolutely or conditionally:[2] absolutely, if the effect of the deed is to be immediate, and the title is to pass at once to the grantee; but conditionally, if the operation of the deed is made dependent on the performance of some condition, or the happening of some subsequent event.[3] He

either from the circumstances of the transaction or the words or acts of the grantor, that it was his intention to part with the deed and put the title in the grantee."

[1] Peavey *v.* Tilton, 18 N. H. 151; 45 Am. Dec. 365; Lady Superior *v.* McNamara, 3 Barb. Ch. 375; 49 Am. Dec. 184.

[2] Young *v.* Gailbeau, 3 Wall. 641; Parmelee *v.* Simpson, 5 Wall. 81; Oliver *v.* Stone, 24 Ga. 63; Tibbals *v.* Jacobs, 31 Conn. 428. A deed may be delivered to a third person, to take effect upon the death of the grantor: Latham *v.* Udell, 38 Mich. 238; Howard *v.* Patrick, 38 Mich. 795; Wallace *v.* Harris, 32 Mich. 380; Foster *v.* Mansfield, 3 Met. 412; 37 Am. Dec. 154; Stone *v.* Duvall, 77 Ill. 475; Stephens *v.* Huss, 54 Pa. St. 20; Stephens *v.* Rinehart, 72 Pa. St. 434.

[3] Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592, the court saying: "To constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this, he must part with the possession of the deed, and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself or to some person for him, which is called an absolute delivery; or otherwise he must part with all present or temporary right of possession and control until the happening of some future event, or the performance of some future condition, upon the happening or not happening or performance or non-performance of which his right of possession may return and his dominion and power over the deed be restored, in which case the delivery is said to be contingent or conditional. An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession and of the power and control over the deed by the grantor for the benefit of the grantee at the time of delivery. This is the legal definition and meaning of the term 'delivery,' as applied to such an instrument. It implies a parting with the possession and surrender of authority over the deed by the grantor at that time, either absolutely or conditionally: absolutely if the effect of the deed is to be immediate, and the title to pass or estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed, or made dependent on the performance of some condition, or the happening of some subsequent event. A conditional delivery is and can only be made by placing the deed in the hands of a third person, to be kept by him until the performance of some condition or conditions by the grantee or some one else, or until the happening of some event, when upon the performance or happening of which the deed is to be delivered over by the depositary to the grantee. Conditional delivery also takes place when by the terms of the deposit with the third person the deed is to be returned to the grantor upon the performance of some condition on his part, or on the part of some other person, or upon the happening of some contingency or some uncertain event at or before some future day, and the like. In fixing the terms and determining the conditions of deposit, it is competent for the grantor or for the

must part either with the possession of the instrument, or with the right to retain it, else there is no delivery.[1] The question of delivery is a question of intent. A delivery to the grantee without the intent to deliver it is not

parties to enter into such stipulations as they please, and the effect of the deed in the third person's hands always depends upon the interest of the parties, or of the grantor when he alone dictates or fixes the conditions. In some cases, the deed is held to operate presently, though placed in the hands of a stranger with a direction to deliver it to the grantee at some future day or upon some certain event. In such cases, if there be no condition connected with the delivery to the grantee, the happening of which must by the terms of the authority in the receiver precede such delivery, the title passes at once to the grantee. It is otherwise, however, where such condition exists; for until that has happened or been performed, or until the event contingent in its nature has transpired, the deed is to have no effect. Cases of the latter description, and those under different circumstances, where it is contemplated that the deed may by possibility or in the course of events be returned to the grantor, are in truth the only ones of conditional delivery, and it is a misapplication of the term where it is employed with reference to any others. As has been well observed, a conditional deed — that is, one delivered conditionally — is not a deed, but an escrow, — a mere writing having the form of a deed, but the effect of which depends wholly upon the happening of the conditions or events upon which it is to be delivered to the grantee. If these come to pass, it becomes a deed, otherwise it is a mere nullity. Where delivery is conditioned upon the performance of some act by the grantee or by some other person, the instrument becomes a deed when the act is performed according to the terms of the deposit or authority conferred upon the receiver. When the condition is for the return of the deed upon the performance of some act by the grantor, or by some one for him, and such act has been performed, then the deed becomes forever a nullity, and no delivery of it by the receiver or depositary to the grantee will make it effectual. If, on the other hand, such act be not performed, or the event do not transpire upon which the instrument was to be delivered back to the grantor, it then becomes his deed agreeably to the stipulation of the parties and the instructions given to the depositary. Many, and perhaps most, of the authorities make a distinction between cases where the future delivery is to depend upon the payment of money or the performance of some other condition, and cases where it is to depend on the happening of some contingency, holding that the former is an escrow, but that the latter will be deemed the grantor's deed presently. This distinction will be found, however, not to be in all cases correct, since it will frequently happen that it will defeat the manifest intention of the parties, which it is everywhere conceded should govern. The foregoing classification will, therefore, we think, for all general purposes, be found more accurately to express the true rules and definitions of the law upon the subject."

[1] Brown *v.* Brown, 66 Me. 316; Burton *v.* Boyd, 7 Kan. 17; Younge *v.* Gailbeau, 3 Wall. 636; Duer *v.* James, 42 Md. 492; Withers *v.* Jenkins, 7 S. C. 124; Kirkman *v.* Bank of America, 2 Cold. 379; Cook *v.* Brown, 34 N. H. 460, 475; Elmore *v.* Marks, 39 Vt. 638; Gould *v.* Day, 94 U. S. 412; Berry *v.* Anderson, 22 Ind. 36; Rutledge *v.* Montgomery, 30 Ga. 899; Stinson *v.* Anderson, 96 Ill. 373; Eckman *v.* Eckman, 55 Pa. St. 269. Where the grantor is as much, or more, interested in the execution or preservation of a deed than the grantee, the fact that it is found in his possession is no presumption against the idea that delivery was intended at the time of execution: Blakemore *v.* Brynside, 7 Ark. 567; Dyer *v.* Bean, 15 Ark. 538.

a legal delivery. Therefore it is competent to show by parol evidence that the deed, though in the hands of the grantee, has never been delivered. For this purpose the original verbal agreement may be shown, as that a written guaranty for the payment of rent was to be procured and indorsed on the lease before it should take effect, and that it was placed in the lessee's hands to enable him to get such indorsement.[1] If the deed is subject to be recalled by the grantor before delivery to the grantee, it is no delivery on the part of the grantor, although he should die without recalling it.[2] So a delivery of a deed to the agent of the grantee, to be held while he shall consider whether he shall accept it, is not a valid delivery.[3]

A deed in the possession of the grantee is presumed to have been delivered, possession being *prima facie* evidence of delivery.[4] The delivery of a deed will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of the title,[5] or from their acts preceding, attending, and following its execution and acknowledgment.[6] The grantee's possession of a regularly executed deed is *prima facie* evidence of its absolute delivery.[7] Delivery may be inferred from the execution of the deed in the presence of

[1] Jordan *v.* Davis, 108 Ill. 336.

[2] Filch *v.* Bunch, 30 Cal. 213; Cook *v.* Brown, 34 N. H. 460; Brown *v.* Brown, 66 Me. 316; Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592; Jacobs *v.* Alexander, 19 Barb. 243; Baker *v.* Haskell, 47 N. H. 479; 93 Am. Dec. 455.

[3] Ford *v.* James, 2 Abb. App. 159.

[4] Berry *v.* Anderson, 22 Ind. 231; Black *v.* Thornton, 30 Ga. 361; Roberts *v.* Swearingen, 8 Neb. 363; Green *v.* Yarnall, 6 Mo. 326; Morris *v.* Henderson, 37 Miss. 492; Black *v.* Shreve, 13 N. J. Eq., 455; Den *v.* Farlee, 21 N. J. L. 280; Benson *v.* Woolverton, 15 N. J. Eq. 158; Tunison *v.* Chamblin, 88 Ill. 378; Reed *v.* Douthit, 62 Ill. 348; Rhine *v.* Robinson, 27 Pa. St. 30; Ward *v.* Lewis, 4 Pick. 520; Chandler *v.* Temple, 4 Cush. 285; Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147; Dawson *v.* Hall, 2 Mich. 390; Games *v.* Stiles, 14 Pet. 322; Carson *v.* Phelps, 40 Md. 73; Patterson *v.* Snell, 67 Me. 559; Billings *v.* Stark, 15 Fla. 297; Tuttle *v.* Turner, 28 Tex. 759; McEwen *v.* Trost, 1 Sneed, 186; Collins *v.* Bankhead, 1 Strob. 28. And this presumption can only be rebutted by clear and convincing proof: Tunison *v.* Chamblin, 88 Ill. 378.

[5] Gould *v.* Day, 94 U. S. 405; Hughes *v.* Easten, 4 J. J. Marsh. 572; 20 Am. Dec. 230.

[6] Dukes *v.* Spangler, 35 Ohio St. 119.

[7] Goodwin *v.* Ward 6 Baxt. 107; Simmons *v.* Simmons, 78 Ala. 365.

an attesting witness,[1] or from putting it in the post-office, directed to the grantee,[2] or from its acknowledgment,[3] or from its acknowledgment and registration.[4] So delivery will be presumed from the recording of a deed,[5] or from leaving it for record.[6] But the mere act of recording a deed, when done by the grantor, even if *prima facie* evidence of delivery to the grantee, is liable to be rebutted; and it is successfully rebutted when it is shown that the deed was not in the nature of a family settlement, or of gift to a minor, but was a deed of trust, intended to confer no benefit on the grantee, and its execution and record are wholly unknown to him until after the death of the grantor;[7] or that the grantee had no knowledge of its existence.[8] Where a deed was duly signed, sealed, and

[1] Moore *v.* Hazleton, 9 Allen, 102.

[2] McKinney *v.* Rhoads, 5 Watts, 343. But see Otto *v.* Doty, 61 Iowa, 23.

[3] McConnell *v.* Rrown, Litt. Sel. Cas. 466; Den *v.* Farlee, 21 N. J. L. 280; Ford *v.* Gregory, 10 B. Mon. 180; Newlin *v.* Osborne, 4 Jones, 157; 67 Am. Dec. 269. *Contra*, Alexander *v.* De Kermel, 81 Ky. 345; Turner *v.* Carpenter, 83 Mo. 333; Bond *v.* Slayback, 63 Cal. 493.

[4] Bullitt *v.* Taylor, 34 Miss 708; Craven *v.* Craven, 38 Iowa, 471; Robinson *v.* Gould, 26 Iowa, 89; Phelps *v.* Phelps, 17 Md. 133; Kille *v* Ege, 79 Pa. St. 15; Ross *v.* Campbell, 73 Ga. 309.

[5] Bullitt *v.* Taylor, 34 Miss. 708; Gilbert *v.* North American Fire Ins. Co., 23 Wend. 43; 35 Am. Dec. 543; Jackson *v.* Perkins, 2 Wend. 308; Jackson *v.* Cleveland, 15 Mich. 94; 90 Am. Dec. 266; Union Mut. Life Ins. Co. *v.* Campbell, 95 Ill. 267; 35 Am. Rep. 166; Himes *v.* Keighblingher, 14 Ill. 469; Boardman *v.* Dean, 34 Pa. St. 252; Chess *v.* Chess, 1 Penr. & W. 32; 21 Am. Dec. 351; Harwood *v.* Steel, 4 Phila. 88; Leppoc *v.* National Union Bank, 32 Md. 136; Knolls *v.* Barnhart, 71 N. Y. 474; Berkshire Mutual Fire Ins. Co. *v.* Sturgis, 13 Gray, 178; Cecil *v.* Beaver, 28 Iowa, 241; 4 Am. Rep. 174; Holliday *v.* White, 33 Tex. 460; Thompson *v.* Jones, 38 Tenn. 574; Wellborn *v.* Weaver, 17 Ga. 267; 63 Am. Dec. 235; Taylor *v.* McClure, 28 Ind. 37; Bensley *v.* Atwill, 12 Cal. 231; Burke *v.* Adams, 80 Mo. 504; 50 Am. Dec. 510; Tobin *v.* Bass, 85 Mo. 654; 55 Am. Rep. 392; Sergham *v.* Wood, 15 Wend. 545; 30 Am. Dec. 75; Blight *v.* Schenck, 10 Pa. St. 285; 51 Am. Dec. 479; Snider *v.* Lackenour, 2 Ired. Eq. 360; 38 Am. Dec. 685; Alexander *v.* Alexander, 71 Ala. 295; Walton *v.* Burton, 107 Ill. 54.

[6] Gorman *v.* Stanton, 5 Mo. 585; Pearce *v.* Danforth, 13 Mo. 360; Bradley *v.* Heath, 12 Pick. 163; 22 Am. Dec 416; Lady Superior *v.* McNamara, 3 Barb. Ch. 375; 49 Am. Dec. 184; Boody *v.* Davis; 20 N. H. 140; 51 Am. Dec. 210; Swiney *v.* Swiney, 14 La. 316. In a California case it was held that recording a deed is not evidence of its delivery unless it comes from the hands of the grantor or some one claiming through or under him: Barr *v.* Schroeder, 32 Cal. 609. In same states registration does not take away the necessity of proving the delivery: Hawkes *v.* Pike, 105 Mass. 560; 7 Am. Rep. 554; Parker *v.* Hill, 8 Met. 447; Samuel *v.* Thornton, 3 Met. 275; 37 Am. Dec. 135; Watson *v.* Ryan, 3 Tenn. Ch. 40.

[7] Union Mut. Ins. Co. *v.* Campbell, 95 Ill. 267; 35 Am. Rep. 166.

[8] Younge *v.* Gailbeau, 3 Wall. 636; Kingsbury *v.* Burnside, 58 Ill. 310; 11 Am. Rep. 67.

recorded, but was not delivered to the grantee nor accepted by him until long after, it was held that although as between the grantor and grantee it might take effect from the date when it was left for record, yet as against attaching creditors it took effect only from the time of delivery and acceptance by the grantee.[1] But it is no objection to the delivery of a deed that it was made after registration.[2] The burden of proof to show that a deed duly recorded was never delivered is on the grantor in an action of ejectment against an innocent purchaser.[3]

The following have been held to constitute a good delivery: Where it was left by the grantor with the attorney who drew it for registration, or taken by the vendor to be handed to the clerk for registration;[4] where the grantor executed and acknowledged the deed, and then left it with the officer without instructions;[5] where a husband had executed a deed to his wife for the purpose of having her exhibit it to his creditor to induce him to grant an extension, and had deposited it with his other papers in the house, where she had access to it, to make use of it for the purpose for which it was made;[6] where it was, by agreement of the parties, left at the register's for record, to be forwarded to the grantee;[7] where the grantor, intending thereby to give it effect, leaves it with the conveyancer to be delivered to the grantee;[8] where the grantor left it with the scrivener, to be delivered to the grantee upon the performance of certain conditions, and the conditions having been fully performed, the scrivener gave the deed to the grantor upon his declaring that he

[1] Bell *v.* Farmers' Bank, 11 Bush, 34; 21 Am. Rep. 205.
[2] Parker *v.* Hill, 8 Met. 447.
[3] Blight *v.* Schenck, 10 Pa. St. 285; 51 Am. Dec. 478.
[4] Burt *v.* Cassety, 12 Ala. 734.
[5] Blight *v.* Schenck, 10 Pa. St. 285; 51 Am. Dec. 478.
[6] Gage *v.* Gage, 36 Mich. 229.
[7] Shaw *v.* Hayward, 7 Cush. 170. It has been ruled that where the grantor left the deed to be recorded, and when recorded to be forwarded to the grantee, there was no delivery until the time of mailing: Partridge *v.* Chapman, 81 Ill. 137.
[8] Thatcher *v.* St. Andrews Church, 37 Mich. 264.

took it to deliver it to the grantee;[1] where a deed of marriage settlement was duly executed by the parties and laid on the table, and the wife, as *cestui que trust*, took it up and kept it in her possession until her death;[2] where plaintiff, to whom a deed had been made in his presence, directed the notary public who drew it to send it to the county recorder for record, but the notary put the deed in his safe, and for some months forgot to send it;[3] where a deed was executed and left with the magistrate before whom it was acknowledged, and taken away by a brother of the grantee for him;[4] where the parties to the deed had it prepared, and agreed it should be signed and acknowledged by the grantor, and left with a justice of the peace for the grantee, which was done;[5] where a deed was properly signed, sealed, attested, and acknowledged in the presence of both parties and a notary, and then left by the grantor with the notary, and never called for;[6] where a conveyance was properly executed, and delivered to the grantee, and afterwards handed to the grantor to be put on record, but the latter died without recording it, leaving a will in which he made specific devises of all his property, but made no mention of the real estate claimed by the grantee;[7] where an insolvent, in accordance with an oral agreement of marriage, executed and acknowledged a deed to his intended wife, and handed it to her before marriage, and she handed it back to him to have it recorded and to take care of it for her, and he recorded and kept it.[8]

In the following cases the delivery was held not sufficient: Where the deed was signed and attested, and left on the table without delivery to any person;[9] where it is

[1] Regan *v.* Howe, 121 Mass. 424.
[2] Jaques *v.* M. E. Church, 17 Johns. 549; 8 Am. Dec. 447; 1 Johns. Ch. 450.
[3] Adams *v.* Ryan, 61 Iowa, 733.
[4] Arrison *v.* Harmstead, 2 Pa. St. 191.
[5] Fewell *v.* Kessler, 30 Ind. 195.
[6] Jamison *v.* Craven, 4 Del. Ch. 311.
[7] Austin *v.* Feridall, 2 McAr. 362.
[8] Otis *v.* Spencer, 102 Ill. 622; 40 Am. Rep. 617.
[9] Hughes *v.* Easten, 4 J. J. Marsh. 573; 20 Am. Dec. 230.

left in the hands of the grantee after its execution, solely for the purpose of transmission to a third party, in whose hands it is to remain until the performance of the conditions upon which it is to be delivered up to the grantee;[1] where it was executed by the grantor, but retained in his possession, with directions to his wife to file it for record after his decease;[2] where it was duly executed and acknowledged by the grantor, but retained by him with the grantee's consent until the consideration money was paid, and before payment the grantor died, having devised the premises in his will, and the deed was found among his papers;[3] where a father executed a deed of land to his two young children, but retained it in his possession and continued to occupy and enjoy the premises until his death;[4] where a father executes a deed in favor of his son, and requests the scrivener to record the same, and then retain it in his hands until called for, which he does, and the father reclaims and cancels the deed after the death of the son, who never had any knowledge of these transactions;[5] handing a deed to the grantee to be put into a trunk containing the joint papers of the grantor and grantee, they being partners, and the grantor keeping the key;[6] where a grantor sent his deed to be recorded, declaring that it was made to prevent the lands being taken for an unjust debt, the grantee having no knowledge of the conveyance until after the grantor's death;[7] where a school district appointed a committee of three to procure and receive a deed of land, and the deed was made and deposited with one of the committee, with directions to deliver it on payment of the purchase-money, but not

[1] Rhodes *v.* Gardiner, 30 Me. 112; Steel *v.* Miller, 40 Iowa, 406; Gilbert *v.* Ins. Co., 23 Wend. 43; 35 Am. Dec. 543; Braman *v.* Bingham, 26 N. Y. 83; People *v.* Bostwick, 32 N. Y. 445.

[2] Jones *v.* Jones, 6 Conn. 111; 16 Am. Dec. 35.

[3] Jackson *v.* Dunlap, 1 Johns. Cas. 114; 1 Am. Dec. 100.

[4] Fain *v.* Smith, 14 Or. 82; 58 Am. Rep. 281.

[5] Maynard *v.* Maynard, 10 Mass. 456; 6 Am. Dec. 146.

[6] Chadwick *v.* Webber, 3 Greenl. 141; 14 Am. Dec. 222.

[7] Barns *v.* Hatch, 3 N. H. 304; 14 Am. Dec. 369.

otherwise, and the district received the deed of the committee man, and voted to accept and record it, but made no payment;[1] where a deed, after being acknowledged by the grantor, was retained by him, and found among his papers after his decease;[2] where a deed was executed by the grantor, and a note by the grantee for the consideration, and both placed in the hands of a third person, to be exchanged when both parties should agree;[3] where the grantee, the widow of the grantor, testified that she found the deed among his papers after his death, and that the signature of the only attesting witness was affixed at her request after his death;[4] where a father executed and acknowledged a deed of the land upon which he lived in favor of his children by a second wife, but did not deliver or record it, giving as one reason for not doing so that he might sell the land for the children if he retained possession of the deed, which he could not do if it was delivered and recorded, and which they could not do, being minors, and the deed remaining in the father's possession until death;[5] where a deed executed to a bank was handed by the notary to one of the directors, who was instructed by the grantor that the deed was not to be delivered to the bank until certain disputes between grantee and grantor were settled;[6] where a deed was executed with the usual formalities, acknowledged by the grantor before a judge, and put on record by the grantor's orders, but it was never delivered in fact, and it never was the grantor's intention to deliver it, except on a contingency that never happened.[7]

Whether there has been a delivery or not is a mixed question of law and fact; what facts constitute a delivery in law being a question for the court, the duty of the

[1] Rhodes *v.* Gardiner, 30 Me. 110.
[2] Wiggins *v.* Lusk, 12 Ill. 132.
[3] Clark *v.* Gifford, 10 Wend. 310.
[4] Goodlett *v.* Kelly, 74 Ala. 213.
[5] Byars *v.* Spencer, 101 Ill. 429; 40 Am. Rep. 212.
[6] Healdsburg Bank *v.* Bailhache, 65 Cal. 327.
[7] Jones *v.* Bush, 4 Harr. (Del.) 1.

jury being to find the existence or non-existence of the facts.[1]

A deed of a corporation need not be delivered, since the corporate seal gives perfection to the instrument without further ceremony.[2] So title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not essential to pass the title.[3] A deed executed and acknowledged by a commissioner appointed by decree to sell and convey land is delivered when the court confirms his report of sale and conveyance.[4] A deed which provides that the grantor shall retain during his life the title and control of the estate granted as trustee for the grantee, if formally sealed and duly acknowledged, will be held valid without proof of actual delivery to the grantee.[5]

Acceptance by the grantee is likewise essential, for the title will not pass until the deed has been accepted,[6] and the grantee must accept before the rights of third parties have intervened; otherwise, he will take subject to their rights.[7] Where a deed is delivered to a third person for the use of the grantee, but without his knowledge or assent, his subsequent assent will not defeat the lien of an intervening judgment against the grantor.[8] Acceptance is presumed where the instrument is beneficial to

[1] Den *v.* Farlee, 21 N. J. L. 280; Jones *v.* Swayze, 42 N. J L. 279; Cocks *v.* Simmons, 57 Miss. 183; Somers *v.* Pumphrey, 24 Ind 231; Dearmond *v.* Dearmond, 10 Ind. 191; Howell *v.* Leith, 39 Ga. 180; Gregory *v.* Walker, 38 Ala. 26; Hurlburt *v.* Wheeler, 40 N. H. 73; Thompson *v.* Jones, 38 Tenn. 574; Lindsay *v.* Lindsay, 11 Vt. 621; Hannah *v.* Swarner, 8 Watts, 9; 34 Am. Dec. 442; Earle *v.* Earle, 20 N. J. L. 347.

[2] Derby Canal *v.* Wilmot, 9 East, 360; Boone on Corporations, sec. 54.

[3] United States *v.* Schurz, 102 U. S. 378, 397.

[4] Cocks *v.* Simmons, 57 Miss. 183.

[5] Linton *v.* Brown, 20 Fed. Rep. 455.

[6] Cabett *v.* Norcross, 35 N. H. 99; Finda *v.* Sage, 46 Barb. 109; Mitchell *v.* Ryan, 3 Ohio St. 377; Comer *v.* Baldwin, 16 Minn. 172; Dikes *v.* Miller, 24 Tex. 417; McFadgen *v.* Eisensmidt, 29 Tenn. 567; Bell *v.* Farmers' Bank, 11 Bush, 34; 21 Am. Rep. 205; White *v.* Bradley, 66 Me. 254; Leppoc *v.* Nat. Union Bank, 32 Md. 136; Kearny *v.* Jeffries, 48 Miss. 343.

[7] Bell *v.* Farmers' Bank, 11 Bush, 34; 21 Am. Rep. 205; Parmelee *v.* Simpson, 5 Wall. 81; Tuttle *v.* Turner, 28 Tex. 759; McPherson *v.* Featherstone, 37 Mo. 632; Day *v.* Griffith, 15 Iowa, 437; Johnson *v.* Farley, 45 N. H. 505.

[8] Hibberd *v.* Smith, 67 Cal. 547; 56 Am. Rep. 726.

the grantee.[1] But this presumption may be overthrown by evidence.[2] Acceptance of a deed is not presumed merely from its being executed and recorded for the supposed benefit of the grantee.[3] The acceptance of a deed of inferior value to that which a grantee is, by his contract, entitled, is equivalent to a waiver of such better deed.[4] A deed may be delivered to a third person for the use of the grantee without any specific authority from the latter.[5]

A deed takes effect from the delivery, and a deed is presumed to have been delivered and to take effect from its date;[6] but it may be alleged and proved by parol, according to the fact, that the deed was delivered on a

[1] Halluck *v.* Bush, 2 Root, 26; 1 Am. Dec. 60; Tibbals *v.* Jacobs, 31 Conn. 431; Treadway *v.* Hamilton Mutual Ins. Co., 29 Conn. 71; Merrill *v.* Meachum, 5 Day, 346; Davenport *v.* Whistler, 46 Iowa, 287; Maloney *v.* Bewley, 10 Heisk. 642; Peavey *v.* Tilton, 18 N. H. 183; 44 Am. Dec. 365; Johnson *v.* Farley, 45 N. H. 505; Wall *v.* Wall, 30 Miss. 91; 64 Am. Dec. 147; Renfro *v.* Harrison, 10 Mo. 411; Mitchell *v.* Ryan, 3 Ohio St. 377; Church *v.* Gilman, 15 Wend. 656; 30 Am. Dec. 82; Merrills *v.* Swift, 18 Conn. 257; 46 Am. Dec. 315; Lady Superior *v.* McNamara, 3 Barb. Ch. 375; 49 Am. Dec. 184; Boody *v.* Davis, 20 N. H. 140; 51 Am. Dec. 210; Blight *v.* Schenck, 10 Pa. St. 285; 51 Am. Dec. 478. But see Hulick *v.* Scovil, 9 Ill. 159.

[2] Treadwell *v.* Bulkley, 4 Day, 395; 4 Am. Dec. 225; Merrills *v.* Swift, 18 Conn. 257; 46 Am. Dec. 315.

[3] Jefferson County Building Ass'n *v.* Heil, 81 Ky. 513.

[4] Minor *v.* Edwards, 12 Mo. 137; 49 Am. Dec. 121.

[5] Verplank *v.* Sterry, 12 Johns. 536; 7 Am. Dec. 348; Church *v.* Gilman, 15 Wend. 656; 30 Am. Dec. 82; Brown *v.* Austen, 35 Barb. 341; Shrader *v.* Bonker, 65 Barb. 608; Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Tibbals *v.* Jacobs, 31 Conn. 431; Graham *v.* Lambert, 5 Humph. 595; Buffum *v.* Green, 5 N. H. 71; 20 Am. Dec. 562; Merrills *v.* Swift, 18 Conn. 257; 46 Am. Dec. 315.

[6] Floyd *v.* Ricks, 14 Ark. 286; 58 Am. Dec. 374; McDowel *v.* Chambers, 1 Strob. Eq. 347; 47 Am. Dec. 539; Lee *v.* Ins. Co., 6 Mass. 219; Breckenridge *v.* Todd, 3 T. B. Mon. 52; 16 Am. Dec. 83; Gardiner *v.* Collins, 3 Mason, 398; Banning *v.* Edes, 6 Minn. 402; Meech *v.* Fowler, 14 Ark. 29; Hood *v.* Brown, 2 Ohio, 267; Harrison *v.* Phillips Academy, 12 Mass. 455; Nay *v.* Mograin, 24 Kan. 75; Egery *v.* Woodard, 56 Me. 45; Harman *v.* Oberdorfer, 33 Gratt. 497; United States *v.* Le Barron, 19 How. 73; Calhoun Co. *v.* American Emigrant Co., 93 U. S. 124; Fish *v.* Gordon, 10 Vt. 288; Roberts *v.* Swearingen, 8 Neb. 363; Loubat *v.* Kip, 9 Fla. 60; Clark *v.* Akers, 16 Kan. 166; Babbitt *v.* Johnson, 15 Kan. 252; Sweetser *v.* Lowell, 33 Me. 446; Fowle *v.* Coe, 63 Me. 245; Robinson *v.* Wheeler, 25 N. Y. 252; Huber *v.* Diebold, 25 N. J. Eq. 171; Masterson *v.* Marshall, 5 Dana, 417; Hall *v.* Benner, 1 Penr. & W. 402; 21 Am. Dec. 394; Deininger *v.* McConnel, 41 Ill. 228; Newlin *v.* Osborne, 4 Jones, 157; 67 Am. Dec. 269; Love *v.* Wells, 25 Ind. 503; 87 Am. Dec. 375; Wheeler *v.* Single, 62 Wis. 380; Raines *v.* Walker, 77 Va. 92; Purdy *v.* Coar, 4 Am. St. Rep. 491.

different day from that on which it bears date.[1] The attestation clause is not conclusive as to the date of its delivery.[2] Where the date of the acknowledgment is subsequent to the date of the deed, delivery is presumed to have been made at the time of acknowledgment.[3] Where a deed was not acknowledged until after the grantee's death, it was held that it would be presumed that delivery had been made before.[4] In deciding whether a deed was delivered at its date, or at some other time, the material inquiry is, When did the minds of the parties meet in regarding it as unconditionally belonging to the grantee?[5] A deed executed by several grantors is to be considered as dated when the last grantor executed it.[6]

ILLUSTRATIONS.—B. executed a deed of certain property conveying it to K., and sent it to his (B.'s) agent to be recorded, which was done. There was no pecuniary consideration for the deed, nor was there any previous arrangement or communication between B. and K. on the subject; nor had K. any knowledge of the execution of the deed; nor did he or his authorized agent ever have possession of it. Subsequently B. informed K. of the deed, and K. assented orally to receive it. *Held*, that such assent made the deed operative from the time the assent was given: *Kingsbury* v. *Burnside*, 58 Ill. 310; 11 Am. Rep. 67.[7] A deed was made and acknowledged ready for delivery,

[1] Leake on Contracts, 137; Goddard's Case, 2 Coke. 4 b; Hall *v.* Cazenove, 4 East, 477; Jayne *v.* Hughes, Ex. 430; Sweetser *v.* Lowell, 33 Me. 446; Genter *v.* Morrison, 31 Barb. 155; Harris *v.* Norton, 16 Barb. 264; Leppoc *v.* National Bank, 32 Md. 136; Fowle *v.* Coe, 63 Me. 245; Poor *v.* Larrabee, 58 Me. 543; Solomon *v.* Evans, 3 McCord, 274; Cook *v.* Knowles, 38 Mich. 316; Geiss *v.* Odenheimer, 4 Yeates, 278; 2 Am. Dec. 407. A date is not essential to a deed: Thompson *v.* Thompson, 9 Ind. 323; 68 Am. Dec. 638.

[2] Barry *v.* Hoffman, 6 Md. 78.

[3] Loomis *v.* Pingree, 43 Me. 299; County of Henry *v.* Bradshaw, 20 Iowa, 355; Blanchard *v.* Tyler, 12 Mich. 339; 86 Am. Dec. 57; Johnson *v.* Moore, 28 Mich. 3; Clark *v.* Akers, 16 Kan. 166; Brolasky *v.* Furey, 12 Phila. 428; Gorman *v.* Stanton, 5 Mo. App. 585. In Illinois delivery is presumed to have been made on the day the deed bears date, even though the date of the acknowledgment is subsequent thereto: Jayne *v.* Gregg, 42 Ill. 413, 416; Blake *v.* Fash, 44 Ill. 302; Hardin *v.* Osborne, 60 Ill. 93.

[4] Eaton *v.* Trowbridge, 38 Mich. 454.

[5] McCullough *v.* Day, 45 Mich. 554.

[6] Kurtz *v.* Hollingshead, 4 Cranch C. C. 180.

[7] And delivery was held sufficient in the following cases: Gould *v.* Day, 94 U. S. 405; Gage *v.* Gage, 36 Mich. 229; Tonery *v.* Henderson, 60 Tex. 291; Martz *v.* Eggemann, 44 Mich. 430; Bogie *v.* Bogie, 35 Wis. 659; Belden *v.* Carter, 4 Day, 66; 4 Am. Dec. 185.

and the grantee, on being told where the deed was, and requested to call and get it, replied. "All right; I will come and get it." *Held*, not a delivery: *Jefferson* v. *Wendt*, 51 Cal. 573.[1] A register of deeds, at the grantor's request, wrote a deed, which the grantor signed, acknowledged, and left with the register. The grantee was absent, and the register had no authority from him to receive the deed; after recording it, the register returned the deed to the grantor, at his request. *Held*, no delivery to the grantee: *Hawkes* v. *Pike*, 105 Mass. 560; 7 Am. Rep. 554. R. purchased the interest of C., a judgment debtor, in land. The deed to C. contained a false description, and R. attempted to strengthen his title by procuring a new deed containing a true description from the grantor of C. The new deed was never delivered to or accepted by C. *Held*, that R. obtained no legal title by the new deed: *Rogers* v. *Carey*, 47 Mo. 232; 4 Am. Rep. 322. A deed not fully executed, and which had never been delivered, was stolen from the possession of the grantor, without negligence on his part, by the grantee named therein: *Held*, that no title passed, even as to subsequent purchasers: *Tisher* v. *Beckwith*, 30 Wis. 55; 11 Am. Rep. 546.

§ 2277. **Escrows.** — Where the deed is delivered upon a condition so that the delivery is not to be complete and the deed binding until the condition is fulfilled, it is called an escrow. Upon the condition being performed, the deed takes effect from that time.[2] "But there are exceptions to that rule; as where the grantor dies before the condition is performed,[3] and in some other cases

[1] And the delivery was held insufficient in Davis *v.* Williams, 57 Miss. 843; Burnett *v.* Burnett, 40 Mich. 361; Williams *v.* Schatz, 42 Ohio St. 47; Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592; Benneson *v.* Aiken, 102 Ill. 284; 40 Am. Rep. 592; Wall *v.* Hickey, 112 Mass. 171; Cannon *v.* Cannon, 26 N. J. Eq. 316, Miller *v.* Lullman, 81 Mo. 311; Jones *v.* Loveless, 99 Ind. 317; Ruckman *v.* Ruckman, 33 N. J. Eq. 354; Davis *v.* Cross, 14 Lea, 637; 52 Am. Rep. 177; Stone *v.* French, 37 Kan. 145; 1 Am. St. Rep. 237.

[2] Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 594; Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; Dyson *v.* Bradshaw, 23 Cal. 528; Hinman *v.* Booth, 21 Wend. 267; Jackson *v.* Rowland, 6 Wend. 666; 22 Am. Dec. 557; Duncan *v.* Pope, 47 Ga. 445; State Bank *v.* Evans, 15 N. J. L. 155; 28 Am. Dec. 400. A mere expectation or promise that something will be done does not constitute such a condition of the delivery as will render the deed an escrow: New Jersey State Ordinary *v.* Thatcher, 41 N. J. L. 403; 32 Am. Rep. 225. Where a deed on its face is not complete, but requires some further act to execute it, delivery of it to the party to whom it is to be made is not absolute, and it remains in his hands subject to the performance of the act: Hicks *v.* Goode, 12 Leigh, 479; 37 Am. Dec. 677.

[3] Brown *v.* Austen, 35 Barb. 360; Hathaway *v.* Payne, 34 N. Y. 113; Stanton *v.* Miller, 58 N. Y. 202; Hatch

where the operation of the conveyance would otherwise be absolutely defeated. In these cases the deed, from necessity, is permitted to have relation back to the first delivery."[1] A delivery in escrow can only be made to a third person. If made to the grantee, or to the grantor's agent only, it is not an escrow, and parol evidence that it was conditional is inadmissible;[2] nor is it an escrow where the grantor retains the right of control over it.[3] The escrow takes effect immediately upon the performance of the condition without any formal delivery over by the depositary. The latter becomes at once the agent

v. Hatch, 9 Mass. 310; 6 Am. Dec. 67; Kirkman *v.* Bank of America, 2 Cold. 397; Brevard *v.* Neely, 2 Sneed, 164; Hunter *v.* Hunter, 17 Barb. 25; Jackson *v.* Rowland, 6 Wend. 666; 22 Am. Dec. 557; Cook's Adm'r *v.* Hendricks, 4 T. B. Mon. 502; or where the condition is that it should be delivered in case the grantee die: Ruggles *v.* Lawson, 13 Johns. 285; 7 Am. Dec. 375; Foster *v.* Mansfield, 3 Met. 412; 37 Am. Dec. 154.

[1] Jackson *v.* Rowland, 6 Wend. 666; 22 Am. Dec. 557. Whenever it is necessary to protect the rights of the parties, not merely against the death of the grantor, but also against future disabilities or intervening claims, equity requires that the second delivery shall relate back to the first: Wheelright *v.* Wheelright, 2 Mass. 446; 3 Am. Dec. 66; Foster *v.* Mansfield, 3 Met. 412; 37 Am. Dec. 154; Frost *v.* Beekman, 1 Johns. Ch. 288; Whitfield *v.* Harris, 78 Miss. 710; Simpson *v.* McGalthery, 52 Miss. 723; Shirley *v.* Ayres, 14 Ohio, 307; 45 Am. Dec. 546; Wellborn *v.* Weaver, 17 Ga. 267; 63 Am. Dec. 235.

[2] Worrall *v.* Munn, 5 N. Y. 229; 55 Dec. 330; Dawson *v.* Hall, 2 Mich. 390; Miller *v.* Fletcher, 27 Gratt. 403; 21 Am. Rep. 356; Johnson *v.* Branch, 11 Humph. 521; Ordinary etc. *v.* Thatcher, 41 N. J. L. 403; 32 Am. Rep. 225; Brown *v.* Reynolds, 5 Sneed, 639; Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; Hagood *v.* Harley, 8 Rich. 325; Gilmore *v.* Whitesides, Dud. Eq. 14; 31 Am. Dec. 563; Foley *v.* Cowgill, 5 Blackf. 18; 32 Am. Dec. 49. "In every case of escrow, there is a contract and privity between the grantor and the grantee. The person to whom the deed is delivered is by mutual agreement constituted the agent of both parties. He does not hold the deed subject to the control of the grantor. He has no power over it, and can no more countermand the delivery of an escrow than of an absolute deed; and it is always in the power of the grantee to entitle himself to the deed and to the estate by performing the stipulated condition." Wellborn *v.* Weaver, 17 Ga. 267; 63 Am. Dec. 235; Wight *v.* R. R. Co., 16 B. Mon. 4; 63 Am. Dec. 522; Ins. Co. *v.* McMillan, 29 Ala. 147; Fairbanks *v.* Metcalf, 8 Mass. 238; Ward *v.* Lewis, 4 Pick. 520; Hagood *v.* Harley, 8 Rich. 325; Ordinary *v.* Thatcher, 41 N. J. L. 403; 32 Am. Rep. 225; Graves *v.* Tucker, 10 Smedes & M. 9; Den *v.* Partee, 2 Dev. & Bat. 530; Dawson *v.* Hall, 2 Mich. 390; McKean *v.* Massey, 6 Kan. 122; Thoroughgood's Case, 9 Rep. 137; Whyddon's Case, Cro. Eliz. 520; Blunden *v.* Wood, Cro. Jac. 85; Holford *v.* Parker, Hob. 248; Simonton's Estate, 4 Watts, 180; Vorheis *v.* Kitch, 8 Phila. 554; Gilbert *v.* North American Fire Ins. Co., 23 Wend. 43; 35 Am. Dec. 543; Jordan *v.* Pollock, 14 Ga. 145; Worrall *v.* Munn, 5 N. Y. 229; 55 Am. Dec. 330; Braman *v.* Bingham, 26 N. Y. 483; Foley *v.* Cowgill, 5 Black, 18; 32 Am. Dec. 49; State *v.* Chrisman, 2 Ind. 126.

[3] Campbell *v.* Thomas, 42 Wis. 437; 24 Am. Rep. 427.

or trustee for the grantee.[1] The condition may be in writing, or be proved by parol, or be partly in writing and partly oral.[2] No title vests in a grantee who obtains possession of an escrow without performance of the condition.[3] And a *bona fide* purchaser from him after the death of the grantor acquires no title.[4] The depositary of an escrow is limited strictly to the conditions of the deposit.[5] The grantor is not estopped, where he has acted on the belief that the condition had been performed, from setting up the invalidity of the deed.[6] Recording an escrow does not make it a deed so as to protect a purchaser from the grantee upon the faith of his mere record title, where such escrow had never been validly delivered to such grantee.[7] But where a deed is put in the hands of a third person to be delivered only on payment of the purchase-money, the grantee being already in possession of the land, and subsequently obtaining the deed without payment by fraudulent representations to the custodian, and deeding the land to a purchaser in good faith, the original grantor is estopped as to such purchaser.[8]

[1] Couch *v.* Meeker, 2 Conn. 302; 7 Am. Dec. 274; Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592. But it is held that a voluntary conveyance intended as a donation of land placed in the hands of a custodian may be withdrawn by the grantor before delivery; and if left with the custodian for delivery on conditions, the latter is not the judge of whether they have been performed or not, and has no right to deliver until the grantor is satisfied: Hoig *v.* Adrian College, 83 Ill. 267

[2] Stanton *v.* Miller, 58 N. Y. 192.

[3] Doe *v.* Knight, 5 Barn. & C. 671; Everts *v.* Agnes, 4 Wis. 356; 65 Am. Dec. 314; 6 Wis. 457; Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; Black *v.* Shreve, 13 N. J. Eq. 455; Titus *v.* Phillips, 18 N. J. Eq. 541; Pratt *v.* Holman, 16 Vt. 530; Blight *v.* Schenck, 10 Pa. St. 285; 51 Am. Dec. 478; Patrick *v.* McCormick, 10 Neb. 1; Cotton v. Gregory, 10 Neb. 125; Nichols *v.* Nichols, 29 Vt. 228; 67 Am. Dec. 699; Smith *v.* S. Royalton Bank, 32 Vt. 341; Wheelright *v.* Wheelright, 2 Mass. 452; 3 Am. Dec. 66; Berry *v.* Anderson, 22 Ind. 36; Abbott *v.* Alsdorf, 19 Mich. 157; Robbins *v.* Magee, 76 Ind. 381.

[4] Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; Chipman *v.* Tucker, 38 Wis. 43; 20 Am. Dec. 1; Smith *v.* South R. Bank, 32 Vt. 341; 76 Am. Dec. 179. But see Blight *v.* Schenck, 10 Pa. St. 285; 51 Am. Dec. 478.

[5] Chicago etc. R. R. Co. *v.* Peck, 112 Ill. 408; Abbott *v.* Alsdorf, 19 Mich. 157.

[6] Robbins *v.* Magee, 76 Ind. 381.

[7] Everts *v.* Agnes, 4 Wis. 343; 65 Am. Dec. 314.

[8] Quick *v.* Milligan, 108 Ind. 419; 58 Am. Rep. 49.

ILLUSTRATIONS.—The vendors delivered a deed to a third person upon the condition that it should not be delivered to the vendees until payment of the purchase-money should be made direct to themselves, but these conditions had not been agreed upon with the vendees, and were unknown to them. *Held*, that such third person was the agent of the vendors only; and he having received payment and delivered the deed to the vendees, the vendors cannot maintain a bill in equity to have such deed declared void, nor to enforce a vendor's lien for the purchase-money: *Smith* v. *Tuggle*, 1 Cent. L. J 67. A promissory note and a mortgage securing it were placed in the hands of R. to be delivered to the payee upon the happening of a certain event, and R., without authority, delivered them to the payee without waiting for such event. *Held*, that the maker was not liable on them, even to a *bona fide* holder for value: *Chipman* v. *Tucker*, 38 Wis. 43; 20 Am. Rep. 1.

§ 2278. **Registration of Deeds—Requisites.**—In order to be wholly valid, a deed or other instrument affecting the title to real estate must be recorded in the proper office for the registry of deeds,[1] and it is then constructive notice of its contents.[2] An unrecorded deed, as between the parties, passes the estate immediately upon its delivery, and upon being recorded, relates back to the time of its delivery, unless the grantor has in the mean time made a conveyance to a subsequent *bona fide* purchaser, or the property has been attached or otherwise encumbered.[3] Where a person conveyed land by a deed which was not recorded, and his heir, after his death, conveyed the same land by a warranty deed, which was duly recorded, to an innocent purchaser for value, it was held that the recorded deed from the heir operated to divest the title of the grantee in the unrecorded deed from the ancestor.[4]

In order to constitute the record of a deed constructive

[1] For a digest of the provisions of the different statutes as to the registration of deeds, See 1 Stimson's American Statute Law, secs. 1610 et seq. The registration laws of the state do not apply to the disposition of lands belonging to the United States: David v. Rickabaugh, 32 Iowa, 540.

[2] See next section.

[3] McMechan v. Griffing, 3 Pick. 149; 15 Am. Dec. 198; Marshall v. Fisk, 6 Mass. 24; 4 Am. Dec. 76; Pray v. Pierce, 7 Mass. 381; 5 Am. Dec. 59.

[4] Youngblood v. Vastine, 46 Mo. 239; 2 Am. Rep. 509.

notice, it is essential that it be an instrument affecting the legal or equitable title to the property; for if it is a void instrument, the record is also void.[1] In the next place, the instrument must be one legally recordable. If it is a conveyance or encumbrance of property which the party is not required to file for record, and which the officer is not authorized to register, the spreading of the same upon the records will only affect those who actually see the copy and are thereby put upon inquiry.[2] And the instrument must be properly recorded; i. e., it must show upon its face that all the formal requirements of the statute affecting the execution, acknowledgment, etc., necessary to entitle the instrument to registration, have been complied with.[3]

A tract of land lying on each side of a river which is the dividing line between two counties must be considered as two distinct parcels of land, and the record in one county of a deed conveying the whole tract is not effectual in regard to the other part lying in the other county.[4]

[1] Moreau *v.* Ditchemendy, 18 Mo. 522; Parker *v.* Hill, 8 Met. 447; Jones *v.* Roberts, 65 Me. 273; Parret *v.* Shaubhert, 5 Minn. 323. Where a copy of a deed and not the original is recorded, the registry is defective: Stevens *v.* Brown, 3 Vt. 420; 23 Am. Dec. 215; Blight *v.* Banks, 6 T. B. Mon. 192; 17 Am. Dec. 136.

[2] Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Washburn *v.* Burnham, 63 N. Y. 132; Boyd *v.* Schlesinger, 59 N. Y. 301; Burnham *v.* Chandler, 15 Tex. 441; Com. *v.* Rhodes, 6 B. Mon. 171, 181; James *v.* Morey, 2 Cow. 246; 14 Am. Dec. 475; Villard *v.* Robert, 1 Strob. Eq. 393; Bassard *v.* White, 9 Rich. Eq. 483; Etzler *v.* Evans, 61 Ind. 56. But if they have in fact seen the record they are affected with actual notice: Musgrove *v.* Bonser, 5 Or. 313; 20 Am. Rep. 737. Recording a deed conveying both real and personal estate is constructive notice of the transfer of the former only, and not of the latter: Pitcher *v.* Barrows, 17 Pick. 361; 28 Am. Dec. 306.

[3] Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Zeigler *v.* Shoner, 78 Pa. St. 357; Galpin *v.* Abbott, 6 Mich. 17; Graves *v.* Graves, 6 Gray, 391; Carter *v.* Champion, 8 Conn. 549; 21 Am. Dec. 695; Heister *v.* Fortner, 2 Binn. 40; 4 Am. Dec. 417; Simon *v.* Brown, 3 Yeates, 186; 2 Am. Dec. 368; Herndon *v.* Kimball, 7 Ga. 432; 50 Am. Dec. 406; Choteau *v.* Jones, 11 Ill. 300; 50 Am. Dec. 460; Rushon *v.* Shields, 11 Ga. 636; 56 Am. Dec. 436. When it is provided by statute that, in order to the registration or recording of a conveyance, the deed shall be acknowledged before some officer and a certificate thereof entered upon the deed, if the deed is entered without the prescribed acknowledgment, the recording or registration will not be constructive notice to any one: Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533.

[4] Horsley *v.* Garth, 2 Gratt. 471; 44 Am. Dec. 394.

Where the boundaries of a county are changed after the making of a deed, and before it is recorded, it must be recorded in the county in which the land lies at the time of the recording, and not in the county in which the land lay at the date of the deed.[1] But a deed of land lying in a new county may be recorded in the old district from which it is cut off, where the new county is not organized at the date of the deed, although it is organized after the recording of the deed, but before the expiration of the time within which it might have been recorded.[2]

§ 2279. Notice by Registration of Instrument.—A conveyance duly acknowledged and registered is constructive notice to and conclusive on all persons claiming through or under the grantor.[3] The record of a conveyance from one stranger to the title to another will not affect a subsequent purchaser who claims under a different grantor.[4] The notice is only to those who claim through or under the same grantor by whom the recorded deed was executed.[5] The registry of a mortgage is in judgment of law notice of such mortgage to subsequent purchasers and mortgagees.[6] But the recording of a second mortgage is not constructive notice to the mortgagee under a first recorded mortgage.[7] It is not necessary, to give effect to registry, that the record should contain a complete chain of title. A single deed duly

[1] Garrison *v.* Haydon, 1 J. J. Marsh. 222; 19 Am. Dec. 70.

[2] Hill *v.* Wilson, 4 Rich. 521; 55 Am. Dec. 697.

[3] Davis *v.* Ownsby, 14 Mo. 170; 55 Am. Dec. 105; Schutt *v.* Large, 6 Barb. 373; Flynt *v.* Arnold, 2 Met. 619; Bates *v.* Norcross, 14 Pick. 231; Doe *v.* Beardsley, 2 McLean, 412; Johnson *v.* Stagg, 2 Johns. 510; Rogers *v.* Burchard, 34 Tex. 453; 7 Am. Rep. 283; Tilton *v.* Hunter, 25 Me. 11. Purchasers at execution sales are within the protection of the registry acts: Jackson *v.* Town; 4 Cow. 599; 15 Am. Dec. 405; Draper *v.* Bryson, 26 Me. 108; 69 Am. Dec. 483.

[4] McCoy *v.* Trustees etc., 5 Serg. & R. 254; Tilton *v.* Hunter, 24 Me. 29; Roberts *v.* Browne, 23 Me. 165; 39 Am. Dec. 614.

[5] Blake *v.* Graham, 6 Ohio St. 580; 67 Am. Dec. 360; Leiby *v.* Wolf, 10 Ohio, 83; Hutherington *v.* Clark, 30 Pa. St. 393; Butts *v.* Norcross, 14 Pick. 224.

[6] Lasselle *v.* Barnett, 1 Blackf. 150; 12 Am. Dec. 217.

[7] Cheesebrough *v.* Millard, 1 Johns. Ch. 409; 7 Am. Dec. 494.

recorded is notice of whatever it contains.[1] Though a deed of "all the estate, both real and personal," to which the grantor is in law or equity entitled, passes all his estate, it is not by being registered made notice in law to a subsequent purchaser from the grantor.[2] Where a conveyance is once duly recorded, it is notice to the world from that time, even though the record be subsequently partially or wholly destroyed by fire.[3] One with actual notice of a deed takes subject to it, without regard to its being defectively executed or improperly recorded.[4] So, also, where the premises are not properly described.[5] The record of a deed is notice only of what appears on the face of the deed or to which it naturally points.[6] The record of an absolute deed is not notice to creditors of the grantee subsequently obtaining judgment on an agreement not referred to in the deed, but executed between the grantor and grantee on the same day, and recorded at the same time in the same book that certain notes given as security for the purchase-money are to be considered a lien upon the premises in the nature of a mortgage.[7] The recording of a conveyance containing an erroneous description of the land conveyed does not impart construc-

[1] Vaughan *v.* Greer, 38 Tex. 530.

[2] Mundy *v.* Vawter, 3 Gratt. 518.

[3] Shannon *v.* Hall, 72 Ill. 354; 22 Am. Rep. 146; Alvis *v.* Morrison, 63 Ill. 181; 14 Am. Rep. 117; Myers *v.* Buchanan, 46 Miss. 397.

[4] Haney *v.* Alberry, 12 Cent. L. J. 39, the court saying: "Upon the question of actual notice, we think the notice of a deed defectively executed or improperly recorded is sufficient to put a subsequent purchaser on inquiry. The only object of recording a deed is to prevent questions of actual notice. The deed is perfectly good between the parties to it without recording. The deed in this case was objected to for the sole reason that one of the parties to it took its acknowledgment. We concede this objection to be valid, — but it is of no force when it comes from one who has actual notice that there was such a deed, — whether the deed turns out to be of any validity or not. Whatever such a deed is worth, the party who has seen it, or is advised of its contents, buys subject to it. If the deed is worthless as between the parties to it, it is of course worthless as to third parsons; but if it is good as between the parties, then it is equally good as to third persons who have seen it." Recording a deed executed by two, but acknowledged by one only, is presumptive evidence of notice to creditors or subsequent purchasers: Shaw *v.* Poor, 6 Pick. 86; 17 Am. Dec. 347.

[5] Partridge *v.* Smith, 2 Biss. 183.

[6] Dikeman *v.* Parrish, 6 Pa. St. 210; 47 Am. Dec. 456.

[7] McLanahan *v.* Reeside, 9 Watts, 508; 36 Am. Dec. 136.

tive notice to a subsequent purchaser;[1] or where the description of land conveyed is omitted;[2] or where the recording is in another county than where the land is situated, under a mistake as to its true locality;[3] or where the deed is fraudulently executed and recorded by a married woman under her maiden name;[4] or where the deed is forged.[5] The record of a deed erroneously recorded affords constructive notice of that only which is recorded. After the recording, the deed left on file for record is no longer a part of the files, and constructive notice is not to be predicated of its contents.[6] A grantee is charged with notice of facts recited in a deed which is a necessary part of his chain of title,[7] but not of a clause in a deed from a stranger, although recorded.[8] If the mortgage as it appeared on record lacked the signature, the registry is no record of the mortgage until the name of the mortgagor is placed upon the record-book, and is not constructive notice of the mortgage.[9] A record of a mortgage ceases to be notice after the mortgagee has entered satisfaction on it, though induced to do so by fraud.[10] The recording by a clerk of an instrument to which he is a party does not avoid the registry.[11] And a statutory provision that "no deed shall be admitted to record until the tax is paid thereon" does not invalidate the record if the deed is so admitted. The statute is merely directory; and if the clerk records the deed, he himself assumes the tax.[12] But a deed does not operate as constructive notice, though acknowledged and left in the proper office for registration, if the tax thereon has not been paid, where

[1] Halloway *v.* Platner, 20 Iowa, 121; 89 Am. Dec. 517.
[2] Chamberlain *v.* Bell, 7 Cal. 292; 68 Am. Dec. 260.
[3] Adams *v.* Hayden, 60 Tex. 223.
[4] Draude *v.* Rohrer Christian Mfg. Co., 9 Mo. App. 249.
[5] Pry *v.* Pry, 109 Ill. 466.
[6] Potter *v.* Dooley, 55 Vt. 512.
[7] Pringle *v.* Dunn, 37 Wis. 466; 19 Am. Rep. 772. And see Payne *v.* Abercrombie, 10 Heisk. 161.
[8] Polk *v.* Cosgrove, 4 Biss. 437.
[9] Shepherd *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523.
[10] Etzler *v.* Evans, 61 Ind. 56.
[11] Brockenborough *v.* Melton, 55 Tex. 493.
[12] Lucas *v.* Claflin, 76 Va. 269.

the statute provides that no deed shall be held to be legally lodged for record until the tax be paid thereon.[1] An index of a recorded instrument will hold subsequent purchasers to notice, if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if upon such inquiry the instrument would have been found.[2] An index entry of a deed describing land conveyed as in different section, township, and range from those of the deed, and containing the words "for description, see record," is not constructive notice of such deed to a subsequent purchaser.[3]

The date of a registry is of the time of the delivery of the deed with the proper officer at the office of registration.[4] Where a deed properly acknowledged and certified is left for record with the register, it takes effect from that date, although not entered on the receiving-book until afterwards.[5] The date of recording a deed may be ascertained from the clerk's official certificate of the fact and time of recording.[6] The time of recording a deed is sometimes matter to be determined by the court, and sometimes to be submitted to the jury. Where the official indorsement on the deed shows that it was not recorded within the time prescribed by law, and there is no competent evidence to contravene such indorsement, the court alone must pass upon the question of its admissibility; but where there is such evidence, the question of its admissibility is to be left to the jury with a hypothetical instruction from the court. Where there are no indorsements to show whether it was recorded in or out of time, it is for the jury to determine whether or not it was recorded

[1] Phillips *v.* Clark, 4 Met. (Ky.) 348; 83 Am. Dec. 471.

[2] Jones *v.* Berkshire, 15 Iowa, 248; 83 Am. Dec. 412.

[3] Breed *v.* Conley, 14 Iowa, 269; 81 Am. Dec. 485.

[4] Dubose *v.* Young, 10 Ala. 365; Gill *v.* Fauntleroy, 8 B. Mon. 177; Davis *v.* Ownsby, 14 Mo. 175; 55 Am. Dec. 105; McCabe *v.* Gray, 20 Cal. 509; Metts *v.* Bright, 4 Dev. & B. 173; 32 Am. Dec. 683; Nichols *v.* Reynolds, 1 R. I. 30; 36 Am. Dec. 238.

[5] Poplin *v.* Mundell, 27 Kan. 138; Metts *v.* Bright, 4 Dev. & B. 173; 32 Am. Dec. 683; Breckenridge *v.* Todd, 3 T. B. Mon. 52; 16 Am. Dec. 83.

[6] Pownal *v.* Taylor, 10 Leigh, 172; 34 Am. Dec. 725.

in time, and the court cannot without proof decide that it was recorded in time.[1] The time of delivery of a deed for registration may be proved by parol when the register has neglected to note the exact time at which such delivery was made.[2] The clerk's indorsement upon a deed when it was filed for record is not conclusive evidence; but evidence is admissible to show the true time of filing it.[3] Marginal notes of a recorder appended to the record of a deed cannot affect its validity, nor are they proof of the facts set forth therein.[4] A deed left with the register with instructions not to record until notified does not before record afford constructive notice of its contents as though recorded.[5] Going to the clerk's office just before midnight with a deed to be filed for record, and he not being there, taking it to his house just before sunrise the next morning, and personally delivering it to him, stating the other attempt, does not make it good as a recorded deed from such previous day, but only from the time of its actual delivery to the clerk.[6] The registry of a deed is not affected by the fact that the deed bears date the 13th of March, while the certificate of acknowledgment describes it as bearing date the 30th of March, if the identity of the deed certified to and the deed recorded sufficiently appears from other parts of the certificate and its annexation to the deed.[7] In Illinois, if two deeds of the same land are executed by the same grantor on the same day, those holding under the deed first recorded have the better title.[8] A deed, though registered after the expiration of the time limited by statute for recording deeds, is notice to all purchasers after the conveyance has been placed upon record.[9]

[1] Budd *v.* Brooke, 3 Gill, 198; 43 Am. Dec. 321.

[2] Metts *v.* Bright, 4 Dev. & B. 173; 32 Am. Dec. 683.

[3] Horsley *v.* Garth, 2 Gratt. 471; 44 Am. Dec. 394; Worcester Bank *v.* Cheney, 87 Ill. 602.

[4] Doe *v.* Dugan, 8 Ohio, 87; 31 Am. Dec. 433.

[5] Haworth *v.* Taylor, 108 Ill. 275.

[6] Horsley *v.* Garth, 2 Gratt. 471; 44 Am. Dec. 394.

[7] Horsley *v.* Garth, 2 Gratt. 471; 44 Am. Dec. 394.

[8] Stebbins *v.* Duncan, 108 U. S. 32.

[9] Frisler *v.* Frisler, 38 Ind. 282; Anderson *v.* Dugas, 29 Ga. 440; McRaven *v.* McGuire, 9 Smedes & M. 34; Leger *v.* Doyle, 11 Rich. 109; 70 Am. Dec. 240; Brannon *v.* May, 42 Ind. 92.

It does not relate back to the day of delivery, but gives to the deed priority over all conveyances made subsequent to the registration.[1] A prior deed enrolled within the time allowed by law takes precedence over a subsequent deed first enrolled.[2] Where neither deed is recorded within the time prescribed by law, the oldest has preference, and not the one first recorded.[3] An interlineation in the record of a deed, made after the deed is recorded, imparts notice only from the time it was made, and cannot impair nor defeat a title previously acquired.[4]

ILLUSTRATIONS. — A's deed was deposited and filed for record on the 3d of the month, and A withdrew it the same day before it was in fact spread upon the records, and did not return it until after the 5th, on which day B's deed was filed. *Held*, that B's deed took the precedence; but that if A's deed had been returned before the filing of B's, then A's would take the precedence, though not recorded first: *Johnson* v. *Burden*, 40 Vt. 567; 94 Am. Dec. 436. A mortgage of a northwest quarter was made to appear in the record as a mortgage of a northeast quarter. *Held*, that a subsequent purchaser of the northwest quarter was not affected by the mortgage: *White* v. *McGarry*, 2 Flip. 572.

§ 2280. **Notice of Unregistered Deed.** — But registration is not requisite to the validity of a deed between the parties.[5] An unregistered deed is void only as to creditors and subsequent *bona fide* purchasers without notice.[6] Notice prior to payment of the purchase-money will bind the party as effectually as if received before the purchase.[7]

[1] Leger *v.* Doyle, 11 Rich. 109; 70 Am. Dec. 240.

[2] Breckenridge *v.* Todd, 3 T. B. Mon. 52; 16 Am. Dec. 83.

[3] Turner *v.* Tyson 49 Ga. 165.

[4] Chamberlain *v.* Bell, 7 Cal. 292; 68 Am. Dec. 260.

[5] Fitzhugh *v.* Croghan 2 J. J. Marsh. 429; 19 Am. Dec. 139, McCaskle *v.* Amarine, 12 Ala. 17; Hill *v.* Epley, 31 Pa. St. 335; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Walker *v.* Coltraine, 6 Ired. Eq. 79; Belk *v.* Massey, 11 Rich. 614; McMechan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198; Philips *v.* Green, 3 A. K. Marsh. 7; 13 Am. Dec. 124; Vose *v.* Morton, 4 Cush. 27; 50 Am. Dec. 750; Portis *v.* Hill, 30 Tex. 529; 98 Am. Dec. 481.

[6] Morse *v.* Wright, 60 Cal. 260; McConnell *v.* Reed, 2 Scam. 374; Snodgrass *v.* Ricketz, 13 Cal. 359; Losey *v.* Simpson, 11 N. J. Eq. 246; Vance *v.* McNairy, 3 Yerg. 171; 24 Am. Dec. 553; Bellas *v.* McCarty, 10 Watts, 13; Van Rensselaer *v.* Clark, 17 Wend. 25; 31 Am. Dec. 280; Derbes *v.* Romero, 32 La. Ann. 927; Blanchard *v.* Tyler, 12 Mich. 339; 86 Am. Dec. 57.

[7] Price *v.* McDonald, 1 Md. 403; 54 Am. Dec. 657.

An unregistered deed binds a subsequent purchaser who has actual or constructive notice of it. Notice is equivalent to registration.[1] The registry of a deed is required to give more general notice of the conveyance than would result from livery of seisin, which was prescribed by the common law for the purpose of notice. But if a second purchaser has in fact notice, the intent of the registry is answered; and to permit him to hold against the first purchaser would be to convert the statute into an engine of fraud, instead of protection against it.[2] A purchaser with actual notice of a prior deed acquires title subject to such deed, though his deed be first recorded.[3]

Notice is either express or implied, or actual or constructive.[4] Actual notice must be given by some person interested in the property, and in the course of the negotiations.[5] The notice, to be effectual, is not necessarily a knowledge of the entire contents of the deed, but rather a notice of its existence,—notice that a deed conveying the property out of the grantor had been executed.[6] Express

[1] Jackson *v.* Leek, 19 Wend. 339; Jackson *v.* Sharp, 9 Johns. 163; 6 Am. Dec. 267; Schutt *v.* Large, 6 Barb. 373; Corliss *v.* Corliss, 8 Vt. 373; Watkins *v.* Edwards, 23 Tex. 443; Morrison *v.* Wilson, 13 Cal. 494; 73 Am. Dec. 593; Morrison *v.* Kelly, 22 Ill. 610; 74 Am. Dec. 169; Draper *v.* Bryson, 17 Mo. 71; 57 Am. Dec. 257; Ludlow *v.* Gill, N. Chip. 33; 1 Am. Dec. 694; Morrison *v.* Shattuck, N. Chip. 19; Avent *v.* Read, 2 Stew. 448; Ohio Ins. Co. *v.* Ledyard, 8 Ala. 866; Galland *v.* Jackman, 26 Cal. 79; 85 Am. Dec. 172; Burkhalter *v.* Ector, 25 Ga. 55; Ross *v.* Hale, 27 Ill. 104; Reason *v.* Edmunson, 5 Ind. 393; Butler *v.* Stevens, 26 Me. 484; Rogers *v.* Jones, 8 N. H. 264; Stevens *v.* Morse, 47 N. H. 532; Den *v.* McKnight, 11 N. J. L. 385; Stewart *v.* Thompson, 3 Vt. 255; Smith *v.* Hall, 28 Vt. 364; McMechan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198; Stevens *v.* Brown, 3 Vt. 420; 23 Am. Dec. 215; Davis *v.* Blunt, 6 Mass. 487; 4 Am. Dec. 168; Jackson *v.* Page, 4 Wend. 585; Brown *v.* Manter, 22 N. H. 472; Schutte *v.* Large, 6 Barb. 374; Gilbert *v.* Jess, 4 Wis. 110; Haywood *v.* Shaw, 16 How. Pr. 119; Stone *v.* Bartlett, 46 Me. 438; Smith *v.* Lambeth, 15 La. Ann. 566; Fitzhugh *v.* Barnard, 12 Mich. 104; McCaskle *v.* Amarine, 12 Ala. 17; Claiborne *v.* Holmes, 51 Miss. 146; Boynton *v.* Rees, 8 Pick. 329; 19 Am. Dec. 327; Newman *v.* Chapman, 2 Rand. 93; 14 Am. Dec. 766; McConnell *v.* Reed, 4 Scam. 117; 38 Am. Dec. 124; Hill *v.* Murray, 56 Vt. 177.

[2] Farnsworth *v.* Childs, 4 Mass. 637; 3 Am. Dec. 249.

[3] Van Rensselaer *v.* Clark, 17 Wend. 25; 31 Am. Dec. 280.

[4] McMechan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198. As to "actual notice" when required by statute to invalidate a prior unrecorded deed, see Curtis *v.* Mundy, 3 Met. 407; Spofford *v.* Weston, 29 Me. 140.

[5] Barnhart *v.* Greenshields, 9 Moore, P. C. 18.

[6] Wallace *v.* Craps, 3 Strob. 266; Galland *v.* Jackman, 26 Cal. 79; 85 Am. Dec. 172.

or actual notice must be clearly proved.[1] It must be direct and positive. "A notice which is barely sufficient to put a party on inquiry is not sufficient, nor is a suspicion of notice sufficient."[2]

Constructive notice is evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted, unless by the most convincing evidence to the contrary.[3] Whatever is sufficient to put a party on inquiry amounts to constructive notice,[4] provided the inquiry becomes a duty, and would lead to a knowledge of the required fact by the exercise of ordinary diligence;[5] for a party will not be charged with constructive notice unless the circumstances are such that the court can say that it was his duty to acquire the

[1] McMechan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198.

[2] Fort *v.* Burch, 6 Barb. 78; Mundy *v.* Vawter, 3 Gratt, 518.

[3] Snell's Equity, 36.

[4] Harper *v.* Reno, 1 Freem. Ch. 336; Booth *v.* Barnum, 9 Conn. 286; 23 Am. Dec. 339. "It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for present purposes, assert that the cases in which constructive notice has been established resolve themselves into two classes: 1. Cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice; and 2. Cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiring, for the very purpose of avoiding notice,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts, which the *res gestæ* would suggest to a prudent mind, but if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply; the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser without notice": Wigram, V. C., in Jones *v.* Smith, 1 Hare, 55. In Williamson *v.* Brown, 15 N. Y. 362, Selden, J., says: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered a *bona fide* purchaser. The presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."

[5] Hood *v.* Fahnestock, 1 Pa. St. 470; 44 Am. Dec. 147.

knowledge in question, and that his failure to obtain it was the result of culpable negligence.[1] A party will be charged with notice of the contents and effect of an instrument which actually affects the land conveyed to him, and which without doubt includes that land, if, after becoming aware of its existence, he fails to make suitable inquiry, notwithstanding that the party whose interest would prompt him to misrepresent should inform him that the encumbrance was paid off or discharged, without, however, furnishing any proof of that fact.[2] Where plaintiff's deed contains a reference to another deed duly recorded, which contains a condition limiting his estate, he will be held to have had notice of the condition.[3] When a subsequent purchaser whose deed is recorded had notice at the time of his purchase of some kind of a prior conveyance from his grantor, even if he did not know what kind of a conveyance it was, whether an estate for years or in fee-simple, he cannot claim as an innocent purchaser.[4] A reference in a release of a mortgage to an instrument on record affecting the land is constructive notice of the contents of such instrument.[5] A patent, though not recorded, is good in equity against a purchaser with notice. In such case, information of its existence by common report, and from a person declaring he had seen it, with knowledge of possession and use of the land under the patent, is sufficient notice.[6] Vague reports from persons not interested in the property will not affect the purchaser,[7] nor will he be bound

[1] De Voss *v.* Richmond, 18 Gratt. 338; 98 Am. Dec. 646.

[2] Price *v.* McDonald, 1 Md. 403; 54 Am. Dec. 657.

[3] Gibert *v.* Peteler, 38 N. Y. 165; 97 Am. Dec. 785.

[4] Galland *v.* Jackman, 26 Cal. 79; 85 Am. Dec. 172.

[5] Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; 59 Am. Dec. 478.

[6] Roberts *v.* Stanton, 2 Munf. 129; 5 Am. Dec. 463.

[7] Snell's Equity, 35. "Certainly, the vague reports of strangers, or information given by a person not interested, will not have the effect of notice to the purchaser, but information derived through parties interested, and from a reliable source, is different. Although a purchaser may disregard rumors set afloat by those who have no right to intermeddle, he is bound to attend to the admonitions of a party in interest": Mulliken *v.* Graham, 72 Pa. St. 490;

by notice in a previous transaction which he had forgotten.[1] A purchaser is not affected with constructive notice of a prior unrecorded conveyance by the mere fact that he was one of the subscribing witnesses thereto.[2] Not only is a mere assertion that some other persons claim a title not sufficient, but even a general claim by the person himself who gives the notice is not enough.[3] A subsequent purchaser is not put upon inquiry as to the existence of a prior unrecorded deed by information of the possible existence of such a deed, when from the same informant he learns that it was to be canceled.[4]

Possession of property by the grantee of an unrecorded deed is sufficient to put the purchaser on inquiry, and therefore raises the presumption of notice.[5] But the possession must be actual, distinct, and unequivocal. It must, moreover, be visible, and manifested by notorious acts of ownership, such as would naturally be observed and known by others.[6] "Every possession will not amount

Wilson *v.* McCullough, 23 Pa. St. 440; 62 Am. Dec. 347; Parker *v.* Kane, 4 Wis. 1; 65 Am. Dec. 283.

[1] Farnsworth *v.* Chase, 4 Mass. 637; 3 Am. Dec. 349. Knowledge of an intent to convey is not sufficient (Cushing *v.* Hurd, 4 Pick. 253, 16 Am. Dec. 335) as to creditors.

[2] Vest *v.* Michie, 31 Gratt. 149; 31 Am. Rep. 722.

[3] Snell's Equity, 35.

[4] Rogers *v.* Wiley, 14 Ill. 65; 56 Am. Dec. 491.

[5] McMechan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198; Tuttle *v.* Jackson, 6 Wend. 213; 21 Am. Dec. 314; Moore *v.* Pearson, 6 Iowa, 279; 71 Am. Dec. 409; Colby *v.* Kenniston, 4 N. H. 262; Norcross *v.* Widgery, 2 Mass. 508; Newman *v.* Chapman, 2 Rand. 93; 14 Am. Dec. 766; Eyre *v.* Dolphin, 2 Ball & B. 301; Forbes *v.* Denniston, Brown Parl. C. 425; Knox *v.* Thompson, 1 Litt. 350; 13 Am. Dec. 246; Jaques *v.* Weeks, 7 Watts, 261; Griswold *v.* Smith, 10 Vt. 452; Taylor *v.* Lowenstein, 50 Miss. 278; Tucker *v.* Vandermark, 21 Kan. 263; Weld *v.* Madden, 2 Cliff. 584; Tunnison *v.* Chamblin, 88 Ill. 378; Vaughn *v.* Tracy, 22 Mo. 415; 25 Mo. 318; 69 Am. Dec. 471; Page *v.* Waring, 76 N. Y. 463; Fair *v.* Stevenot, 29 Cal. 490; Grimstone *v.* Carter, 3 Paige, 421; 24 Am. Dec. 230; Pritchard *v.* Brown, 4 N. H. 397; 17 Am. Dec. 431; Hardy *v.* Summers, 10 Gill & J. 316; 32 Am. Dec. 167; McConnell *v.* Reed, 4 Scam. 117; 38 Am. Dec. 124; Baynard *v.* Norris, 5 Gill, 468; 46 Am. Dec. 647; McLaughlin *v.* Shepherd, 32 Me. 143; 52 Am. Dec. 646; Wyat *v.* Elam, 23 Ga. 201; 68 Am. Dec. 518; Nelson *v.* Sims, 23 Miss. 383; 57 Am. Dec. 144; Hunter *v.* Watson, 12 Cal. 363; 73 Am. Dec. 543; Morrison *v.* Kelly, 22 Ill. 610; 74 Am. Dec. 169. A purchaser of land in the possession of tenants is chargeable with notice of the extent of their interests: Hood *v.* Fahnestock, 1 Pa. St. 470; 18 Am. Dec. 147. The rule in the text is questioned in Rhode Island: Harris *v.* Arnold, 1 R. I. 136. See Beatie *v.* Butler, 21 Mo. 133; 64 Am. Dec. 234.

[6] McMechan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198; Coleman *v.* Barkelew, 27 N. J. L. 359; Rupert *v.* Mark, 15 Ill. 540; Boyce *v.* McCulloch, 3 Watts & S. 429; 39 Am. Dec. 35.

to implied notice. It must be an actual and exclusive possession, manifested by notorious acts of ownership, such as would naturally be observed and known by others. Merely cutting wood or pasturing cattle on uninclosed woodland, repairing the fences, and even removing an old house standing on part of the land, which may be regarded as mere acts of trespass as well as of ownership, have been held insufficient. Nor does even actual, open, notorious possession of the land necessarily and in all cases create a presumption of notice. If, for example, the first purchaser were previously in possession as lessee, and after purchase continue in possession as grantee without any actual visible change in its character of his possession, this could not operate as notice to a second purchaser who knew of the previous possession as lessee, and had no actual notice of the actual change of title."[1] Therefore possession alone can hardly furnish notice of a title acquired by a person after his possession commenced.[2] If the possession is consistent with the recorded title, the presumption of notice will not be raised.[3] Constructive notice of an unrecorded lease for life is not given by the fact that the lessee and lessor are both in possession of the premises so as to take priority over a subsequent mortgage by the lessor to a mortgagee in good faith, where there was the same possession by the lessor and lessee before the lease.[4] Where one holds and is in possession of

[1] Holmes *v.* Street, 10 N. J. Eq. 941; McMeichan *v.* Griffing, 3 Pick. 149; 15 Am. Dec. 198.

[2] McMechan *v.* Grffing, 3 Pick. 419; 15 Am. Dec. 198; Rogers *v.* Jones, 8 N. H. 271. In a New Hampshire case (Emmons *v.* Murray, 16 N. H. 398), it appeared that the occupant had been in possession a number of years without any title, and after having acquired one, continued in as before, and without any change in the mode or character of his occupancy, either by improvements, increasing the value of the land, or otherwise. The court said: "We think it plain that occupation under these circumstances can afford no indication of a claim of title so as to place a second purchaser upon his guard, or to raise the imputation of fraud against him for taking a conveyance of the same party, under whom the occupant has acquired a title. It had no tendency to put the party upon inquiry."

[3] Smith *v.* Yule, 31 Cal. 180; 89 Am. Dec. 167.

[4] Bell *v.* Twilight, 18 N. H. 159; 45 Am. Dec. 367.

certain rights in a tract of land by a deed which is recorded, and has certain other rights by a deed which is not recorded, his possession will not be notice of a title or claim beyond what he holds under the deed which is recorded.[1] But possession is only implied notice.[2] Where actual notice of the unrecorded conveyance is required by statute, possession and cultivation of land, and fencing it, by a party who has an unrecorded deed therefor, is not sufficient to warrant the inference that a third person had any notice of such deed.[3]

Where a party effects a purchase through an agent, notice to the agent is notice to him, whether communicated to the principal or not.[4] But notice, to charge a principal, must be given to the agent or attorney in the same transaction,[5] unless the prior transaction in which he received it is fresh, and the matter clear in his mind, or the transactions are so connected as to amount to one and the same.[6] And in order to affect a person with a constructive notice of facts within the knowledge of his agent or attorney, it is necessary, not only that the knowledge should be derived from the same (or what is practically the same) transaction, but the knowledge must be material to that transaction, and such as it was the duty of the agent to communicate to his principal.[7]

Where a person purchases for valuable consideration with notice from a person who bought without notice, he may shelter himself under the first purchaser; for

[1] Butler *v.* Stevens, 26 Me. 484.

[2] Vaughan *v.* Tracy, 22 Mo. 415; 25 Mo. 318; 69 Am. Dec. 471.

[3] Pomroy *v.* Stevens, 11 Met. 244.

[4] Goodenough *v.* Warren, 5 Saw. 501; Haywood *v.* Shaw, 16 How. Pr. 119; May *v.* Borel, 12 Cal. 91.

[5] "The general propositions, — 1. That notice to the solicitor is notice to the client; 2. That where a purchaser employs the same solicitor as the vendor, he (the purchaser) is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed; and 3. That the notice to the solicitor, which will alone bind the client, must be notice in that transaction in which the client employs him, — have not, as general propositions, been disputed at the bar": Fuller *v.* Bennett, 2 Hare, 394.

[6] The Distilled Spirits, 11 Wall. 366; Snell's Equity, 39.

[7] The Distilled Spirits, 11 Wall. 366.

otherwise the first or *bona fide* purchaser would be unable to deal with his property, and the sale of estates would be very much clogged; and even if a person who buys with notice sells to a *bona fide* purchaser for valuable consideration without notice, the latter may protect his title.[1]

ILLUSTRATIONS. — A had heard B say that he had an unrecorded deed for certain lands. *Held*, sufficient to charge A, who had subsequently purchased the lands with actual notice of the title of B: *Mense* v. *McLean*, 13 Mo. 298. A person about to purchase property was told by the recorder that the seller had already given a deed of the property to another person, and that it had been filed for record, but had been taken away before recorded. *Held*, that this information was sufficient to put him on inquiry: *Lawton* v. *Gordon*, 37 Cal. 202. The owner of a lot in a city occupies part of a house on the same, and another person occupies the remainder of the house, and while this occupation of both continues, the owner conveys to such other person, whose deed is not recorded, and afterwards conveys to a third person, whose deed is first recorded. *Held*, that the possession of the one having the unrecorded deed is insufficient to give notice to the subsequent purchaser: *Smith* v. *Yule*, 31 Cal. 180; 89 Am. Dec. 167. Defendant drew a deed, and as notary public took the acknowledgment of its execution, and also drew notes executed by the grantee for the unpaid purchase-money. Four years afterwards, he bought the premises. *Held*, that he was not chargeable by these facts with notice of the vendor's claim and lien for unpaid purchase-money: *White* v. *Fisher*, 77 Ind. 65; 40 Am. Rep. 287.

§ 2281. Effect of Errors of Recording Officer. — The authorities conflict on the question as to the effect of errors by the recording officer in registering the instrument. Some of the cases hold that, notwithstanding the errors or omissions of the officer, if the instrument has in itself all the requisites to a valid registry, and is deposited with the proper officer, the grantee or mortgagee

[1] Trull *v.* Bigelow, 16 Mass. 406; 8 Am. Dec. 144; Boynton *v.* Rees, 8 Pick. 329; 19 Am. Dec. 326; Bell *v.* Twilight, 18 N. H. 159; 45 Am. Dec. 367; Herndon *v.* Kimball, 7 Ga. 432; 50 Am. Dec. 406; Choteau *v.* Jones, Ill. 300; 50 Am. Dec. 460; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Lee *v.* Cato, 27 Ga. 637; 73 Am. Dec. 746.

has performed his entire duty in the premises, and will not be affected by any errors committed by the recording officer, nor by his failure to record the instrument, either in whole or in part.[1] Others hold that the record is notice only of what it actually contains, and that an error in description, amount, names of parties, or other essential part of a deed which appears in the record of an instrument, or any omission by the registering officer to copy such instrument, or any portion thereof, upon the records, whether the error or omission be the result of carelessness, negligence, or evil design on the part of the delinquent officer, will operate to vititate the record as constructive notice of the perfect instrument.[2] A deed filed for record in a recorder's office, and recorded, is notice to subsequent purchasers, notwithstanding the failure of the officer to index it,[3] or his recording it in the wrong book.[4] An index of the record of conveyances, by law required to be kept by the public recorder, but in which he is not required to state the amount of the considera-

[1] Oats *v.* Walls, 28 Ark. 244; Lee *v.* Birmingham, 30 Kan. 312; Mangold *v.* Barlow, 61 Miss. 593; 48 Am. Rep. 84; Board of Comm'rs *v.* Babcock, 5 Or. 472; Brooks's Appeal, 64 Pa. St. 127; Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416; Gaskill *v.* Badge, 3 Lea, 144; Beverly *v.* Ellis, 1 Rand. 102; Metts *v.* Bright, 4 Dev. & B. 173; 32 Am. Dec. 683; Hoffman *v.* Mackall, 5 Ohio St. 124; 64 Am. Dec. 637; Throckmorton *v.* Prince, 28 Tex. 605; Franklin *v.* Cannon, 1 Root, 500; Hartmyre *v.* Gates, 1 Root, 61; Judd *v.* Woodruff, 2 Root, 298; Meyrick *v.* Wallace, 19 Ill. 486; Bank of Kentucky *v.* Haggin, 1 A. K. Marsh. 306; Polk *v.* Casgrove, 4 Biss. 437; Nichols *v.* Reynolds, 1 R. I. 30; 36 Am. Dec. 238; McGregor *v.* Hall, 3 Stew. & P. 397; Mims *v.* Mims, 35 Ala. 23. See note to case of Green *v.* Garrington, 16 Ohio St. 348, in 91 Am. Dec. 106–110.

[2] Barnard *v.* Campan, 29 Mich. 162; Terrell *v.* Andrew County, 44 Mo. 309; Brydon *v.* Campbell, 40 Md. 331; Frost *v.* Beekman, 1 Johns. Ch. 288; Sawyer *v.* Adams, 8 Vt. 172; 30 Am. Dec. 459; Beekman *v.* Frost, 18 Johns. 544; 9 Am. Dec. 246; James *v.* Morey, 2 Cow. 246; 14 Am. Dec. 475; Chamberlin *v.* Bell, 7 Cal. 292; 68 Am. Dec. 260; Shepherd *v.* Burkhalter, 13 Ga. 443; 58 Am. Dec. 523; Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250; Disque *v.* Wright, 49 Iowa, 538; Taylor *v.* Hotchkiss, 2 La. Ann. 917; Hill *v.* McNichol, 76 Me. 314; Thorp *v.* Merrill, 21 Minn. 336; Jennings *v.* Wood, 20 Ohio, 261; Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772.

[3] Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416; Chatham *v.* Bradford, 50 Ga. 327; 15 Am. Rep. 692; Mutual Life Ins. Co. *v.* Dake, 87 N. Y. 257; 1 Abb. N. C. 381; Stockwell *v.* McHenry, 107 Pa. St. 237; 52 Am. Dec. 475; Trockmorton *v.* Price, 28 Tex. 606; 91 Am. Dec. 334. *Contra*, Barney *v.* McCarty, 15 Iowa, 510; 83 Am. Dec. 427; Whalley *v.* Small, 25 Iowa, 184.

[4] Conklin *v.* Hinds, 16 Minn. 457.

tion of instruments recorded, is not notice to a purchaser for a valuable consideration of such amount, although it states it. The same is true of an entry-book.[1] Thus where a mortgage is entered and indexed, correctly stating the amount, but in the record the amount is stated less, a subsequent purchaser for a valuable consideration, not knowing of the former mortgage, is bound only by the record, although he knew of the statement in the index.[2]

§ 2282. **Construction of Deeds.** — The construction of deeds follows the rules of law in regard to the construction of other contracts in writing.[3] The deed will be construed favorably, so as to uphold the intention of the parties, when possible.[4] It is construed most strongly against the grantor;[5] and where a deed will inure several ways, the grantee may elect which way to take it.[6] But it is said that the rule that a deed shall be construed most strongly against the grantor and favorably to the grantee in respect to the thing granted and the estate conveyed is the last one which courts apply, and ought never to be resorted to so long as a satisfactory result can be reached by other rules of analysis and construction.[7] All the parts of a deed are to be considered and construed together. Every part should, if possible, be made to take effect, and every word to operate, if by law it may, according to the intention of the parties.[8] The particular intent will govern the general intent,[9] and parts of a deed inconsistent with the

[1] Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250.

[2] Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250.

[3] See *post*, Chapter CIX., Contracts in Writing.

[4] Melick *v.* Pidcock, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; Edwards *v.* Bowden, 99 N. C. 80; 6 Am. St. Rep. 487.

[5] Rung *v.* Shoneberger, 2 Watts, 23; 26 Am. Dec. 95; City of Alton *v.* Ill. Trans. Co., 12 Ill. 38; 52 Am. Dec. 479; Pike *v.* Monroe, 36 Me. 309; 58 Am. Dec. 751; Com. *v.* Erie R. R. Co., 27 Pa. St. 339; 67 Am. Dec. 471; Dodge *v.* Walley, 22 Cal. 224; 83 Am. Dec. 61.

[6] Jackson *v.* Hudson, 3 Johns. 375; 3 Am. Dec. 500.

[7] Flagg *v.* Eames, 40 Vt. 16; 94 Am. Dec. 363.

[8] Richardson *v.* Palmer, 38 N. H. 212; Moore *v.* Griffin, 22 Me. 350; Howell *v.* Howell, 7 Ired. 491; 47 Am. Dec. 335.

[9] Dawes *v.* Prentice, 16 Pick. 435.

manifest intent will be rejected.[1] Where the terms are plain and unambiguous, the court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words.[2] Inconsistencies in a deed are to be reconciled, if possible. The old rule that the earlier clause controls the latter one is only applicable when reconcilement is impossible.[3] So the construction of a deed which requires the rejection of a whole clause thereof will not be adopted, except from unavoidable necessity.[4] The clauses may be transposed so as to give it its apparent construction.[5] The intention of parties to a deed may be ascertained,—1. From the words of the grant; 2. From the surrounding circumstances, in which may be considered the position of the parties, and the subject of the grant at and subsequent to the transaction.[6] The grammatical construction is not necessarily to be followed; for neither false English nor bad Latin will matter when the meaning of the party is apparent.[7] A deed untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography may be valid if there be sufficient words to declare clearly and legally the party's meaning.[8] The printed part of a deed is as much a part of the deed as the written part, and the parties are as much bound by one as the other.[9] Punctuation may be wholly disregarded, if necessary;[10] and will only be resorted to to settle the meaning of an instrument after all other means fail.[11] The force and legal effect of a deed is to be determined by the court as a matter of law.[12] Questions relative to the

[1] State *v.* Trask, 6 Vt. 355; 27 Am. Dec. 554.
[2] Donahue *v.* McNulty, 24 Cal. 411; 85 Am. Dec. 78.
[3] Waterman *v.* Andrews, 14 R. I. 589.
[4] City of Alton *v.* Trans. Co., 12 Ill. 38; 52 Am. Dec. 479.
[5] Staton *v.* Mullis, 92 N. C. 623.
[6] Grubb *v.* Grubb, 101 Pa. St. 11.
[7] Hancock *v.* Watson, 18 Cal. 140; Jackson *v.* Topping, 1 Wend. 388; 19 Am. Dec. 515.
[8] Cobb *v.* Hines, Busb. 343; 59 Am. Dec. 559.
[9] Wallwork *v.* Derby, 40 Ill. 527.
[10] Ewing *v.* Burnet, 11 Pet. 41; Bruensman *v.* Carroll, 52 Mo. 213; Beirne *v.* Wells, 94 N. C. 67.
[11] Ewing *v.* Burnet, 11 Pet. 41.
[12] Piles *v.* Bouldin, 11 Wheat. 325; Thornberry *v.* Churchill, 4 T. B. Mon. 29; 16 Am. Dec. 125; Carson *v.* Ray, 7 Jones, 609; 78 Am. Dec. 267.

location of the thing granted, the extent of its boundaries, the monuments intended by certain names, etc., are for the determination of the jury.[1]

§ 2283. **Public Grants—Construction of.**—In the case of a grant by the sovereign or government, the construction is always against the grantee, and the grant is taken most beneficially for the government.[2] But this rule, though applied to a grant of some prerogative right to an individual, to be held by him as a franchise, and which is intended to become private property in his hands,[3] seems to have no application, where the grant is made for a valuable consideration.[4]

§ 2284. **Recitals in Deeds.**—The recitals in a deed—by which is meant the statements of the facts and agreements upon which the deed is founded—are not essential to its validity, and do not control the operative parts of the deed, where to do so would defeat its intention.[5] Misrecitals will not invalidate a deed;[6] and though they are false in fact, the conveyance made on the idea of their truth remains good notwithstanding.[7]

Recitals in a deed bind parties and privies, and estop them from contradicting them.[8] But they do not bind

[1] Kimball *v.* Temple, 25 Cal. 449; Stanley *v.* Greene, 12 Cal. 148; Donahue *v.* Case, 61 N. Y. 631; Frier *v.* Jackson, 8 Johns. 495; Long *v.* Waggoner, 47 Mo. 178; Richardson *v.* Palmer, 38 N. H. 218.

[2] Gildart *v.* Gladstone, 11 East, 685; Jackson *v.* Reeves, 3 Caines, 293; Kennedy *v.* McCartney, 4 Port. 141; Mayor etc. *v.* Ohio etc. R. R. Co., 26 Pa. St. 355; Wilcoxon *v.* Maghee, 12 Ill. 381; 54 Am. Dec. 409.

[3] Martin *v.* Waddell, 16 Pet. 367, 411; Dubuque R. R. Co. *v.* Litchfield, 23 How. 66, 88; Commonwealth *v.* Roxbury, 9 Gray, 451, 492; Lansing *v.* Smith, 4 Wend. 9; 21 Am. Dec. 89.

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. 589.

[5] Allen *v.* Holton, 20 Pick. 464; Moore *v.* Magrath, Cowp. 9; Powell *v.* Powell, 5 Dana, 170; Farrell *v.* Hilditch, 5 Com. B., N. S., 840.

[6] 2 Greenl. Cruise, 624; Lewin *v.* Morley, Cro. Jac. 127.

[7] Boughton *v.* Sandilands, 3 Taunt. 342; Thompson *v.* Jackson, 3 Rand. 361; 15 Am. Dec. 721.

[8] Scott *v.* Douglass, 7 Ohio, 227; McBurney *v.* Cutler, 18 Barb. 203; Rankin *v.* Warner, 2 Lea, 302; Robbins *v.* McMillan, 26 Miss. 434; Jackson *v.* Parkhurst, 9 Wend. 209; Kaine *v.* Denniston, 22 Pa. St. 202; Carver *v.* Jackson, 4 Pet. 83; Fisk *v.* Flores, 43 Tex. 340. But this rule does not extend to mere description or non-essential averments: Osborne *v.* Endicott, 6 Cal.

strangers.[1] Recitals in a deed, it is said, will operate as an estoppel against the grantee only under those circumstances where the declarations of a grantor, made at the time of the execution of a deed, would be evidence against the grantee and those claiming under him.[2] A recital of one deed in another binds the parties and those claiming under them by estoppel.[3]

A grantee is held to have notice of all the facts recited in the deed.[4] A reference in a deed to a will is notice to the grantee of the trusts contained in the will.[5] A recital in a deed of land that the consideration has been paid is only *prima facie* evidence of payment;[6] though a bar to an action at law by the bargainer for the purchase-money.[7] But it is no evidence of the fact of its payment as against third persons.[8] In Maine it is said that the effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration. For every other purpose it may be waived or explained by parol proof. The grantor may show, notwithstanding the acknowledgment of payment, that no money was received, and recover the price against the grantee.[9]

§ 2285. **Description of Property — Quantity.** — If the description of the property is so indefinite that the subject of the conveyance cannot be ascertained, the grant is void.[10] A deed which conveys no particular spot of

149; 65 Am. Dec. 498. A general recital is no estoppel; but a recital of a particular fact, if material, is an estoppel: Hall *v.* Benner, 1 Penr. & W. 402; 21 Am. Dec. 394.

[1] Griggs *v.* Smith, 12 N. J. L. 22; Overseers *v.* Overseers, 10 Johns. 230; Whitaker *v.* Garnet, 3 Bush, 402; Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372.

[2] Joeckel *v.* Easton, 11 Mo. 118; 47 Am. Dec. 142.

[3] Doe *v.* Porter, 3 Ark. 18; 36 Am. Dec. 448; Williams *v.* Keyser, 11 Fla. 234; 89 Am. Dec. 243.

[4] Willis *v.* Gay, 48 Tex. 463; 26 Am. Rep. 328.

[5] Graff *v.* Castleman, 5 Rand. 195; 16 Am. Dec. 741.

[6] Parker *v.* Foy, 43 Miss. 260; 5 Am. Rep. 484.

[7] Mendenhall *v.* Parish, 8 Jones, 105; 78 Am. Dec. 269.

[8] Lloyd *v.* Lynch, 28 Pa. St. 419; 70 Am. Dec. 137.

[9] Goodspeed *v.* Fuller, 46 Me. 141; 71 Am. Dec. 572.

[10] Bailey *v.* White, 41 N. H. 337; U. S. *v.* King, 3 How. 773; Wofford *v.* McKinna, 23 Tex. 44; 76 Am. Dec.

ground can transfer no title.[1] But if, notwithstanding an uncertain description, the intention of the parties can be gathered from the deed, or from oral proof, the grant is not void.[2] It is not necessarily void for uncertainty where land is described by a general name or designation. It may be shown by extrinsic evidence what particular land is embraced by the general designation.[3] A deed is not void for uncertainty of description if it can be made good by any construction.[4] A deed is not void for uncertainty if part of the land claimed under it will certainly pass;[5] nor is it void for uncertainty because from lapse of time it may be impossible to identify the lands conveyed by it;[6] nor where it conveys all the grantor's interest in real estate in a certain town without describing the lots separately.[7] "If there be but one description in the deed, that is to be strictly adhered to. If there be more than one, and they turn out upon evidence not to agree, that is to be adopted which is most certain."[8] But they should all be reconciled, if possible.[9] A particular description following a general one will control,[10] unless the general description is clear and certain, while the particular one

53; Campbell *v.* Johnson, 44 Mo. 247; Fuller *v.* Fellows, 30 Ark. 657; Howard *v.* North, 5 Tex. 290; 51 Am. Dec. 769; Tierney *v.* Brown, 65 Miss. 563; 7 Am. St. Rep. 679.

[1] Hart *v.* Hawkins, 3 Bibb, 502; 6 Am. Dec. 667; Lumbard *v.* Aldrich, 8 N. H. 31; 28 Am. Dec. 381.

[2] Wendell *v.* Jackson, 8 Wend. 183; 22 Am. Dec. 635; Hart *v.* Hawkins, 3 Bibb, 502; 6 Am. Dec. 666; Bosworth *v.* Sturtevant, 2 Cush. 392; Newson *v.* Pryor, 9 Wheat. 7; Mulford *v.* La Franc, 26 Cal. 88; Baso *v.* Mitchell, 22 Tex. 285; Cooper *v.* White, 30 Ark. 513; Smith *v.* Crawford, 81 Ill. 296; Negley *v.* Lindsay, 67 Pa. St. 217; 5 Am. Rep. 427; Smith *v.* Crawford, 81 Ill. 296; Cooper *v.* White, 30 Ark. 513; Swain *v.* Saltmarsh, 54 N. H. 9.

[3] Tucker *v.* Field, 51 Miss. 191; Lewis *v.* Seibles, 65 Miss. 251; 7 Am. St. Rep. 649.

[4] Pursley *v.* Hayes, 22 Iowa, 11; 92 Am. Dec. 350; Tucker *v.* Field, 51 Miss. 191.

[5] Clark *v.* Munyan, 22 Pick. 410; 33 Am. Dec. 752.

[6] Nixon *v.* Porter, 34 Miss. 697; 69 Am. Dec. 408.

[7] Harmon *v.* James, 7 Smedes & M. 111; 45 Am. Dec. 296.

[8] Den *v.* Graham, 1 Dev. & B. 76; 27 Am. Dec. 226; Vose *v.* Handy, 2 Me. 322; 11 Am. Dec. 101; Doe *v.* Porter, 3 Ark. 18; 36 Am. Dec. 448; Melvin *v.* Proprietors, 5 Met. 15; 38 Am. Dec. 384; Anderson *v.* Baughman, 7 Mich. 69; 74 Am. Dec. 699.

[9] Shultz *v.* Young, 3 Ired. 385; 40 Am. Dec. 413.

[10] Gano *v.* Aldridge, 27 Ind. 294; Jones *v.* Smith, 73 N. Y. 205; McEowin *v.* Lewis, 26 N. J. L. 451; Wilt *v.* Cutler, 38 Mich. 189; Doe *v.* Porter, 3 Ark. 18; 36 Am. Dec. 448; Melvin *v.* Proprietors, 5 Met. 15; 38 Am. Dec. 384.

is uncertain and obscure.[1] If the different parts of a description are consistent, no part should be rejected.[2] But a false or impossible part may and should be rejected, in order to uphold a deed, where what remains constitutes a perfect and certain description.[3] An evident omission in a description may be supplied by construction.[4] It will be presumed that the land is situated in the state where the deed was executed.[5] Where there are two conflicting descriptions, each equally certain, that will control which is more favorable to the grantee,[6] and his right of election in case of uncertainty to make the same certain passes as an incident to the title.[7] It is no objection to a deed that the description of lands thereby conveyed is in figures and abbreviations.[8] A mistake in spelling the name of a tract of land will not vitiate a deed if the word misspelt resembles in sound or sense the right name.[9]

A tract of land which has a well-known name may be described by that name.[10] It may be described by reference therein to another deed or map containing a description.[11] If the land have two names, it may be described by either, though one be the true name by which it was patented, and the other be a name only acquired by reputation,[12] and the following descriptions have been upheld: A description as that on which the grantor lives, stating the quantity and general location, there being no

[1] Barney *v.* Miller, 18 Iowa, 460; Haley *v.* Amestoy, 44 Cal. 132; Sawyer *v.* Kendall, 10 Cush. 241; White *v.* Gay, 9 N. H. 126; 31 Am. Dec. 224; Green Bay etc. Co. *v.* Hewitt, 55 Wis. 96; 42 Am. Rep. 701; Lyman *v.* Gedney, 114 Ill. 388; 55 Am. Rep. 871.

[2] Herrick *v.* Hopkins, 23 Me. 217.

[3] Wendell *v.* Jackson, 8 Wend. 183; 22 Am. Dec. 635; Wade *v.* Deray, 50 Cal. 376; Bond *v.* Fay, 12 Allen, 86; Thayer *v.* Torrey, 37 N. J. L. 339; Tubbs *v.* Gatewood, 26 Ark. 128; Beal *v.* Gordon, 55 Me. 482; Shewelter *v.* Pirner, 55 Mo. 218; Morton *v.* Jackson, 1 Smedes & M. 494; 40 Am. Dec. 107; Irving *v.* Cunningham, 66 Cal. 15; Andrews *v.* Pearson, 68 Me. 19; Bradshaw *v.* Bradbury, 64 Mo. 334.

[4] Hoffman *v.* Riehl, 27 Mo. 554.

[5] Butler *v.* Davis, 5 Neb. 521.

[6] Vance *v.* Fore, 24 Cal. 435; Melvin *v.* Proprietors, 5 Met. 15; 38 Am. Dec. 384; Esty *v.* Baker, 50 Me. 325; 79 Am. Dec. 616.

[7] Armstrong *v.* Mudd, 10 B. Mon. 144; 50 Am. Dec. 445.

[8] Harrington *v.* Fish, 10 Mich. 415.

[9] Huddleson *v.* Reynolds, 8 Gill, 332; 50 Am. Dec. 702.

[10] Haley *v.* Amestoy, 44 Cal. 132.

[11] Caldwell *v.* Center, 30 Cal. 539; 89 Am. Dec. 131.

[12] Huddleson *v.* Reynolds, 8 Gill, 332; 50 Am. Dec. 702.

other land in the neighborhood belonging to the grantor;[1] a description as "one and a half acres, more or less, and adjoining land of R. D. and others, being the Brunt swamp-land, so called";[2] a deed to "one half of my lot."[3] Where a deed purports to convey a certain number of acres, referring to the record of a deed of the same land to the grantor, no warranty of the quantity mentioned is implied.[4] So where land is described by certain monuments, lines, and courses, and also as containing a certain quantity, the words expressing the quantity are not to be considered as a covenant that the land contains such quantity, but are to be taken as merely descriptive.[5] A statement that the granted premises are the same that were conveyed to the grantor by a certain deed is not conclusive that the grantor intends to convey all to which he acquired title thereby.[6]

In a purchase of land by metes and bounds purporting to contain a specified number of acres, more or less, the metes and bounds, and not the number of acres, control.[7] A description by metes and bounds may be treated as surplusage, where they are plainly erroneous.[8] A grantee is entitled to the land up to the point called for in his deed, although the distance given does not reach to that point.[9] A call in a grant from one terminus to another is *prima facie* understood to mean a direct line from the former to the latter point, where there are no accompanying words of description which indicate that the line is not to be a direct line.[10] The meaning of the words "be

[1] Smith *v.* Greaves, 15 Lea, 459; Melvin *v.* Proprietors, 5 Met. 15; 38 Am. Dec. 384.

[2] Dow *v.* Jewell, 18 N. H. 340; 45 Am. Dec. 371.

[3] Lick *v.* O'Donnell, 3 Cal. 593; 58 Am. Dec. 383.

[4] Johnson *v.* Moor, 2 Root, 252; 1 Am. Dec. 69.

[5] Powell *v.* Clark, 5 Mass. 355; 4 Am. Dec. 67.

[6] Lovejoy *v.* Lovett, 124 Mass. 270.

[7] Peay *v.* Briggs, 2 Mill Const. 98; 12 Am. Dec. 656; Bond *v.* Quattlebaum, 1 McCord, 584; 10 Am. Dec. 702; Wendell *v.* Jackson, 8 Wend. 183; 22 Am. Dec. 635.

[8] Norwood *v.* Byrd, 1 Rich. 135; 42 Am. Dec. 407.

[9] Brand *v.* Daunoy, 8 Mart., N. S., 159; 19 Am. Dec. 176.

[10] Shultz *v.* Young, 3 Ired. 385; 40 Am. Dec. 413.

the same more or less," in a deed, is, that the parties should run the risk of gain or loss, and if the quantity proved greater or less than the quantity sold, the parties should abide by their bargain.[1] The word "about," qualifying the number of acres, means simply a near approximation to the number.[2] If the deficiency in the quantity of the land be so great as to defeat the object of the purchase, the vendee may rescind the bargain.[3] But when there is a very great difference between the actual and estimated quantity of acres of land sold in gross, the court will give relief.[4]

§ 2286. **Boundaries — Monuments.** — A boundary is "any separation, natural or artificial, which marks the confines or line of two contiguous estates."[5] Natural boundaries are natural objects remaining where they were placed by nature; as shores, rivers, brooks, and creeks, ponds, beaches, streets, or highways, and the like. Artificial boundaries are those erected by man.[6] A call for the boundary line of another tract is a "natural boundary."[7] Natural objects, being of a more permanent

[1] Frederick *v.* Youngblood, 19 Ala. 680; 54 Am. Dec. 209.

[2] Stevens *v.* McKnight, 40 Ohio St. 341.

[3] Pringle *v.* Witten, 1 Bay, 256; 1 Am. Dec. 612; Nelson *v.* Carrington, 4 Munf. 332; 6 Am. Dec. 519.

[4] Harrell *v.* Hill, 19 Ark. 102; 68 Am. Dec. 202; Nelson *v.* Matthews, 2 Hen. & M. 164; 3 Am. Dec. 620; Nelson *v.* Carrington, 4 Munf. 332; 6 Am. Dec. 519.

[5] Bouv. Law Dict. 218.

[6] Boone on Real Property, sec. 302. In Waterman *v.* Johnson, 13 Pick. 267, the court say: "It is a well-settled rule in the construction of deeds that where certain monuments are referred to in a description, which do not exist at the time, and afterwards the parties, in good faith and by mutual agreement, put up monuments as and for those intended in the description, such monuments will be deemed the monuments intended in the description. Yet this placing of monuments, and the consent and agreement of the parties in relation thereto, must be proved by parol. If it is competent to show by parol evidence that certain monuments have been erected and fixed at or about or soon after the time of the execution of a deed, as and for the monuments meant and intended in the descriptive parts of a deed, *a fortiori* is it admissible to adduce similar proof to show that certain monuments actually existing at the time were the monuments intended, where there are two or more which equally well answer the description. Suppose the deed describes a line as running to a pine-tree marked, and in applying the deed to the land there are found two pine-trees marked, either of which answers the general description, and no course, distance, or other particular in the deed to determine which is intended: parol evidence would be admissible to show which was intended."

[7] Graybeal *v.* Powers, 76 N. C. 66.

and notorious character than artificial ones, are preferred as monuments in forming boundary lines, where the two kinds conflict,[1] unless the latter are obviously the more certain.[2] The description of boundaries by known and visible monuments, either natural or artificial, is preferred to a description by courses and distances and other measurements,[3] unless, as in the case of natural and artificial boundaries, it is clear that the latter description is the correct one,[4] or was intended to control.[5] The identical monument or boundary referred to in a deed may always be shown by parol proof.[6] A deed is not avoided by the loss of a plat referred to therein, rendering it difficult to define the boundaries.[7] Where the legal boundary between two towns differed from that popularly recognized, and a deed described a boundary in terms equally applicable to either, it was held that parol evidence was admissible to explain the ambiguity.[8] A straight line is presumed to be meant in a description of land in

[1] Fulwood *v.* Graham, 1 Rich. 491; Higginbotham *v.* Stoddard, 72 N. Y. 94; Bolton *v.* Laun, 16 Tex. 96; Cox *v.* Freedley, 33 Pa. St. 124; 75 Am. Dec. 584; Graybeal *v.* Powers, 76 N. C. 66; Simonton *v.* Thompson, 55 Ind. 87; Bradford *v.* Hill, 1 Hayw. 22; 1 Am. Dec. 546; Hall *v.* Powell, 4 Serg. & R. 456; 8 Am. Dec. 722.

[2] Lincoln *v.* Wilder, 29 Me. 169.

[3] Woodward *v.* Nims, 130 Mass. 70; Galvin *v.* Collins, 128 Mass. 525; Wilder *v.* Hunt, 34 Tex. 44; Johnson *v.* Preston, 9 Neb. 474; Dickson *v.* Wilson, 82 N. C. 487; Fulwood *v.* Graham, 1 Rich. 491; Kalbfleisch *v.* Standard Oil Co., 43 N. J. L. 259; West *v.* Shaw, 67 N. C. 489; Keenan *v.* Kavanaugh, 44 Vt. 268; Yates *v.* Van De Bogert, 56 N. Y. 526; Wendell *v.* Jackson, 8 Wend. 183; 22 Am. Dec. 635; Frost *v.* Spaulding, 19 Pick. 445; 31 Am. Dec. 150; Doe *v.* Porter, 3 Ark. 18; 36 Am. Dec. 448; Franklin *v.* Dorland, 28 Cal. 175; 87 Am. Dec. 111; Harris *v.* Hall, 70 Ga. 831.

[4] Higginbotham *v.* Stoddard, 72 N. Y. 94; Davis *v.* Rainsford, 17 Mass. 207.

[5] Buffalo etc. R. R. Co. *v.* Stigeler, 61 N. Y, 348, the court saying: "The reason of the rule is said to be, that conveyances are supposed to be made with reference to an actual view of the premises by the parties. Hence courses and distances must be varied to conform to actual or ascertained objects, or fixed boundaries designated or referred to by them; but when it appears from the designation of quantity, or other elements of description, that the courses and distances from a fixed and determined line were intended to control monuments, then the latter should be disregarded. The intention of the parties as evidenced by the deed is in all cases to determine the location of the premises granted by it."

[6] Emery *v.* Webster, 42 Me. 204; 66 Am. Dec. 274; Stone *v.* Clark, 1 Met. 378; 35 Am. Dec. 370.

[7] New Hampshire Land Co. *v.* Tilton, 19 Fed. Rep. 73.

[8] Putnam *v.* Bond, 100 Mass. 58; 1 Am. Rep. 82.

a deed when the call is simply from one monument to another; but a creek is not a monument in the sense of this rule, if no given point therein is named.[1]

§ 2287. **Courses and Distances.** — Where there are no monuments, the land must be bounded by the courses and distances named in the deed.[2] Distances yield to courses,[3] and quantity yields to all the descriptive particulars, in a deed,[4] unless the intent to give only a certain quantity is very clear.[5] A plan or survey referred to in a deed controls courses and distances.[6] The description by lot prevails over that by bearings and distances.[7]

§ 2288. **What Passes as Incident to Grant.** — The grant of a thing passes as incident thereto, even though not mentioned in the conveyance, everything which is essential to its beneficial use and enjoyment.[8] The words "privileges and appurtenances" are unnecessary in a deed, as a grant of the land passes them without their being mentioned.[9] Nor are the things which pass limited to those absolutely necessary to the enjoyment of the property conveyed; it is sufficient if full enjoyment of

[1] Fratt *v.* Woodward, 32 Cal. 219; 91 Am. Dec. 573.

[2] Chinoweth *v.* Haskell, 3 Pet. 96; Grand Trunk R. R. Co. *v.* Dyer, 49 Vt. 74; Drew *v.* Swift, 46 N. Y. 204; Sanders *v.* Godding, 45 Iowa, 463; Opdyke *v.* Stevens, 28 N. J. L. 83.

[3] Bryan *v.* Beckley, Litt. Sel. Cas. 91; 12 Am. Dec. 276; Hoffman *v.* Riehl, 27 Mo. 554.

[4] Wendell *v.* Jackson, 8 Wend. 183; 22 Am. Dec. 635; Clark *v.* Scammon, 62 Me. 47; Fuller *v.* Carr, 33 N. J. L. 157; Peay *v.* Briggs, 2 Mill Const. 98; 11 Am. Dec. 656; Winans *v.* Cheney, 55 Cal. 267.

[5] Kirkland *v.* Way, 3 Rich. 4; Pierce *v.* Faunce, 37 Me. 63.

[6] Heaton *v.* Hodges, 14 Me. 66; 30 Am. Dec. 731, 741, note; Birmingham *v.* Anderson, 48 Pa. St. 253; Powers *v.* Jackson, 50 Cal. 429; Kennebec Purchase *v.* Tiffany, 1 Me. 219; 10 Am. Dec. 60; Wolfe *v.* Scarborough, 2 Ohio St. 361.

[7] Rutherford *v.* Tracy, 48 Mo. 325; 8 Am. Rep. 104.

[8] Pomfret *v.* Ricroft, 1 Wms. Saund. 323 a, note; Cocheco etc. Co. *v.* Whittier, 10 N. H. 305; Wise *v.* Wheeler, 6 Ired. 196; Murphy *v.* Campbell, 4 Pa. St. 484; Winchester *v.* Hees, 35 N. H. 33; Janes *v.* Jenkins, 34 Md. 1; 6 Am. Rep. 300; Sparks *v.* Hess, 15 Cal. 196; Dunklee *v.* R. R. Co., 24 N. H. 489; Allen *v.* Scott, 21 Pick. 25; 32 Am. Dec. 238; Sheets *v.* Selden, 2 Wall. 187; Brigham *v.* Smith, 4 Gray, 299; 64 Am. Dec. 76; Hammond *v.* Woodman, 41 Me. 177; 66 Am. Dec. 219; Seymour *v.* Lewis, 13 N. J. Eq. 439; 78 Am. Dec. 108.

[9] Berry *v.* Billings, 44 Me. 416; 69 Am. Dec. 107.

the property cannot be had without them.[1] One selling property lying within the limits of a city, and in the conveyance bounding such property by streets designated as such in the conveyance, or on a map made by the city, or by the owner of the property, impliedly covenants that the purchaser shall have the use of such streets, although at the time of the sale they are unopened.[2] The incidents which pass must be open and visible,[3] though it is not essential that they were at the time of the grant in actual use.[4] But they must have been attached to the lands conveyed as a matter of right.[5] An easement will not pass, unless legally appurtenant to the land in the hands of the grantor.[6] Land will not pass as incident or appurtenant to land;[7] nor does a deed of land convey to the purchaser title to timber cut and lying on the ground.[8]

§ 2289. **Right of Owner of Soil to Full Dominion over It, above and below.** — The owner of land has a right to the exclusive dominion over it, above and below. He is entitled to all the minerals beneath it, the water which is in it, and everything in fact in the soil the surface of which is his. So, too, he has a right to everything above it, — *cujus est solum, ejus est usque ad cœlum.*[9]

§ 2290. **Things Overhanging One's Land.** — Therefore no one has a right to make any erection on his land which may project over the land of his neighbor, and to do so constitutes a nuisance, for which an action will lie without proof of any special damage.[10] Thus a bay-window

[1] Simmons *v.* Cloonan, 81 N. Y. 559.

[2] White *v.* Flannigin, 1 Md. 525; 54 Am. Dec. 669; Moale *v.* Baltimore, 7 Md. 314; 61 Am. Dec. 277.

[3] Simmons *v.* Cloonan, 81 N. Y. 557; Butterworth *v.* Crawford, 46 N. Y. 349; 7 Am. Rep. 352.

[4] Simmons *v.* Cloonan, 81 N. Y. 557.

[5] Green *v.* Collins, 86 N. Y. 246; 40 Am. Rep. 531.

[6] Spalding *v.* Abbot, 55 N. H. 423; Jackson *v.* Hathaway, 15 Johns. 447; 8 Am. Dec. 263.

[7] Van O'Linda *v.* Lothrop, 21 Pick. 292; 32 Am. Dec. 261; St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

[8] Jenkins *v.* Lykes, 19 Fla. 148.

[9] Marvin *v.* Brewster Iron Co., 55 N. Y. 528; 14 Am. Rep. 322; Chasemore *v.* Richards, 2 Hurl. & N. 168.

[10] Tucker *v.* Newman, 11 Ad. & E. 40; Reynolds *v.* Clarke, 1 Strange, 634; Aiken *v.* Benedict, 39 Barb. 400; Fay *v.* Prentice, 14 L. J., N. S., 298, the court saying, among other things, that "in a declaration for an injury for the

that projects, a cornice, stoop, portico, or anything that may be regarded as an invasion in any degree interfering with the rights of the owner of the soil, may be regarded as a nuisance, and actionable to the same extent as though it was an actual invasion of the soil.[1] A brick wall projecting over an adjoining lot is a nuisance, without any reference to the question whether it is safe and secure or not.[2] But though an action for a nuisance will lie, an action of ejectment will not;[3] nor will trespass.[4] The party injured may at his election cut off all that portion of the eaves or other projection over his land, and thus of his own motion abate the nuisance; or he may bring his action for the damages and also for an abatement of the nuisance.[5] So an insecure building allowed to stand near another's property is a nuisance.[6]

§ 2291. Trees Overhanging Another's Land. — If the branches of trees growing on one person's land overhang the land of his neighbor, this is a nuisance.[7] The latter may sue for damage caused thereby, or he may abate the nuisance himself by cutting off the branches which overhang to the extent that they overhang his land.[8] In *Du-*

erection of a building by an adjoining land-owner so that its eaves project over the land of another, it need not be stated that any special damage has been done; for it is an injury to a right, and the law will presume that rain will fall, and after the lapse of a reasonable time will presume that it has fallen. This was an action on the case for erecting a house with a cornice projecting over the lands of the plaintiff by means of which quantities of rain fell from the cornice upon the plaintiff's garden and did damage, and by reason of which the plaintiff had been greatly annoyed and incommoded in the use and possession of his premises. It was held by the court that the projection in itself was a nuisance from which the law inferred a damage, and that the plaintiff could maintain his action in respect to the projection alone, even though no rain had fallen, and that the plaintiff was not confined to damage from the rain."

[1] Wood on Nuisances, 112; Com. *v.* Blaisdell, 107 Mass. 234; Com. *v.* McDonald, 16 Serg. & R. 390; Grove *v.* Fort Wayne, 45 Ind. 429; 15 Am. Rep. 262; Jenks *v.* Williams, 115 Mass. 217.

[2] Meyer *v.* Metzler, 51 Cal. 142.

[3] Aiken *v.* Benedict, 39 Barb. 400. But see Sherry *v.* Frecking, 4 Duer, 452.

[4] Reynolds *v.* Clark, 2 Ld. Raym. 1399.

[5] Wood on Nuisances, 109; Shipley *v.* Fifty Associates, 106 Mass. 194; 8 Am. Rep. 318; Bellows *v.* Sackett, 15 Barb. 96.

[6] Benson *v.* Saurez, 28 How. Pr. 511; Ferguson *v.* Selma, 43 Ala. 398.

[7] Wood on Nuisances, 113.

[8] Countryman *v.* Lighthill, 24 Hun, 405; Lyman *v.* Hale, 11 Conn. 177; 27 Am. Dec. 728.

bois v. *Beaver*[1] it is said: "Different opinions have been held as to the rights of the owners of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other; some holding that, in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates;[2] while others, with better reasons, as it seems to me, hold that the tree is wholly the property of him upon whose land the trunk stands."[3] Where the trunk is on the boundary line, the tree belongs to the adjoining proprietors as tenants in common.[4] If the branches of a fruit-tree which grows on the land of A overhang the land of B, B has no property in the fruit; neither can A enter upon B's land to pluck it; but A owns the fruit, and is entitled to it, if he can get it without trespassing upon B.[5]

ILLUSTRATIONS. — The branches of a tree not poisonous, upon the defendant's land, overhung the plaintiff's garden from five to fifteen feet. It was alleged that in consequence thereof the plaintiff's garden was injured. The only proof was, that the plaintiff had some berry-bushes on his side of the line, and he thought there was a difference between those in the shade and those not. *Held*, that the action could not be maintained, as no damage was shown. The plaintiff's remedy was by clipping the branches: *Countryman* v. *Lighthill*, 24 Hun, 405.

§ 2292. What is Conveyed by Particular Language, Words, and Phrases.—No particular form of words is necessary to convey realty; any words denoting an intent to transfer the title are sufficient.[6] A conveyance purporting to convey a greater estate than the grantor has passes the estate he possesses.[7]

[1] 25 N. Y. 123; 82 Am. Dec. 326.

[2] Waterman *v.* Soper, 1 Ld. Raym. 737; Griffin *v.* Bixby, 12 N. H. 454; 37 Am. Dec. 225.

[3] Holder *v.* Coates, 1 Moody & M. 112; Lyman *v.* Hale, 11 Conn. 177; 27 Am. Dec. 728; Masters *v.* Pollie, 2 Rolle, 141; Crabbe on Real Property, sec. 96; Skinner *v.* Wilder, 38 Vt. 115; 88 Am. Dec. 645; Hoffman *v.* Armstrong, 48 N. Y. 203; 8 Am. Rep. 537.

[4] Dubois *v.* Beaver, 25 N. Y. 123; 82 Am. Dec. 326; Waterman *v.* Soper, 1 Ld. Raym. 737; Griffin *v.* Bixby, 12 N. H. 454; 37 Am. Dec. 225; Relyea *v.* Beaver, 32 Barb. 547.

[5] Hoffman *v.* Armstrong, 48 N. Y. 203; 8 Am. Rep. 537.

[6] Gambril *v.* Rose, 8 Blackf. 140; 44 Am. Dec. 760.

[7] McCorry *v.* King's Heirs, 3 Humph. 267; 39 Am. Dec. 166.

§ 2293. Reservations and Exceptions.—"The operation of an exception in a deed is to retain in the grantor some portion of his former estate which by the exception is taken out or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him."[1] If land is conveyed in general terms, an exception of a specific part, as the trees or woods, or the minerals, or an easement, is valid, and not repugnant to the grant.[2] But if the part excepted was specifically granted, as if a person grants ten acres in specific terms, excepting one of them, the exception is repugnant to the grant, and void.[3] A reservation may be made in the premises, the clause of grant, the *habendum*, or *reddendum*.[4] A reservation is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources.[5] A reservation cannot be made to a stranger,[6] nor by parol.[7] The same rules of construction apply to a reservation as to an express grant.[8] Therefore a reservation may be void for uncertainty.[9] So where a deed excepts out of the conveyance one acre of land, and there is nothing in the exception or evidence to locate it upon any particular part of

[1] Ashcroft *v.* R. R. Co., 126 Mass. 196; 30 Am. Rep. 672; Roberts *v.* Robertson, 53 Vt. 690; 38 Am. Rep. 710; Eiseley *v.* Spooner, 23 Neb. 470; 8 Am. St. Rep. 128.

[2] Boone on Real Property, sec. 303; Pike *v.* Munroe, 36 Me. 309; 58 Am. Dec. 751.

[3] 4 Kent's Com. 468. But this technical rule is rejected in Minnesota. Thus where a deed conveyed "all that piece or parcel of land . . . . described as follows, to wit, being the northeast quarter of section 32, ... except forty acres in the southeast corner of the northeast quarter of said section 32," it was held that the deed did not convey the forty excepted, but whatever title the grantors had thereto remained in them as if the deed had not been made: Babcock *v.* Latterner, 30 Minn. 417.

[4] Stambaugh *v.* Hallobaugh, 10 Serg. & R. 362.

[5] Moulton *v.* Faught, 41 Me. 298.

[6] Hornbeck *v.* Westbrook, 9 Johns. 73.

[7] Wintermute *v.* Light, 46 Barb. 278; Turner *v.* Cool, 23 Ind. 56; 85 Am. Dec. 449; Gibbons *v.* Dillingham, 11 Ark. 9.

[8] Ashcroft *v.* R. R. Co., 126 Mass. 196; 30 Am. Rep. 672.

[9] Stambaugh *v.* Hollabaugh, 10 Serg. & R. 362.

the tract, the exception is void for uncertainty, and the grantee takes the entire tract.[1] Where there is a reservation or exception in a deed, it is to be construed most strongly against the grantor, and when the grantor asserts a reservation, the *onus* of showing it is upon him.[2] But if the intention of the parties can be fairly ascertained from the instrument, such intention will govern.[3] The invalidity of an attempted reservation for uncertainty does not necessarily vitiate the grant.[4] An exception out of a grant includes all that is necessary to the enjoyment of the thing excepted.[5]

The words "right to use and occupy," in the reservation in a deed, import a general right in the grantors to use and occupy, either by themselves or others, limited only by the implied legal duty to occupy in a prudent manner.[6] A deed of land to A, her heirs and assigns forever, in consideration of love, good-will, and affection, reserving the use of the lands during the grantor's natural life, conveys the fee *in præsenti*, subject to the life estate.[7] A grant of land and all the buildings thereon "except the brick factory" does not pass the land on which the factory stands, nor the water privilege appurtenant thereto.[8]

ILLUSTRATIONS.—A warranty deed was conditioned for a reservation of all the grantor's right, title, and interest for his life. *Held*, valid: *Graves* v. *Atwood*, 52 Conn. 512; 52 Am. Rep. 610. A deed reserved the right to cut and remove timber, "at any and all times, also the right of ingress and egress at any and all times, for the space of twelve years from the date above written, for the purpose so as aforesaid." *Held*, that the right of entry and of property ceases with the twelve years:

[1] Mooney *v.* Cooledge, 30 Ark. 640.
[2] Grubb *v.* Grubb, 101 Pa. St. 11; Jackson *v.* Hudson, 3 Johns. 375; 3 Am. Dec. 500; Jackson *v.* Gardiner, 8 Johns. 394; Wiley *v.* Sirdorus, 41 Iowa, 224.
[3] Wiley *v.* Sirdorus, 41 Iowa, 224.
[4] Baldwin *v.* Winslow, 2 Minn. 213.
[5] Allen *v.* Scott, 21 Pick. 25; 32 Am. Dec. 238; Rich *v.* Zeilsdorff, 22 Wis. 544; 99 Am. Dec. 81.
[6] Cooney *v.* Hayes, 40 Vt. 478; 94 Am. Dec. 425; Benhain *v.* Minor, 38 Conn. 252.
[7] Cribb *v.* Rogers, 12 S. C. 564; 32 Am. Rep. 511.
[8] Allen *v.* Scott, 21 Pick. 25; 32 Am. Dec. 238.

Saltonstall v. *Little*, 90 Pa. St. 422; 35 Am. Rep. 683. A deed of lands reserved the timber, the grantee stipulating that the grantor should have two years to remove it. *Held*, that it might be removed after that time: *Irons* v. *Webb*, 41 N. J. L. 203; 32 Am. Rep. 193. A deed contained a specific description of land conveyed, and contained this clause: "Said J. C. Roberts reserving lots sold Nos. 1, 2, 3, 32, 33." The two last had not been sold. *Held*, that they did not pass, the clause being an exception: *Roberts* v. *Robertson*, 53 Vt. 690; 38 Am. Rep. 710. Land was conveyed by deed, "saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as has been lawfully taken for a public road." *Held*, that the fee in the soil of the road, and not merely an easement, was reserved to the grantor: *Munn* v. *Worrall*, 53 N. Y. 44; 13 Am. Rep. 470. A and B were co-tenants of a passway. A sold his portion thereof, and in the deed attempted to reserve to himself the right to pass and repass through said passway into and upon adjoining land. *Held*, that such reservation or exception was void, and that the other co-tenant might at all times so treat it: *Marshall* v. *Trumbull*, 28 Conn. 183; 73 Am. Dec. 667. A deed to a railroad company contained this clause: "Reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company." *Held*, to confer on the grantor a new right not previously vested in him, operative as a reservation, and not as an exception, and vesting only an estate for life: *Ashcroft* v. *Eastern Railroad Company*, 126 Mass. 196; 30 Am. Rep. 672. A warranty deed granted a parallelogram of land nine chains and ninety-six links long by five chains and two links wide, "containing five acres, ... reserving from said grant a strip thirty-three feet in width on the south side of said tract for a public street." *Held*, that the fee of the thirty-three-feet strip passed to the grantee: *Elliot* v. *Small*, 35 Minn. 396; 59 Am. Rep. 329.

§ 2294. Covenants in Deeds—In General.—A covenant is an agreement under seal between two or more parties whose names are therein stated, by which some of them engage with the others, or some of them, that some act has or has not been done, or that it shall or shall not be done.[1] A covenant is either express or implied.[2] How-

[1] De Bolle *v.* Ins. Co., 4 Whart. 68; 33 Am. Dec. 38.

[2] 1 Bouv. Law Dict. 403.

ever absurd or improbable a covenant may be, an action may be maintained for a breach thereof, unless it was not within the range of possibility.[1] Non-performance can be excused only by showing that its performance is unlawful, or has been rendered impossible by the intervention of causes beyond human control.[2] It is not excused by the fact that subsequent lawful act of third persons have rendered it impossible.[3] Any words sufficiently showing the intention of the parties will make an express covenant; and it is not essential that the word "covenant" itself should be used for this purpose.[4] Although a deed contains express covenants, other covenants may still be implied at common law;[5] but an express covenant will qualify the generality of an implied covenant, and restrain it so that it shall not be held broader than the express covenant.[6] Where officers or persons in a representative capacity, in executing deeds or leases, use words from which implied covenants would rise against individuals, they are not bound by such, but are only concluded by express covenants.[7] Covenants are dependent or independent. He who covenants to do a particular thing is liable without any act on the part of the covenantee, unless the act of the latter is required to enable the former to comply with the covenant.[8] But where acts are to be done simultaneously, neither party to the covenant can recover without showing a performance, or an offer to perform, on his part.[9] The avowed inability of a defend-

[1] Beebe *v.* Johnson, 19 Wend. 500; 32 Am. Dec. 519. See *post*, Performance of Contracts.

[2] Morrow *v.* Campbell, 7 Port. 41; 31 Am. Dec. 704.

[3] Reid *v.* Edwards, 7 Port. 508; 31 Am. Dec. 721.

[4] Marshall *v.* Craig, 1 Bibb, 379; 4 Am. Dec. 647; Randel *v.* Canal Co., 1 Harr. (Del.) 151; Lovering *v.* Lovering, 13 N. H. 513; Jackson *v.* Stewart, 20 Johns. 85; Bull *v.* Follett, 5 Cow. 170.

[5] Roebuck *v.* Dupuy, 2 Ala. 535; Morris *v.* Harris, 9 Gill, 27; Funk *v.* Voneida, 11 Serg. & R. 109; 14 Am. Dec. 617; Sumner *v.* Williams, 8 Mass. 201; 5 Am. Dec. 83.

[6] Crouch *v.* Fowle, 9 N. H. 219; 32 Am. Dec. 350; Lynch *v.* Onondaga Salt Co., 64 Barb. 558.

[7] Webster *v.* Conley, 46 Ill. 13; 92 Am. Dec. 234.

[8] Rector *v.* Purdy, 1 Mo. 186; 13 Am. Dec. 494.

[9] Bean *v.* Atwater, 4 Conn. 3; 10 Am. Dec. 91; Greene *v.* Linton, 7 Port. 133; 31 Am. Dec. 707.

ant to perform, when an offer of performance is made by plaintiff, is sufficient to dispense with all subsequent formalities on the part of the plaintiff; but such avowal has no retroactive effect; nor will it cure defects in what plaintiff has already done, nor excuse him from showing both a willingness and an ability to perform in accordance with the contract.[1] Covenants are independent if by their terms the time of performance of one is so fixed that it is to happen or may happen before the performance of the other.[2] In an action on a covenant to be performed on a particular day, no demand need be alleged.[3] Breach of covenant may be assigned generally by negativing the words of the covenant.[4] "Full covenants" are covenants for seisin, for right to convey, against encumbrances, for quiet enjoyment, for further assurance and of warranty.[5] A deed good in form only is not a sufficient compliance with the covenant to make "a good and perfect deed." Good title is necessary to make "a good and perfect deed."[6] A contract "to make a warranty deed free and clear of all encumbrances" is not satisfied by a deed containing covenants of general warranty and freedom from encumbrances, unless the grantor has at the time a perfect and unencumbered title.[7] A contract by three to convey land with warranty is not complied with by a conveyance with warranty by one of the three warrantors, and a release or quitclaim deed from the other two.[8]

§ 2295. Construction of Covenants.—A covenant should be construed reasonably, according to the sense of the

[1] Hawley *v.* Mason, 9 Dana, 32; 33 Am. Dec. 522.
[2] Sayre *v.* Craig, 4 Ark, 10; 37 Am. Dec. 757; Bowen *v.* Bailey, 42 Miss. 405; 2 Am. Rep. 601. *Contra*, Robinson *v.* Harbour, 42 Miss. 797; 2 Am. Rep. 671.
[3] Rector *v.* Purdy, 1 Mo. 186; 13 Am. Dec. 494.
[4] Bacon *v.* Lincoln, 4 Cush. 210; 50 Am. Dec. 765.
[5] 4 Kent's Com. 471; Wilson *v.* Wood, 17 N. J. Eq. 216; 88 Am. Dec. 231.
[6] Feemster *v.* May, 13 Smedes & M. 275; 53 Am. Dec. 83.
[7] Porter *v.* Noyes, 2 Me. 22; 11 Am. Dec. 30.
[8] Lawrence *v.* Parker, 1 Mass. 191; 2 Am. Dec. 10.

words employed,[1] and so as to effectuate the intention of the parties as ascertained from the whole deed, if agreeable to the rules of law.[2] Being part of a deed, it is subject to the same rules of construction as the deed, and should be so expounded as to give effect to the actual intent of the parties;[3] so that construction is to be preferred which renders the whole covenant operative.[4] Express covenants are construed more strictly than implied ones,[5] and more strongly against the covenantor, and most favorably to the covenantee.[6]

§ 2296. Covenant of Seisin. — The covenant for seisin is that whereby the grantor covenants with the grantee that he, the grantor, has the very estate, both in quantity and quality, which he professes to convey.[7] In England and some of the states a covenant of "seisin" or "lawful seisin" is a covenant that the grantor is seised of an indefeasible estate;[8] but other states hold that this covenant is satisfied if the grantor has an actual seisin, claiming a fee, although his title was acquired tortiously, and is defeasible.[9] It extends only to a title existing in a third person, and not to one in the grantee.[10] In most of the states it is held that there is a breach of the covenant for seisin, if at all, as soon as the deed is executed; and that the right of action for damages arising from the breach

[1] Pavey *v.* Burch, 3 Mo. 447; 26 Am. Dec. 682; Killian *v.* Harshan, 7 Ired. 497. And see Rogers *v.* Danforth, 9 N. J. Eq. 289; Toms *v.* Wilson, 4 Best & S. 442.

[2] Sweet *v.* Brown, 12 Met. 175; 45 Am. Dec. 243.

[3] Watchman *v.* Crook, 5 Gill & J. 239; Ludlow *v.* McCrea, 1 Wend. 228; Marvin *v.* Stone, 2 Cow. 781; Schoenberger *v.* Hoy, 40 Pa. St. 132; Wadlington *v.* Hill, 18 Miss. 560.

[4] Randel *v.* Canal Co., 1 Harr. (Del.) 154.

[5] Shubrick *v.* Salmond, 3 Burr. 1639.

[6] Hookes *v.* Swain, Lev. 102; Sid. 151; Randel *v.* Chesapeake etc. Canal Co., 1 Harr. (Del.) 154; Gifford *v.* First Presb. Soc., 56 Barb. 114; Warde *v.* Warde, 16 Beav. 103.

[7] Howell *v.* Richards, 11 East, 641; Pecare *v.* Chouteau, 15 Mo. 527; Greenby *v.* Wilcocks, 2 Johns. 1; 3 Am. Dec. 379.

[8] Young *v.* Raincock, 7 Com. B. 310; Mills *v.* Catlin, 22 Vt. 106; Parker *v.* Brown, 15 N. H. 186; Lockwood *v.* Sturdevant, 6 Conn. 385.

[9] Raymond *v.* Raymond, 10 Cush. 134; Follett *v.* Grant, 5 Allen, 175; Wilson *v.* Widenham, 51 Me. 567; Watts *v.* Parker, 27 Ill. 229.

[10] Fitch *v.* Baldwin, 17 Johns. 161.

cannot pass to a subsequent assignee.[1] In others, if there is an actual seisin, the breach is not final and total in the first instance, but is postponed until the grantee, or those claiming under him, are disturbed in their seisin, either actually or constructively; and the claim for damages will pass by a conveyance to a subsequent grantee.[2]

The covenant is broken if the grantor has no possession of the land, either by himself or another;[3] or if there is an existing title paramount;[4] or an outstanding estate for life;[5] or if there be an adverse possession of a part by a stranger;[6] or a concurrent seisin of another as tenant in common;[7] or if no such land exists as that purported to be conveyed;[8] or even if there be a material deficiency in the amount of land;[9] or if the grantor has only an estate-tail;[10] or if the grantor at the time of the conveyance was not the owner of the things affixed to the

[1] Greenby *v.* Wilcocks, 2 Johns. 2; 3 Am. Dec. 379; Rawle on Covenants, 319; Salmon *v.* Vallejo, 41 Cal. 481; Wilson *v.* Cochran, 46 Pa. St. 229; Fowler *v.* Poling, 2 Barb. 300; Pollard *v.* Dwight, 4 Cranch, 430; Lot *v.* Thomas, 2 N. J. L. 407; 2 Am. Dec. 354; Redwine *v.* Brown, 10 Ga. 314; Marston *v.* Hobbs, 2 Mass. 439; 3 Am. Dec. 61; Wead *v.* Larkin, 54 Ill. 489; 5 Am. Rep. 149; Slater *v.* Rawson, 1 Met. 450; 6 Met. 439; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; Hamilton *v.* Wilson, 4 Johns. 72; 4 Am. Dec. 253; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139; Gilbert *v.* Bulkley, 5 Conn. 262; 13 Am. Dec. 57.

[2] Backus *v.* McCoy, 3 Ohio, 211; 17 Am. Dec. 585; Devore *v.* Sunderland, 17 Ohio, 60; 49 Am. Dec. 442; Great Western Stock Co. *v.* Saas, 24 Ohio St. 542; Martin *v.* Baker, 5 Blackf. 232; McCrady *v.* Brisbane, 1 Nott & McC. 104; 9 Am. Dec. 676; Dickson *v.* Desire, 23 Mo. 152; Richard *v.* Bent, 59 Ill. 38; 14 Am. Rep. 1. This is the English rule also: Kingdon *v.* Nottle, 1 Maule & S. 355; 4 Maule & S. 53.

[3] Colt *v.* McReynolds, 2 Robt. 655; Slater *v.* Ranson, 1 Met. 450; Allen *v.* Little, 36 Me. 170; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139; Salmon *v.* Vallejo, 41 Cal. 481; Dickinson *v.* Hoomes, 8 Gratt. 397; Dale *v.* Shively, 8 Kan. 276.

[4] Cochrell *v.* Proctor, 65 Mo. 41; Pringle *v.* Witten, 1 Bay, 256; 1 Am. Dec. 612; Lot *v.* Thomas, 2 N. J. L. 407; 2 Am. Dec. 354; Pate *v.* Mitchell, 23 Ark. 590; 79 Am. Dec. 114; Mitchell *v.* Hazen, 4 Conn. 495; 10 Am. Dec. 167; Westbrook *v.* McMillan, 1 Hill, 317; 26 Am. Dec. 187; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; Dickson *v.* Desire, 23 Mo. 151; 66 Am. Dec. 661.

[5] Wilder *v.* Ireland, 8 Jones, 90; Mills *v.* Catlin, 22 Vt. 106.

[6] Sedgwick *v.* Hollenback, 7 Johns. 376.

[7] Downer *v.* Smith, 38 Vt. 464; Wheeler *v.* Hatch, 12 Me. 389.

[8] Bacon *v.* Lincoln, 4 Cush. 212; 50 Am. Dec. 765; Basford *v.* Pearson, 9 Allen, 387; 85 Am. Dec. 764.

[9] Pringle *v.* Witten, 1 Bay, 256.

[10] Comstock *v.* Comstock, 23 Conn. 352.

freehold as pass on a conveyance of it;[1] or if there was a tax deed outstanding against it.[2]

But the covenant is not broken by the existence upon the land of easements or encumbrances not affecting the technical seisin;[3] as, for example, a railroad;[4] or a public highway;[5] or an outstanding mortgage;[6] or a judgment;[7] or a right of dower;[8] or of a right to erect a wall on the granted premises;[9] or by the existence of a subsequent written contract from a former owner for the conveyance of the legal estate to another person than the grantee;[10] or by proof that the covenantor had no title in fee-simple.[11]

The burden of proof in an action for breach of covenant of seisin is upon the defendant who answers that he was well seised.[12] Chancery will grant relief to a defrauded vendee upon a covenant of seisin in the deed if the vendor is utterly insolvent.[13]

§ 2297. Covenant of Right to Convey.—The covenant for right to convey is synonymous with the covenant of seisin, and the same fact, i. e., the seisin of the grantor, which will support the latter will support the former.[14] Such a covenant is also—like the covenant for seisin—

[1] Mott *v.* Palmer, 1 N. Y. 572; West *v.* Stewart, 7 Pa. St. 122; Burke *v.* Nichols, 1 Abb. App. 260; Tift *v.* Horton, 53 N. Y. 381; 13 Am. Rep. 537; Ritchmyer *v.* Morse, 3 Keyes, 349; 37 How. Pr. 388; Loughran *v.* Ross, 45 N. Y. 792; 6 Am. Rep. 173.

[2] Vorhis *v.* Forsythe, 4 Biss. 409.

[3] Reasoner *v.* Edmundson, 5 Ind. 394; Vaughn *v.* Stuzaker, 16 Ind. 340; Stockwell *v.* Couillard, 129 Mass. 231; Lewis *v.* Jones, 1 Pa. St. 336; 44 Am. Dec. 138.

[4] Kellogg *v.* Malin, 50 Mo. 496; 11 Am. Rep. 426; Smith *v.* Hughes, 50 Wis. 620.

[5] Whitbeck *v.* Cooke, 15 Johns. 483; 8 Am. Dec. 272; Vaughn *v.* Stuzaker, 16 Ind. 340.

[6] Sedgwick *v.* Hollenback, 7 Johns. 380; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139.

[7] Sedgwick *v.* Hollenback, 7 Johns. 380.

[8] Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139; Tuite *v.* Miller, 10 Ohio, 383; Lewis *v.* Lewis, 5 Rich. 12.

[9] Blondeau *v.* Sheridan, 81 Mo. 545.

[10] Seckler *v.* Fox, 51 Mich. 92.

[11] Axtel *v.* Chase, 77 Ind. 74.

[12] Mecklem *v.* Blake, 16 Wis. 102; 82 Am. Dec. 707.

[13] Ingram *v.* Morgan, 4 Humph. 66; 40 Am. Dec. 626.

[14] Marston *v.* Hobbs, 2 Mass. 437; 3 Am. Dec. 61; Rickert *v.* Snyder, 9 Wend. 421; Raymond *v.* Raymond, 10 Cush. 140.

broken at the time of the conveyance, and cannot be taken advantage of by an heir or assignee.[1]

§ 2298. **Covenant against Encumbrances.**—The covenant against encumbrances is—like that of seisin and of title—broken as soon as made, and the breach cannot be taken advantage of by an assignee.[2] A warranty against encumbrances was not implied at common law from the use of the words "grant, bargain, and sell" in a conveyance.[3] An action for breach of the covenant against encumbrances is barred by the subsequent discharge in bankruptcy of the covenantor.[4] It is no defense that the covenantee knew of the encumbrance at the time of the conveyance.[5]

It has been laid down that "every right to and interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance, is to be deemed in law an encumbrance."[6] An actual eviction is not essential.[7]

The following have been held to be encumbrances within the covenant against encumbrances, and therefore a breach of that covenant, viz.: An outstanding mortgage, unless the premises are declared to be subject thereto;[8] a

[1] Chapman *v.* Holmes, 11 N. J. L. 20; Hamilton *v.* Wilson, 4 Johns. 72; 4 Am. Dec. 253; Swasey *v.* Brooks, 30 Vt. 692; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 339. *Contra* in Illinois: Richard *v.* Brent, 59 Ill. 38; 14 Am. Rep. 1.

[2] Clark *v.* Swift, 3 Met. 390; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; Funk *v.* Voneida, 11 Serg. & R. 110; 14 Am. Dec. 617; Andrews *v.* Dawson, 17 N. H. 413; 43 Am. Dec. 606. *Contra*, Richard *v.* Bent, 59 Ill. 38; 14 Am. Rep. 1; Foote *v.* Burnet, 10 Ohio, 317; 36 Am. Dec. 90. An action on a covenant against encumbrances broken during the lifetime of the ancestors should be brought by the administrator, not the heir: Frink *v.* Bellis, 33 Ind. 135; 5 Am. Rep. 193.

[3] Gee *v.* Pharr, 5 Ala. 586; 39 Am. Dec. 339.

[4] Reed *v.* Pierce, 36 Me. 455; 58 Am. Dec. 761.

[5] Snyder *v.* Lane, 10 Ind. 424; Hovey *v.* Newton, 7 Pick. 29; Funk *v.* Voneida, 11 Serg. & R. 110; 14 Am. Dec. 617; Beach *v.* Miller, 51 Ill. 206; 2 Am. Rep. 290. *Contra*, Desvergers *v.* Willis, 56 Ga. 515; 2 Am. Rep. 56.

[6] Parson, C. J., in Prescott *v.* Trueman, 4 Mass. 627; 3 Am. Dec. 246.

[7] Share *v.* Anderson, 7 Serg. &. R. 43; 10 Am. Dec. 421.

[8] Reed *v.* Pierce, 36 Me. 455; 58 Am. Dec. 761; Freeman *v.* Foster, 55 Me. 508; Brooks *v.* Moody, 25 Ark. 452.

judgment;[1] an attachment;[2] a claim of dower;[3] taxes;[4] municipal assessments;[5] an outstanding lease;[6] or a paramount title;[7] or where the estate is subject to a covenant that no ardent spirits shall be sold thereon;[8] or that a division fence shall be maintained;[9] or subject to a restriction against building, except in a specified way.[10] A right to an easement or servitude of any kind in the land in a third person is an encumbrance;[11] as, for example, a right to pass over the land and take water from a spring;[12] or a right to cut and maintain a drain or other watercourse on the land;[13] or to cut trees;[14] or the right of way of a railroad over the land;[15] or a highway;[16] or a right to maintain a party-wall on the land;[17] or a right to flow land.[18]

[1] Jenkins *v.* Hopkins, 8 Pick. 346.

[2] Kelsey *v.* Remer, 43 Conn. 129; 21 Am. Rep. 638.

[3] Porter *v.* Noyes, 2 Me. 22; 11 Am. Dec. 30; Walker *v.* Deaver, 79 Mo. 664; Bigelow *v.* Hubbard, 97 Mass. 195; McAlpin *v.* Woodruff, 11 Ohio St. 120; Runnells *v.* Webber, 59 Me. 488. But not a possibility of dower: Bostwick *v.* Williams, 36 Ill. 65; 85 Am. Dec. 385.

[4] Fuller *v.* Jolette, 9 Biss. 296; Peters *v.* Myers, 22 Wis. 602; Long *v.* Moler, 5 Ohio St. 271; Rundell *v.* Lakey, 40 N. Y. 514; Ingalls *v.* Cooke, 21 Iowa, 560; Mitchell *v.* Pillsbury, 5 Wis. 407; Plowman *v.* Williams, 6 Lea, 268. And from the time they are assessed; not from the date of the delivery of the tax bill: Cochran *v.* Guild, 106 Mass. 29; 8 Am. Rep. 296; Rundell *v.* Lakey, 40 N. Y. 513. *Contra*, Kern *v.* Towsley, 45 Barb. 150.

[5] The liability to assessments for the opening of a street was held to be a breach of the covenant against encumbrances in a deed executed after the street was opened, though before any assessments were made: Fagan *v.* Cadmus, 46 N. J. L. 441; Cadmus *v.* Fagan, 47 N. J. L. 549.

[6] Grice *v.* Scarborough, 2 Spear, 649; 43 Am. Dec. 391; Batchelder *v.* Sturgis, 3 Cush. 201; Porter *v.* Bradley, 7 R. I. 538; Pease *v.* Christ, 31 N. Y. 141; Cross *v.* Noble, 67 Pa. St. 77; Fritz *v.* Persey, 31 Minn. 368.

[7] Prescott *v.* Trueman, 4 Mass. 627; 3 Am. Dec. 246.

[8] Hatcher *v.* Andrews, 5 Bush, 561.

[9] Burbank *v.* Pillsbury, 48 N. H. 475; 97 Am. Dec. 633.

[10] Roberts *v.* Levy, 3 Abb. Pr., N. S., 311.

[11] Kutz *v.* McCune, 22 Wis. 628; 99 Am. Dec. 85; Brooks *v.* Curtis, 4 Lans. 283; 50 N. Y. 639; 10 Am. Rep. 545; McMullin *v.* Wooley, 2 Lans. 394; Giles *v.* Dugro, 1 Duer, 331; Lamb *v.* Danforth, 59 Me. 322; 8 Am. Rep. 426.

[12] Harlow *v.* Thomas, 15 Pick. 68.

[13] Smith *v.* Sprague, 40 Vt. 43; Prescott *v.* White, 21 Pick. 341; 32 Am. Dec. 266; Ginn *v.* Hancock, 31 Me. 42; Lamb *v.* Danforth, 59 Me. 323; 8 Am. Rep. 426.

[14] Cathcart *v.* Bowman, 5 Pa. St. 319; Spurr *v.* Andrew, 6 Allen, 420.

[15] Beach *v.* Miller, 51 Ill. 206; 2 Am. Rep. 290; Kellogg *v.* Malin, 50 Mo. 496; 11 Am. Rep. 426; Burk *v.* Hill, 48 Ind. 52; 17 Am. Rep. 731.

[16] Burk *v.* Hill, 48 Ind. 52; 17 Am. Rep. 731; Pritchard *v.* Atkinson, 3 N. H. 335; Kellogg *v.* Ingersoll, 2 Mass. 101; Parish *v.* Whitney, 3 Gray, 516; Haynes *v.* Young, 36 Me. 557. *Contra*, Wilson *v.* Cochran, 46 Pa. St. 229; Whitbeck *v.* Cook, 15 Johns. 483; 8 Am. Dec. 272.

[17] Mackey *v.* Harmon, 34 Minn. 168.

[18] Patterson *v.* Sweet, 3 Ill. App. 550.

But the covenant is not broken by a tax or assessment the amount of which has not been ascertained or determined;[1] or because a portion of the land conveyed had been illegally sold for taxes;[2] nor by the existence of a public road over the land, known to the purchasers at the time of the purchase;[3] nor by the right of a mill-owner to go upon the land and clear the channel of a stream;[4] or a mortgage which the covenantee is bound to pay;[5] or a right to flow the land by a mill-pond;[6] or by a condition that a city lot shall not be used as a cemetery;[7] or by giving an encumbrance on the property after covenanting it to be free from encumbrance.[8]

§ 2299. Covenant for Quiet Enjoyment.—By the covenant for quiet enjoyment, the grantor covenants that the grantee shall hold and enjoy the premises granted without any disturbance on the part of either himself or others.[9] To constitute this covenant, no precise or technical language is required; any words which amount to or import an agreement to that effect are sufficient.[10] Such a covenant which appears in the *habendum* clause, although not in its proper place, will be given full operation.[11] The covenant extends to the possession, not to the title, of the land, and in order to establish a breach of the covenant, a lawful eviction in some form, either actual or constructive, must be shown.[12] The grantee is bound to act

[1] Dowdney *v.* Mayor, 54 N. Y. 186; Barlow *v.* St. Nicholas Bank, 63 N. Y. 397; 20 Am. Rep. 547.

[2] Cummings *v.* Holt, 56 Vt. 384.

[3] Desvergers *v.* Willis, 56 Ga. 515; 21 Am. Rep. 289; Jordan *v.* Eve, 31 Gratt. 1; Cincinnati *v.* Brochman, 35 Ohio St. 289; Patton *v.* Quarrier, 18 W. Va. 447; Deacons *v.* Doyle, 75 Va. 258.

[4] Prescott *v.* Williams, 5 Met. 429; 39 Am. Dec. 688.

[5] Watts *v.* Wellman, 2 N. H. 458.

[6] Kutz *v.* McCune, 22 Wis. 628; 99 Am. Dec. 55.

[7] Floyd *v.* Clark, 7 Abb. N. C. 136.

[8] Foster *v.* Woodward, 141 Mass. 160.

[9] Boone on Real Property, sec. 314.

[10] Midgett *v.* Brooks, 12 Ired. 145; 55 Am. Dec. 405.

[11] Midgett *v.* Brooks, 12 Ired. 145; 55 Am. Dec. 405.

[12] Whitbeck *v.* Cook, 15 Johns. 483; 8 Am. Dec. 272; Greenvault *v.* Davis, 4 Hill, 645; Moore *v.* Frankenfield, 25 Minn. 540; Rea *v.* Minkler, 5 Lans. 197; Fowler *v.* Poling, 6 Barb. 170; Russ *v.* Steele, 40 Vt. 315; Murphy *v.* Price, 48 Mo. 250; Pringle *v.* Witten, 1 Bay, 256; 1 Am. Dec. 612; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139.

in good faith towards his grantor, and make the most of whatever title he has acquired; and if he yields without a contest or resistance, the burden rests upon him to show that the title was paramount, and that he yielded the possession to the pressure of that title.[1] The covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title, whether that title be established by judgment or not.[2] So the covenant is broken where the land is in the possession of a stranger under paramount title, who keeps out the grantee;[3] or where the grantor himself enters tortiously, and without title;[4] or where the title and possession is disturbed by a suit in equity;[5] or where a lower owner, by virtue of a paramount right, raises his dam, and floods the land so conveyed, this is a breach of the covenant.[6]

But the covenant is not broken where the disturbance extends only to a particular mode of enjoyment of the land, and not to the title or possession;[7] nor by wrongful and unlawful evictions by third persons;[8] nor under rights acquired subsequently to the conveyance;[9] nor by the acts of the state or sovereign power.[10]

[1] Moore *v.* Vail, 17 Ill. 190; Thomas *v.* Stickle, 32 Iowa, 76; Peck *v.* Hensley, 20 Tex. 678; Stone *v.* Hooker, 9 Cow. 157; Hunt *v.* Amidon, 4 Hill, 345; 40 Am. Dec. 283.

[2] Clark *v.* Lineberger, 44 Ind. 223; McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; Stewart *v.* Drake, 9 N. J. L. 141; Cowdrey *v.* Coit, 44 N. Y. 382; 4 Am. Rep. 690; Smith *v.* Shepard, 15 Pick. 147; 25 Am. Dec. 432; Home Life Ins. Co. *v.* Sherman, 46 N. Y. 370. And see Upton *v.* Townsend, 17 Com. B. 30; Adams *v.* Conover, 22 Hun, 424.

[3] Shattuck *v.* Lamb, 65 N. Y. 499; 22 Am. Rep. 656.

[4] Sedgwick *v.* Hollenback, 7 Johns. 376.

[5] Martin *v.* Martin, 1 Dev. 413; Calthorp *v.* Heyton, 2 Mod. 54; Andrews *v.* McCoy, 8 Ala. 920; 42 Am. Dec. 669.

[6] Scriver *v.* Smith, 100 N. Y. 471; 53 Am. Rep. 224.

[7] Dennett *v.* Atherton, L. R. 7 Q. B. 326.

[8] 2 Greenl. Cruise, 764; Rantin *v.* Robertson, 2 Strob. 366; Ellis *v.* Welch, 6 Mass. 250; 4 Am. Dec. 122; Surget *v.* Arighi, 11 Smedes & M. 37; 49 Am. Dec. 46. The complicity of the covenantor in the violence used must be shown, to render him liable: Jones *v.* Worley, 21 La. Ann. 404; Dudley *v.* Folliott, 3 Term Rep. 584.

[9] Ellis *v.* Welch, 6 Mass. 250; 4 Am. Dec. 122; Frost *v.* Ernst, 4 Whart. 85.

[10] Frost *v.* Ernst, 4 Whart. 86; Osborn *v.* Nicholson, 13 Wall. 655; Ellis *v.* Welch, 6 Mass. 246; 4 Am. Dec. 122.

§ 2300. Covenant for Further Assurance.—The covenant for further assurance binds the grantor to make such further assurances of the lands as the grantee shall lawfully and reasonably require.[1] Before the covenantee can bring his action for a breach, he must have drawn up such a one as called for, and notify the covenantor of it, and give him a reasonable time to examine it.[2] The request for further assurance must be made within a reasonable time.[3] Under such a covenant the grantor is bound to obtain the release of a mortgage.[4]

§ 2301. Covenant of Warranty.—The covenant of warranty is an undertaking by the warrantor that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, he will make compensation in money for the loss sustained by such failure of title.[5] A covenant to furnish a warranty deed means a deed with special warranty, and not a deed with general warranty and with covenant against encumbrances.[6] A contract to give a good and sufficient warranty deed of a certain individual's interest in a piece of land does not require a warranty that such person's title is perfect.[7] But it is not complied with by the mere giving of a warranty deed, where the grantor has no title or an imperfect title to the land.[8] At common law, the words "grant, bargain, sell," etc., do not imply a warranty of title.[9] But an express covenant of warranty in a deed does away with any implied covenant contained in the words "grant, bargain, and sell," the implied covenant

[1] 2 Greenl. Cruise, 767.
[2] Miller *v.* Parsons, 9 Johns. 336.
[3] Boone on Real Property, sec. 315.
[4] Colby *v.* Osgood, 29 Barb. 339.
[5] King *v.* Kerr, 5 Ohio, 154; 22 Am. Dec. 777.
[6] Withers *v.* Baird, 7 Watts, 227; 32 Am. Dec. 754.
[7] Babcock *v.* Wilson, 17 Me. 372; 35 Am. Dec. 263.
[8] Everson *v.* Kirtland, 4 Paige, 628; 27 Am. Dec. 91.
[9] Frost *v.* Raymond, 2 Caines, 188; 2 Am. Dec. 228; Rickets *v.* Dickens, 1 Murph. 348; 4 Am. Dec. 555; Allen *v.* Sayward, 5 Greenl. 227; 17 Am. Dec. 221.

being operative only where the parties have omitted to insert covenants in the instrument.[1]

Where the grantor acquires title after the conveyance with general warranty, the title thus acquired inures to the benefit of the grantee, and the grantee then has no right to elect whether or not to reject the title.[2] The covenant of warranty is personal in that the covenantee is not confined to the lands of the covenantor for compensation in case of a breach.[3] The duration of the warranty is co-extensive only with the estate to which it is annexed; and on a conveyance of an estate for life with warranty, the warranty becomes extinct on the death of the grantee.[4] Where the grantor, before any breach of the covenant, becomes reinvested with the seisin which he conveyed, the covenant is extinguished.[5] But where two convey with warranty, and the grantee reconveys to one of them with warranty, the first warranty is not extinguished.[6]

Unlike the covenant for quiet enjoyment, the covenant of warranty goes to the title as well as to the possession.[7] So the eviction, to be a breach of the covenant of warranty, must not only be of lawful right, but by paramount title.[8] The mere existence of a paramount title in another is not a breach of the covenant of warranty; in order to such breach, there must be some disturbance of the grantee's possession.[9] An eviction by process or

[1] Weems *v.* McCaughan, 7 Smedes & M. 422; 45 Am. Dec. 314.

[2] Baxter *v.* Bradbury, 20 Me. 260; 37 Am. Dec. 49; Williams *v.* Grey, 3 Me. 207; 14 Am. Dec. 234.

[3] 3 Washburn on Real Property, sec. 660.

[4] Rector *v.* Waugh, 17 Mo. 13; 57 Am. Dec. 251.

[5] Brown *v.* Metz, 33 Ill. 339; 85 Am. Dec. 277.

[6] Birney *v.* Hann, 3 A. K. Marsh. 322; 13 Am. Dec. 167.

[7] Williams *v.* Wetherbee, 1 Aiken, 233; Patton *v.* Kennedy, 1 A. K. Marsh. 389; 10 Am. Dec. 744; Fowler *v.* Poling, 6 Barb. 170.

[8] Rindskopf *v.* Farmers' etc. Ins. Co., 58 Barb. 36; King *v.* Kerr, 5 Ohio, 154; 22 Am. Dec. 777; Fowler *v.* Poling, 6 Barb. 165; Kellogg *v.* Platt, 33 N. J. L. 328; Kenney *v.* Norton, 10 Heisk. 384; Emerson *v.* Proprietors, 1 Mass. 464; 2 Am. Dec. 34; Booker *v.* Bell, 3 Bibb, 173; 6 Am. Dec. 641.

[9] Kent *v.* Welch, 7 Johns. 258; 5 Am. Dec. 266; Ferriss *v.* Harshea, 1 Mart. & Y. 48; 17 Am. Dec. 782; King *v.* Kerr, 5 Ohio, 154; 22 Am. Dec. 777;

judgment of law is not essential.[1] The party may voluntarily yield to a dispossession, without losing his remedy on the covenant, provided the title to which he yielded be good and paramount to that of his warrantor.[2] But he does so at his own peril, and in a suit against his warrantor the burden of proof rests upon the plaintiff.[3]

The following are breaches of the covenant: An eviction by legal process under a prior mortgage,[4] or under an unexpired term for years;[5] or a judgment in ejectment without actual eviction;[6] or a prevention of a legal entry by the grantee;[7] or the existence of an outstanding

Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; Hynson *v.* Dunn, 5 Ark. 395; 41 Am. Dec. 100; Scott *v.* Kirkendall, 88 Ill. 465; 30 Am. Rep. 562, the court saying: "The question is, whether there can be a recovery in an action of covenant for breach of covenant of warranty, in a case where the land concerned is and ever has been vacant and unoccupied, without showing more than an outstanding paramount title. The great current of authority is in favor of the negative of the proposition. It is common doctrine, and well established, generally, that the mere existence of a paramount legal title which has never been asserted cannot amount to a breach of this covenant. The covenantee or his assignee must be disturbed in the possession, actual or constructive; he must be evicted, or there be something equivalent thereto; and in the action the plaintiff must allege and prove an ouster or eviction by a paramount title. It is not necessary, however, that he should be evicted by legal process; it is enough that he has yielded the possession to the rightful owner; or the premises being vacant, that the rightful owner has taken possession: 3 Washburn on Real Property, 406; Sedgwick on Damages, 6th ed., *158; Greenvault *v.* Davis, 4 Hill, 643; St. John *v.* Palmer, 5 Hill, 599; Day *v.* Chism, 10 Wheat. 449; Marston *v.* Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Sprague *v.* Baker, 17 Mass. 586; Jenkins *v.* Hopkins, 8 Pick. 346; Moore *v.* Vail, 17 Ill. 185; Matteson *v.* Vaughn, 38 Mich. 373. And see note to Foote *v.* Burnet, 10 Ohio, 319, for a collection of cases as to what amounts to eviction. This covenant of warranty is regarded as, in effect, a covenant for quiet enjoyment, and can only be broken by something equivalent to an eviction or disturbance of possession by the grantee: 3 Washburn on Real Property, 398. What will be held as equivalent to eviction, authorities may differ concerning; but there is a general concurrence that something more than the mere existence of a paramount title is necessary to constitute a breach of the covenant of warranty."

[1] Greenvault *v.* Davis, 4 Hill, 643; Patton *v.* Kennedy, 1 A. K. Marsh. 389; 10 Am. Dec. 744; Hanson *v.* Buckner, 4 Dana, 251; 29 Am. Dec. 401.

[2] Hamilton *v.* Cutts, 4 Mass. 352; 3 Am. Dec. 222; Mackey *v.* Collins, 2 Nott & Mc. 186; 10 Am. Dec. 586; Donnell *v.* Thompson, 10 Me. 170; 25 Am. Dec. 216.

[3] Hamilton *v.* Cutts, 4 Mass. 352; 3 Am. Dec. 222; Smith *v.* Shepard, 15 Pick. 147; 25 Am. Dec. 432; Crance *v.* Collenbaugh, 47 Ind. 256; Dennis *v.* Heath, 11 Smedes & M. 206; 49 Am. Dec. 51.

[4] Tufts *v.* Adams, 8 Pick. 547.

[5] Rickert *v.* Snyder, 9 Wend. 416.

[6] Drury *v.* Shumway, 1 D. Chip. 110; 1 Am. Dec. 704; Williams *v.* Wetherbee, 1 Aiken, 233; Cummins *v.* Kennedy, 3 Litt. 118; 14 Am. Dec. 45.

[7] Caldwell *v.* Kirkpatrick, 6 Ala. 60; 41 Am. Dec. 36.

right of way over the whole or a part of the premises;[1] or a recovery by a stranger of a permanent use of a part of the land as a private passage-way;[2] or the impossibility of a grantee's obtaining possession of the land conveyed;[3] or suffering taxes to remain unpaid after giving a warranty deed.[4] But the covenant is not broken by the acts of mere strangers;[5] or the opening of a highway over the land by the power of eminent domain;[6] or by the existence of encumbrances known to the grantee at the time of sale, and which he agreed to pay off as a part of the consideration;[7] or the entry of a decree against the grantee in the alternative, as "unless he pay," etc.;[8] or by a personal decree for a sum in full of dower to be enforced by execution;[9] or that the grantor held the land on a condition to erect a house thereon within a certain time.[10]

§ 2302. Other Covenants.—A covenant to give a "lawful deed of conveyance" means a deed conveying a lawful or good title.[11] A covenant to execute and deliver a good and sufficient deed in fee-simple with warranty of title not only means that a party will execute such a deed containing a warranty of title, but that he had the power to give such a deed as would carry with it an indefeasible title to the land conveyed.[12] A tender of vendor's own deed without procuring his wife's relinquishment of dower is not a satisfaction of his covenant to make the vendee "a good and perfect deed."[13] A warranty of "indisputable and satisfactory title" by the grantor is satisfied if his title is

[1] Russ v. Steele, 40 Vt. 310.
[2] Butt v. Riffe, 78 Ky. 352.
[3] Park v. Bates, 12 Vt. 381; 36 Am. Dec. 347.
[4] Rinehart v. Rinehart, 91 Ind. 89.
[5] Norton v. Jackson, 5 Cal. 263; Hale v. New Orleans, 13 La. Ann. 499; Surget v. Arighi, 11 Smedes & M. 87; 49 Am. Dec. 46.
[6] Peck v. Jones, 70 Pa. St. 83.
[7] Pitman v. Conner, 27 Ind. 337; Allen v. Lee, 1 Ind. 58; 48 Am. Dec. 352; Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504.
[8] Kirkendall v. Keogh, 2 Ill. App. 492.
[9] Johnson v. Nyce, 17 Ohio, 66; 49 Am. Dec. 444.
[10] Estabrook v. Smith, 6 Gray, 572; 66 Am. Dec. 445.
[11] Dearth v. Williamson, 2 Serg. & R. 498; 7 Am. Dec. 652.
[12] Tarwater v. Davis, 7 Ark. 153; 44 Am. Dec. 534.
[13] Greenwood v. Ligon, 10 Smedes & M. 615; 48 Am. Dec. 775.

good and valid.[1] A quitclaim deed is performance of contract to give good title if the vendor had the title.[2] An agreement by a purchaser of land to assume and pay an encumbrance implies, not a covenant against liability, but at most a covenant of indemnity against damage resulting from a breach of the agreement. In a suit, therefore, damage must be proved.[3] A person who covenants to convey as soon as he gets the title from another must show that he has attempted to attain that title.[4] A warranty of the quantity of land conveyed cannot be proved by parol evidence.[5] One accepting a deed in good faith which does not embrace the identical lands described in the covenant cannot afterwards dispute the same.[6]

A sealed agreement, for a valuable consideration, not to make a will to the prejudice of the rights of the covenantor's heirs in his estate is valid.[7] So is a covenant not to permit the owner of an adjoining tract of land to cut a ditch through the covenantor's premises.[8] But where a land-owner granted to an oil transportation company the exclusive right of way and privilege of laying and maintaining tubing for transporting oil through a tract of two thousand acres, it was held invalid as an unreasonable restraint of trade.[9]

§ 2303. Covenants Running with the Land.—Covenants which "run with the land" are those which so concern the land itself that their burden or their benefits are capable of running with it; and in the case of such covenants both the liability to perform them and the right to take advantage of them passes to the assignee of the

[1] Winter *v.* Stock, 29 Cal. 407; 89 Am. Dec. 57.
[2] Pugh *v.* Chesseldine, 11 Ohio, 109; 37 Am. Dec. 414.
[3] Selleck *v.* Griswold, 57 Wis. 291.
[4] Sproule *v.* Winant, 7 T. B. Mon. 195; 18 Am. Dec. 164.
[5] Cabot *v.* Christie, 42 Vt. 121; 1 Am. Rep. 313.
[6] Marshall *v.* Haney, 4 Md. 498; 59 Am. Dec. 92.
[7] Taylor *v.* Mitchell, 87 Pa. St. 518; 30 Am. Rep. 383.
[8] Jacobs *v.* Davis, 34 Md. 204.
[9] West Virginia Trans. Co. *v.* Ohio Pipe Line Co., 22 W. Va. 600; 46 Am. Rep. 527.

land,[1] and may be enforced by or against heirs, devisees, or alienees who claim under the seisin vested in the grantor.[2] For a covenant to run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.[3] Where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced against an assignee of the covenantor with notice.[4] It is an essential quality of a real covenant that it relate to the realty, having for its object something annexed to, or inherent in, or connected with land or other real property. A personal covenant does not bind the assignee of a covenantor, even though expressly named, but charges only the executor or administrator; and it makes no difference if such personal covenant is connected with real covenants so as to form one entire consideration.[5] A remote assignee may sue upon a covenant running with the land, whether or not he has taken from his immediate grantor with warranty. No intermediate grantor, though with warranty, can sue upon such covenant unless he has previously made good to his grantee his damages suffered by the breach of the covenant.[6] A tenant for life cannot sue upon a covenant of warranty in a prior deed in fee to one under whom he deraigns.[7] A covenantor cannot be subjected to different actions for the same breach of the same covenant brought by a number of subsequent grantees.[8] Only persons named in a deed-poll can recover on its covenants.[9]

[1] Spencer's Case, 5 Rep. 16; 1 Smith's Lead. Cas. 27.

[2] Spencer's Case, 5 Rep. 16; 1 Smith's Lead. Cas. 27. See Title Landlord a d Tenant.

[3] Wiggin's Ferry Co. v. R. R. Co., 94 Ill. 83.

[4] Norfleet v. Cromwell, 70 N. C. 634; 16 Am. Rep. 787.

[5] Morse v. Garner, 1 Strob. 514; 47 Am. Dec. 565.

[6] Markland v. Crump, 1 Dev. & B. 94; 27 Am. Dec. 230.

[7] St. Clair v. Williams, 7 Ohio, pt. 2, 110; 30 Am. Dec. 194.

[8] Wilson v. Taylor, 9 Ohio St. 595; 75 Am. Dec. 488.

[9] Lahy v. Holland, 8 Gill, 445; 50 Am. Dec. 705.

The covenants for quiet enjoyment, for further assurance, and of warranty run with the land.[1] And so do covenants by the grantee not to carry on a particular trade on the premises;[2] or any offensive trade;[3] or erect any building;[4] or a covenant in a conveyance of city lots, that any house which might be erected thereon should be set back a certain distance from the line of the street on which such lots fronted;[5] or a covenant not to sell liquors on the premises;[6] or a covenant to maintain a fence;[7] or a covenant by a grantee of land to pay a mortgage on it.[8] So do covenants by a grantor not to erect, or suffer to be erected, any structure or edifice upon a lot adjoining the premises conveyed;[9] or that neither he nor his heirs shall make any claim to the land conveyed;[10] or to protect the husband against the wife's claim for dower.[11]

The covenants of seisin, of good right to convey, and against encumbrances do not run with the land;[12] nor a

[1] Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; King *v.* Kerr, 5 Ohio, 154; 22 Am. Dec. 777; Suydam *v.* Jones, 10 Wend. 180; 25 Am. Dec. 552; Hunt *v.* Amidon, 4 Hill, 345; 40 Am. Dec. 283; Moore *v.* Merrill, 17 N. H. 75; 43 Am. Dec. 593; Ross *v.* Turner, 7 Ark. 132; 44 Am. Dec. 531; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528; 49 Am. Dec. 189; Wead *v.* Larkin, 54 Ill. 489; 5 Am. Rep. 149; Flaniken *v.* Neal, 67 Tex. 629; Wilder *v.* Davenport, 58 Vt. 642; Schofield *v.* Homestead Co., 32 Iowa, 317; 7 Am. Rep. 197.

[2] Barrom *v.* Richard, 3 Edw. Ch. 96; 8 Paige, 351; 35 Am. Dec. 713; Mayor *v.* Pattison, 10 East, 136.

[3] Barron *v.* Richard, 8 Paige, 351; 35 Am. Dec. 713.

[4] Trustees of Watertown *v.* Cowen, 4 Paige, 510; 27 Am. Dec. 80.

[5] Winfield *v.* Henning, 21 N. J. Eq. 188.

[6] Sutton *v.* Head, 86 Ky. 156; 9 Am. St. Rep. 274.

[7] Bronson *v.* Coffin, 108 Mass. 175; 11 Am. Rep. 335; Hazlett *v.* Sinclair, 77 Ind. 488; 40 Am. Rep. 254; Kellogg *v.* Robinson, 6 Vt. 276; 27 Am. Dec. 550. If already in existence, a covenant to build and maintain a fence is personal only: Hartung *v.* Witte, 59 Wis. 285.

[8] Wilcox *v.* Campbell, 35 Hun, 254.

[9] Trustees *v.* Cowen, 4 Paige, 510; 27 Am. Dec. 80.

[10] Fairbanks *v.* Williamson, 7 Me. 96.

[11] Gaines *v.* Poor, 3 Met. (Ky.) 503; 79 Am. Dec. 559.

[12] See *ante*, §§ 2296–2298; Read *v.* Hollister, 20 Neb. 112; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 339; Fuller *v.* Gillette, 9 Biss. 296; Lot *v.* Thomas, 2 N. J. Eq. 407; 2 Am. Dec. 354; Moore *v.* Merrill, 17 N. H. 75; 43 Am. Dec. 593; Ross *v.* Turner, 2 Eng. 132; 44 Am. Dec. 531; King *v.* Gilson, 32 Ill. 348; 83 Am. Dec. 269; Baker *v.* Hunt, 40 Ill. 264; 89 Am. Dec. 346; Blondeau *v.* Sheridan, 81 Mo. 545. A covenant against encumbrances runs with the land in Vermont: See *ante*, § 2298; and Indiana: Dehority *v.* Wright, 101 Ind. 382; and Ohio: Foote *v.* Burnet, 10 Ohio, 317; 36 Am. Dec. 90; but see Devore *v.* Sunderland, 17 Ohio, 52; 49 Am. Dec. 442; and seisin in Iowa: Schofield *v.* Homestead Co., 32 Iowa, 317; 7 Am. Rep. 197.

stipulation in a deed poll that the grantee and his heirs will make and maintain a division fence.[1] A covenant by the owner of land not to permit a grist-mill to be erected upon his land does not run with the land;[2] nor a covenant not to hire persons of a certain description to work in a mill;[3] nor a covenant by the vendor of marl-land, that neither he nor his assigns will sell marl from adjoining land;[4] nor a covenant that the vendee, "his heirs and assigns, owner or owners of the land for the time being," would at any time, on six months' notice, resell to the vendor for a specified price;[5] nor an agreement by the land-owner that the products of his land shall be transported to market by a certain common carrier;[6] nor an agreement in a deed to pay certain outstanding taxes.[7]

§ 2304. Measure of Damages for Breach of Covenants. —The measure of damages for breach of the covenant of seisin or right to convey is the money paid and interest;[8] but until he is evicted by the title paramount his damage is only nominal.[9] Interest on the sum paid from the date of payment is in lieu of mesne profits, the grantee being

[1] Kennedy *v.* Owen, 136 Mass. 199.

[2] Harsha *v.* Reed, 45 N. Y. 415.

[3] Mayor *v.* Pattison, 10 East, 136.

[4] Brewer *v.* Marshall, 19 N. J. Eq. 537; 97 Am. Dec. 679.

[5] London etc. R. R. Co. *v.* Gomm, 30 Week. Rep. 620.

[6] West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600; 46 Am. Rep. 527.

[7] Graber *v.* Duncan, 79 Ind. 565.

[8] Swafford *v.* Whipple, 3 G. Greene, 261; 54 Am. Dec. 498; Stubbs *v.* Page, 2 Me. 378; Leland *v.* Stone, 10 Mass. 459; Mitchell *v.* Hazen, 4 Conn. 495; 10 Am. Dec. 169; Dale *v.* Shively, 8 Kan. 276; Nutting *v.* Herbert, 35 N. H. 120; Lacey *v.* Marnan, 37 Ind. 168; Phipps *v.* Tarpley, 31 Mo. 433; Cox *v.* Strode, 2 Bibb, 277; 5 Am. Dec. 603; Blake *v.* Burnham, 29 Vt. 437; Park *v.* Check, 4 Cold. 20; Willson *v.* Willson, 25 N. H. 229; 57 Am. Dec. 320; McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; Wilson *v.* Forbes, 2 Dev. 30; Nichols *v.* Walter, 8 Mass. 243; Smith *v.* Strong, 14 Pick. 128; Rich *v.* Johnson, 2 Pinn. 88; 52 Am. Dec. 144; Marston *v.* Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Cushman *v.* Blanchard, 2 Me. 266; 11 Am. Dec. 76; Backus *v.* McCoy, 3 Ohio, 211; 17 Am. Dec. 585; Singleton *v.* Bremar, 4 McCord, 13; 17 Am. Dec. 699; Spring *v.* Chase, 22 Me. 505; 39 Am. Dec. 595. And the true consideration paid may be shown by parol: Morse *v.* Shattuck, 4 N. H. 229; 17 Am. Dec. 419.

[9] Cockrell *v.* Proctor, 65 Mo. 41; Smith *v.* Hughes, 50 Wis. 620; Willson *v.* Willson, 25 N. H. 229; 57 Am. Dec. 320; Mecklem *v.* Blake, 22 Wis. 495; 99 Am. Dec. 68; Boon *v.* McHenry, 55 Iowa, 202; Norman *v.* Winch, 65 Iowa, 263.

left to his remedy against the evictor, who has established a paramount title, to obtain pay for improvements.[1] If a covenant of seisin be broken as to a part of land, the damages recoverable will be such a proportion of the whole consideration, and interest, as the value of that part bears to the value of the whole.[2] Damages on breach of a covenant of seisin arising from the existence of a prior mortgage are determined by the amount due on the mortgage.[3] Where a deed contained two covenants, and both were broken, it was held that the defendant was entitled to recover on that which would give him the largest amount of damages.[4]

So for breach of the covenants for quiet enjoyment or of warranty, the rule generally adopted is, that the consideration money, with interest and costs, is the measure of damages,[5] that being presumed to be the value of the

[1] Conrad *v.* Druids' Grand Grove, 64 Wis. 258.

[2] Ela *v.* Card, 2 N. H. 175; 9 Am. Dec. 46.

[3] Gilbert *v.* Bulkley, 5 Conn. 262; 13 Am. Dec. 57.

[4] Stark *v.* Olney, 3 Or. 88.

[5] Booker *v.* Bell, 3 Bibb, 173; 6 Am. Dec. 641; McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; Mack *v.* Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Foster *v.* Thompson, 41 N. H. 379; Crispield *v.* Storr, 36 Md. 150; Davis *v.* Smith, 5 Ga. 285; 48 Am. Dec. 279; Hopkins *v.* Lee, 6 Wheat. 118; Pence *v.* Duval, 9 B. Mon. 49; Dickson *v.* Desire, 23 Mo. 166; Cox *v.* Henry, 32 Pa. St. 19; Wilhelm *v.* Fimple, 31 Iowa, 137; 7 Am. Rep. 117; Wade *v.* Comstock, 11 Ohio St. 82; Pitcher *v.* Livingston, 4 Johns. 1; 4 Am. Dec. 229; Cox *v.* Strode, 2 Bibb, 273; 5 Am. Dec. 603; Allen *v.* Anderson, 2 Bibb, 415; Sumner *v.* Williams, 8 Mass. 162; 5 Am. Dec. 83; Henning *v.* Withers, 3 Brev. 458; 6 Am. Dec. 589; Phillips *v.* Smith, 1 Car. Law Rep. 475; 6 Am. Dec. 542; Bond *v.* Quattlebaum, 1 McCord, 584; 10 Am. Dec. 702; King *v.* Kerr, 5 Ohio, 154; 22 Am. Dec. 777; Markland *v.* Crump, 1 Dev. & B. 94; 27 Am. Dec. 230; Elliott *v.* Thompson, 4 Humph. 99; 40 Am. Dec. 630; Clark *v.* Parr, 14 Ohio, 118; 45 Am. Dec. 529; Drew *v.* Towle, 30 N. H. 531; 64 Am. Dec. 309; Wood *v.* Kingston Coal Co., 48 Ill. 356; 95 Am. Dec. 554; Stebbins *v.* Wolf, 33 Kan. 765. In Staats *v.* Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254, the leading case on this point, Kent, C. J., said: "At common law, on a writ of *warrantia chartæ*, the demandant recovered in compensation only the value for the land at the time of the warranty made, and although the land had become of increased value afterwards by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when the warranty was made. This recompense in value on *excambium*, as it was anciently termed, consisted of lands of the warrantor, or which his heir inherited from him, of equal value with the land from which the feoffee was evicted. That this was the ancient and uniform rule of the English law is a point, as I apprehend, not to be questioned; yet in the early ages of the feudal law on the continent, as it appears, the lord was bound to recompense his vassal on eviction with other lands equal to the value of the feud at the time of evic-

land at the time of the conveyance.[1] The covenantor is liable for the real consideration paid by the covenantee, without regard to the parties receiving it, or the manner of its appropriation.[2] The price paid, if not shown, may be inferred from the value of the land proved on the trial.[3] So where land is sold with warranty, and there is a deficiency in the quantity, the purchaser is entitled to compensation for such deficiency, the value being estimated at the time when the deficiency was discovered.[4] The interest runs from the date of the deed, and not from the time of actual payment, whether before or after such date.[5] When the original grantee has sold the land to another, and the second purchaser has been evicted, his right of recovery against the first grantor upon the original cove-

tion. But there is no evidence that this rule ever prevailed in England, nor do I find in any case that the law has been altered since the introduction of personal covenants to the disuse of the ancient warranty. These covenants have been deemed preferable, because they secure a more easy, certain, and effectual recovery. But the change in the remedy did not affect the established measure of compensation, nor are we at liberty now to substitute a new rule of damages from mere speculative reasoning, and that, too, of doubtful solidity. In warranties upon the sale of chattels, the law is the same as upon the sale of lands, and the buyer recovers back only the original price. This is also the rule in Scotland as to chattels. Our law preserves in all its branches symmetry and harmony upon this subject. In the modern case of Flureau *v.* Thornhill, 2 W. Black. 1078, the court of king's bench laid down this doctrine, that upon a contract for a purchase of land, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money with interest and costs was all that was to be expected. Upon the sale of lands the purchaser usually examines the titles for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is therefore usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin. The hardship of this doctrine has been ably exposed by Lord Kames in his examination of a decision in the Scotch law, that the vendor was bound to pay according to the increased value of the land."

[1] Cummins *v.* Kennedy, 3 Litt. 118; 14 Am. Dec. 45. See McKean *v.* Reed, Litt. Sel. Cas. 395; 12 Am. Dec. 318.

[2] Boom *v.* Wolfe, 50 Iowa, 286.

[3] Lowe *v.* McDonald, 3 A. K. Marsh. 354; 13 Am. Dec. 181.

[4] Nelson *v.* Matthews, 2 Hen. & M. 164; 3 Am. Dec. 620; Clark *v.* Zeigler, 79 Ala. 346.

[5] McMillan *v.* Ritchie, 3 T. B. Mon. 348; 16 Am. Dec. 107.

nant is limited to the value of the land at the time of his purchase.[1]

The expenses of defending the title include necessary counsel fees.[2] For improvements made, or for the increased value of the property, no recovery can be had.[3] The fact that the vendee received no rents and profits from the premises cannot be taken into consideration to affect the question of damages, as a person purchasing real estate is presumed to do so because the rents and profits will be equivalent to the interest of the money he pays for it.[4] That the land was bought for a particular purpose, which was known to the vendor, makes no difference.[5] [6]Upon an exchange of lands, the value of the tract conveyed, and not that of the tract received, is the true criterion of damages.[6] Where the covenantee has purchased the paramount title, or extinguished the encumbrance, the measure of damages is the sum actually and in good faith paid by him for it, and the amount expended by him in defending his possession, provided such sums do not exceed the purchase-money and interest.[7] If the covenantee extinguished the paramount title for a nominal sum, the damages are measured by such sum, with an allowance for trouble and expense.[8] The damages are nominal, though the warrantor had not the title when he made his conveyance, if, before recovery against him, he has obtained the title.[9] If a vendor sells land with war-

[1] Dickson *v.* Desire, 23 Mo. 151; 66 Am. Dec. 661.

[2] Dalton *v.* Bowker, 8 Nev. 190; Smith *v.* Sprague, 40 Vt. 43; Harding *v.* Larkin, 41 Ill. 413; Robertson *v.* Lemon, 2 Bush, 301; Andrews *v.* Davison, 17 N. H. 413; 43 Am. Dec. 606. *Contra*, Turner *v.* Miller, 42 Tex. 418; 19 Am. Rep. 47; Gragg *v.* Richardson, 25 Ga. 566; 71 Am. Dec. 190.

[3] Marston *v.* Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Pitcher *v.* Livingston, 4 Johns. 1; 4 Am. Dec. 229; Willson *v.* Willson, 25 N. H. 229; 57 Am. Dec. 320.

[4] Spring *v.* Chase, 22 Me. 505; 39 Am. Dec. 595.

[5] Phillips *v.* Reichert, 17 Ind. 120; 79 Am. Dec. 463.

[6] Cummins *v.* Kennedy, 3 Litt. 118; 14 Am. Dec. 45.

[7] McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; Richards *v.* Iowa Homestead Co., 44 Iowa, 304; 24 Am. Rep. 745; Price *v.* Deal, 90 N. C. 290; Walker *v.* Deaver, 79 Mo. 664; Amos *v.* Crosby, 74 Ga. 793.

[8] Leffingwell *v.* Elliott, 8 Pick. 445; 19 Am. Dec. 343.

[9] Baxter *v.* Bradbury, 20 Me. 260; 37 Am. Dec. 50.

ranty of title, and at the time the land has been rented by his agent, without his direction or knowledge, and the vendee is thereby delayed in getting possession, the measure of damages is the fair rental value for the lost time; and, *prima facie*, the rent agreed to be paid by the tenant is the fair rental value.[1] So in an action by a grantee of land against the grantor for breach of covenants of warranty in the eviction of the grantee by a mortgagee, the measure of damage is the amount of the mortgaged debt, and interest, if less than the full value of the estate.[2] The measure of damages, where a third person has recovered judgment in partition for an undivided third part of the land, is one third of the purchase-money, with interest.[3] Where a grantee with warranty has recovered against the grantor after eviction suffered, the latter may recover upon a prior covenant of quiet enjoyment the amount he has been obliged to pay his grantee.[4]

But it is held in some of the states that damages for breach of these covenants should be ascertained by the value of the land at the time of eviction.[5]

In an action upon the covenant against encumbrances, the damages are the diminution in value of the estate by reason of the existence of the encumbrances.[6] Only nominal damages are recoverable, unless the covenantee can show actual damage.[7] Where he has had to pay money

[1] Moreland *v.* Metz, 24 W. Va. 119; 49 Am. Rep. 246.

[2] Furnas *v.* Durgin, 119 Mass. 500; 20 Am. Rep. 341.

[3] Wright *v.* Nipple, 92 Ind. 310.

[4] Markland *v.* Tucker, 1 Dev. & B. 94; 27 Am. Dec. 230.

[5] Horsford *v.* Wright, Kirby, 3; 1 Am. Dec. 8; Sterling *v.* Peet, 14 Conn. 245; Drury *v.* Shumway, 1 Chip. D. 110; 1 Am. Dec. 704; Webber *v.* Cousey, 12 La. Ann. 534; Coleman *v.* Ballard, 13 La. Ann. 512; Cushman *v.* Blanchard, 2 Me. 266; 11 Am. Dec. 76; Hardy *v.* Nelson, 27 Me. 525; Gore *v.* Brazier, 3 Mass. 523; 3 Am. Dec. 182; Wyman *v.* Ballard, 12 Mass. 304; Smith *v.* Strong, 14 Pick. 128; Keeler *v.* Wood, 30 Vt. 242; Smith *v.* Sprague, 40 Vt. 43; Park *v.* Bates, 12 Vt. 381; 36 Am. Dec. 347.

[6] Leake on Contracts, 1074; Bronson *v.* Coffin, 108 Mass. 175; 11 Am. Rep. 335. "By the breach of a covenant against encumbrances the purchase-money becomes instantly revendicable, with interest, except for any time during which the purchaser may have been in the perception of profits, actual or potential, which could not be recovered from": Patterson *v.* Stewart, 6 Watts & S. 527; 40 Am. Dec. 586.

[7] Boone on Real Property, 318; Prescott *v.* Trueman, 4 Mass. 627; 3 Am.

to remove the encumbrance, the measure of his damage is what he paid, or reasonably should have paid, therefor,[1] provided it is not more than the value of the land.[2] The grantee may remove the encumbrance before it is due, and if he does so, may recover of the grantor the amount necessarily paid to effect such removal.[3] Where the breach of a covenant against encumbrances or for quiet enjoyment consists simply of the existence of an unexpired term or lease, the measure of damages is the value of the use of the premises for the time the grantee has been deprived of the use of them.[4]

The covenant to sell and convey requires the giving a good title to the covenantee free from all encumbrances. On a breach of such covenant, the covenantee may recover the value of certain services, part consideration for the covenant, with interest.[5] On the breach of a covenant to convey, the measure of damages is the value of the land at the time fixed for the conveyance, with interest.[6] The measure of damages in an action of covenant on an executory contract for the sale of land by the covenantor, where the former has been put in possession, and has not been evicted, the breach consisting in the covenantor failing to convey and in his not having the legal title, is the purchase-money paid, with interest for the time for which the covenantee may be accountable for the profits of the land to the true owner.[7] On breach of a covenant to con-

Dec. 249; De La Vergne *v.* Norris, 7 Johns. 350; 5 Am. Dec. 281; Willson *v.* Willson, 25 N. H. 227; 57 Am. Dec. 320; Reed *v.* Pierce, 36 Me. 455; 58 Am. Dec. 761.

[1] Bronson *v.* Coffin, 108 Mass. 175; 11 Am. Rep. 335; Schofield *v.* Iowa Homestead Co., 32 Iowa, 317; 7 Am. Rep. 197; Guthrie *v.* Russell, 46 Iowa, 269; 26 Am. Rep. 135; Prescott *v.* Trueman, 4 Mass. 627; 3 Am. Dec. 249; Foote *v.* Burnet, 10 Ohio, 317; 36 Am. Dec. 90; Reed *v.* Pierce, 36 Me. 455; 58 Am. Dec. 761; Grant *v.* Tallman, 20 N. Y. 191; 75 Am. Dec. 384. The reasonableness of the sum is a question for the jury: St. Louis *v.* Bissell, 46 Mo. 157.

[2] Kelsey *v.* Remer, 43 Conn. 129; 21 Am. Rep. 638; Foote *v.* Burnet, 10 Ohio, 317; 36 Am. Dec. 90.

[3] Funk *v.* Voneida, 11 Serg. & R. 110; 14 Am. Dec. 617.

[4] Fritz *v.* Pusey, 31 Minn. 368.

[5] Sibley *v.* Spring, 12 Me. 460; 28 Am. Dec. 191.

[6] Cock *v.* Taylor, 2 Over. 49; 5 Am. Dec. 49; Kennedy *v.* Kennedy, 2 Bibb, 464; 5 Am. Dec. 629.

[7] Thompson *v.* Guthrie, 9 Leigh, 101; 33 Am. Dec. 225.

vey by a *bona fide* vendor who believed that he had a good title at the time of making the contract, but afterwards discovered that he had not, and refused to receive any part of the purchase-money, only nominal damages can be recovered.[1]

Whatever remedy for damages exists under covenants, express or implied, belongs to a court of law, and not to a court of equity.[2] But if the vendor acts *mala fide*, and refuses to convey because the land has increased in value, the vendee may compel a specific performance, or recover as damages the difference between the contract price and the enhanced value.[3]

§ 2305. Cancellation of Deeds and Other Instruments. —Equity will compel the surrender of deeds or other instruments obtained by mistake or fraud, or held for fraudulent, inequitable, and unconscionable purposes. "The jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice, in analogy to the principle *quia timet;* that is, for fear that such instruments might afterwards be vexatiously or injuriously used, when the evidence to impeach them was lost, or that they might be already clouding the title or interest of the party."[4] Therefore a party has a right to come into equity to have agreements, deeds, or securities canceled, rescinded, or delivered up, where he has a defense to them good in equity, but not capable of being made available at law.[5] As to voidable instruments,

[1] Baldwin *v.* Munn, 2 Wend. 399; 20 Am. Dec. 626.

[2] Chesterman *v.* Gardner, 5 Johns. Ch. 29; 9 Am. Dec. 265.

[3] Baldwin *v.* Munn, 2 Wend. 399; 20 Am. Dec. 627.

[4] Snell's Equity, 516; Pomeroy's Eq. Jur., sec. 1377; Hagar *v.* Shindler, 29 Cal. 47; Eckman *v.* Eckman, 55 Pa. St. 269; Downing *v.* Wherrin, 19 N. H. 9; 49 Am. Dec. 139; Holland *v.* Mayor, 11 Md. 186; 69 Am. Dec. 195; Polk *v.* Rose, 25 Md. 153; 89 Am. Dec. 773; Smith *v.* Smith, 23 Wis. 176; 99 Am. Dec. 153; Stanton *v.* Miller, 65 Barb. 58. In such suit it is proper to decree that the deeds constituting the cloud be set aside and removed; but the court should not decree that the holder of such deed convey his title thereunder to the complainant: Rucker *v.* Dooley, 47 Ill. 377; 95 Am. Dec. 615.

[5] Snell's Equity, 517.

equity will set aside or cancel them in the following cases, viz.: 1. Where there was some actual fraud in the party defendant, in which the party plaintiff had not participated; 2. Where there was some constructive fraud against public policy, and the party plaintiff had not participated therein; 3. Where there was some constructive fraud against public policy, and although the party plaintiff had participated therein, yet public policy would have been defeated by allowing the instrument to stand; 4. Where there was some constructive fraud in both parties, but they were not both of them *in pari delicto*.[1] And on the same principle, equity will order the cancellation or delivery up of void documents in all cases in which the delivery up of the document might help to prevent the perpetration of some further wrong.[2]

But equity will not order the cancellation or delivery up of a deed or other instrument which is void on its face;[3] nor where the party seeking relief was the sole guilty party or where he had participated equally and deliberately in the fraud; or where the agreement was founded on illegality, immorality, or some unconscionable conduct on his part;[4] nor a mere voluntary agreement not enforceable in a court, but not fraudulent;[5] nor where the complainant has an adequate remedy at law.[6]

A grantee, by destroying his own deed, does not revest the title in his grantor.[7] The cancellation or destruction

[1] Snell's Equity, 518; Hamilton *v.* Batlin, 8 Minn. 403; 83 Am. Dec. 787.

[2] Snell's Equity, 519; Pomeroy's Eq. Jur., sec. 1377; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Hamilton *v.* Cummings, 1 Johns. Ch. 517.

[3] Elliott *v.* Piersoll, 1 McLean, 11; Piersoll *v.* Elliott, 6 Pet. 95; Gray *v.* Coan, 23 Iowa, 344; Ward *v.* Dewey, 16 N. Y. 519; Vandoren *v.* Mayor, 9 Paige, 388; Munson *v.* Munson, 28 Conn. 582; 73 Am. Dec. 693; Scott *v.* Onderdonk, 14 N. Y. 9; 67 Am. Dec. 106; Simpson *v.* Lord Howden, 3 Mylne & C. 97; Bromley *v.* Holland, 7 Ves. 16; Threfall *v.* Lunt, 7 Sim. 627; Hurd *v.* Billington, 6 Gr. 145. But *aliter*, where such deed is *prima facie* valid if its recitals are sustained: Lyon *v.* Hunt, 11 Ala. 295; 46 Am. Dec. 216.

[4] Snell's Equity, 519; Franco *v.* Bolton, 3 Ves. Jr. 372; St. John *v.* St. John, 11 Ves. 535; Ayerst *v.* Jenkins, L. R. 16 Eq. 275.

[5] Snell's Equity, 517.

[6] Munson *v.* Munson, 28 Conn. 582; 73 Am. Dec. 693.

[7] Van Hook *v.* Simmons, 25 Tex. Supplement, 323; 78 Am. Dec. 573; Howard *v.* Huffman, 3 Head, 562; 75

of a deed conveying land will not revest the title in the alienor, although done by mutual consent, and with a view to that object;[1] nor will the surrender or redelivery of a deed by the grantee to the grantor with intent to cancel it.[2] No alteration of a deed after the title has passed thereunder, by whomsoever made, or with whatever purpose, can revest the grantor with the title.[3] But it has been held that the contents of a deed cannot be proved if the deed has been surrendered and destroyed by the party's own voluntary act or consent; and such surrender and destruction of an unrecorded deed may have the effect of divesting his title by estopping him from proving the contents.[4]

§ 2306. Reformation of Deeds and Other Instruments. —Where, by mistake, a deed or other instrument *inter vivos* is not what parties intended, or there is a mistake in it, other than a mistake in law, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the other side, or is evident from the nature of the case or from the rest of the deed, equity will rectify the mistake.[5] A mistake will be corrected in a defective conveyance, whether it be in regard to a common-law or to a statutory requisite.[6] So equity will relieve

Am. Dec. 783; Gugins *v.* Van Gorder, 10 Mich. 523; 82 Am. Dec. 55; Sutton *v.* Jervis, 31 Ind. 265; 99 Am. Dec. 631; Stapp *v.* Wilkinson, 80 Ala. 47.

[1] Tibeau *v.* Tibeau, 19 Mo. 78; 59 Am. Dec. 329.

[2] Lawton *v.* Gordon, 34 Cal. 36; 91 Am. Dec. 670; Taliaferro *v.* Rolton, 34 Ark. 503. But see Sawyer *v.* Peters, 50 N. H. 143.

[3] Alexander *v.* Hickox, 34 Mo. 496; 86 Am. Dec. 118.

[4] Speer *v.* Speer, 7 Ind. 178; 63 Am. Dec. 418.

[5] Snell's Equity, sec. 375; Pomeroy's Eq. Jur., sec. 845; De Jarnett *v.* Cooper, 59 Cal. 703; Elliot *v.* Sockett, 108 U. S. 132; Aldridge *v.* Weems, 2 Gill & J. 36; 19 Am. Dec. 250; Newcomer *v.* Kline, 11 Gill & J. 457; 37 Am. Dec. 74; Willis *v.* Henderson, 4 Scam. 13; 38 Am. Dec. 120; Mosby *v.* Wall, 23 Miss. 81; 55 Am. Dec. 71; Leitensdorfer *v.* Delphy, 15 Mo. 160; 55 Am. Dec. 137; Greer *v.* Caldwell, 14 Ga. 207; 58 Am. Dec. 553; Dunham *v.* Chatham, 21 Tex. 231; 73 Am. Dec. 228; Price *v.* Cutts, 20 Ga. 142; 74 Am. Dec. 52; Thompson *v.* Marshall, 36 Ala. 504; 76 Am. Dec. 328; Nat. Fire Ins. Co. *v.* Crane, 16 Md. 260; 77 Am. Dec. 289; Smith *v.* Jordan, 13 Minn. 264; 97 Am. Dec. 232; Kilmer *v.* Smith, 77 N. Y. 226; 33 Am. Rep. 613; Turner *v.* Shaw, 9 Am. St. Rep. 319.

[6] Beardsley *v.* Knight, 10 Vt. 185; 33 Am. Dec. 193.

against mistake of law in drawing an instrument so as to make it conform to the plain intention of the parties.[1] Where, through a mistake, a deed made *bona fide*, and for a valuable consideration, has been defectively executed, equity will decree that a new deed be executed.[2] So where a deed has been lost, the execution of another will be decreed.[3] So equity will reform a misdescription in a conveyance founded on a consideration, though the deed is a quitclaim, and contains no covenants.[4] So equity has power to correct mistakes in wills.[5]

Equity has exercised jurisdiction to reform deeds and other instruments where void for patent ambiguity;[6] where, through mistake, the whole of the premises is conveyed upon trusts, when the intention was to convey only one portion on trusts, and the remainder in fee-simple;[7] where a commissioner of deeds, who, being a commissioner for two states, by mistake describes himself in his certificate of acknowledgment as commissioner of deeds for the wrong state;[8] where a tract of land intended by parties to be included in a mortgage is omitted therefrom by mistake;[9] where a party sells land according to a map as containing "fifteen acres, more or less," and in the deed describes the land according to the map, but is induced by the fraudulent representations of the grantee to alter the description so as to make it include an additional twenty-seven acres, the grantor being ignorant of the effect produced by the alteration;[10] where an attorney, in drawing a deed, by which a father conveys a life estate to his daughter, neglects to insert "for her sole and

[1] Evants *v.* Strode, 11 Ohio, 480; 38 Am. Dec. 744.

[2] Somerville *v.* Trueman, 4 Har. & McH. 43; 1 Am. Dec. 389.

[3] Wade *v.* Greenwood, 2 Rob. (La.) 474; 40 Am. Dec. 759; Hord *v.* Baugh, 7 Humph. 576; 46 Am. Dec. 91.

[4] Deford *v.* Mercer, 24 Iowa, 118; 92 Am. Dec. 460.

[5] Wood *v.* White, 32 Me. 340; 52 Am. Dec. 654.

[6] Campbell *v.* Johnson, 44 Mo. 247.

[7] Kirk *v.* Zell, 1 McAr. 116.

[8] Simpson *v.* Montgomery, 25 Ark. 365; 99 Am. Dec. 229.

[9] White *v.* Wilson, 6 Blackf. 448; 39 Am. Dec. 437.

[10] Read *v.* Cramer, 2 N. J. Eq. 277; 34 Am. Dec. 205.

separate benefit";[1] where a deed is defectively executed.[2] The power to reform instruments is exercised by courts of equity with great caution, and never unless a proper case is made by the pleadings.[3] A written instrument will not be reformed, unless the evidence of mistake is clear and convincing.[4]

§ 2307. **When Relief not Given.** — Equity will not relieve when the mistake is not as to the contents of the instrument, but as to its legal effect;[5] nor where neither fraud, mistake, nor surprise is proved, and the deed is such as the parties designed it to be;[6] nor where the deed is voluntary;[7] nor where it is illegal, or relates to an illegal matter;[8] nor where the mistake was not mutual;[9] nor where the mistake arose from negligence;[10] nor where the correction is not asked for;[11] nor where the complaining party has been guilty of laches.[12] A grantor cannot

[1] Stone *v.* Hale, 17 Ala. 557; 52 Am. Dec. 185.

[2] Carter *v.* Champion, 8 Conn. 549; 21 Am. Dec. 695.

[3] Stricker *v.* Tinkham, 35 Ga. 176; 89 Am. Dec. 280.

[4] Hinton *v.* Citizens' Ins. Co., 63 Ala. 488; Sable *v.* Maloney, 48 Wis. 331; Sawyer *v.* Hovey, 3 Allen, 331; 81 Am. Dec. 659.

[5] Toops *v.* Snyder, 70 Ind. 554; Leavitt *v.* Palmer, 3 N. Y. 19; 51 Am. Dec. 333; Pierson *v.* Armstrong, 1 Iowa, 282; 63 Am. Dec. 440; Anderson *v.* Tydings, 8 Md. 427; 63 Am. Dec. 708; Jordan *v.* Stephens, 51 Me. 78; 81 Am. Dec. 556. As, for example, the mistake of the grantor as to the legal effect of the language used in the deed, if the language is such as he intended should be used: Burt *v.* Wilson, 28 Cal. 632; 87 Am. Dec. 142. A grantee who relies upon the recital in a deed of the number of acres conveyed as a guaranty of quantity thereby mistakes the legal effect of the instrument, and cannot obtain any relief upon that ground: Martin *v.* Hamlin, 18 Mich. 354; 100 Am. Dec. 181.

[6] McElderry *v.* Shipley, 2 Md. 25; 56 Am. Dec. 703; Bradford *v.* Bradford, 54 N. H. 463; Story *v.* Conger, 36 N. Y. 673; 93 Am. Dec. 546.

[7] Eaton *v.* Eaton, 15 Wis. 259; Petesch *v.* Hambach, 48 Wis. 443; Powell *v.* Powell, 27 Ga. 36; 73 Am. Dec. 724. But the rule that a deed will not be reformed at the instance of mere volunteers does not apply to a dispute between two volunteers claiming under the same deed, when the grantor has no interest in the controversy: Adair *v.* McDonald, 42 Ga. 506.

[8] Henkle *v.* Ins. Co., 1 Ves. Sr. 317; Petesch *v.* Hambach, 48 Wis. 443.

[9] De Jarnatt *v.* Cooper, 59 Cal. 703. But when the actual grantor in a deed is merely a nominal party who has parted with his interest to other third persons, and the contract is in fact between them, and the mistake is mutual between the parties at interest, equity will correct a mistake, mutual as to the several parties, though the nominal actor has made no mistake, but merely did as he was directed: Murray *v.* Sells, 53 Ga. 257.

[10] Brown *v.* Fagan, 71 Mo. 563; Toops *v.* Snyder, 70 Ind. 554.

[11] Gamble *v.* Daugherty, 71 Mo. 599.

[12] Sable *v.* Maloney, 48 Wis. 331.

be required to execute a second deed, where one previously executed has been lost or destroyed while in the grantee's possession.[1] A deed will not be reformed as to covenants therein, after an action for its breach has been brought against the defendants by the complainant, who suffered a recovery against him for costs.[2]

ILLUSTRATIONS. — P., being the owner of two lots, one occupied by him as a homestead, the other of little value, gave a mortgage in which his wife joined, intending to cover his homestead. By mistake, the deed described the other lot. P. having subsequently died, *held*, that there could be no reformation of the instrument: *Petesch* v. *Hambach*, 48 Wis. 443.

[1] Hoddy *v.* Hoard, 2 Ind. 474; 54 Am. Dec. 456.

[2] Ruffner *v.* McConnel, 17 Ill. 212; 63 Am. Dec. 362.

CHAPTER CIX.

CONTRACTS IN WRITING.

§ 2308. Form of — Signing, etc.
§ 2309. Terms not included in final written contract not binding.
§ 2310. Written contract cannot be varied by extrinsic evidence.
§ 2311. Exceptions — To prove agreement.
§ 2312. Exceptions — Want of or failure of consideration.
§ 2313. Latent ambiguity.
§ 2314. Fraud, duress, illegality, etc.
§ 2315. Construction of written contracts.
§ 2316. Intent of parties to be followed, if possible.
§ 2317. Words to be construed according to their ordinary meaning.
§ 2318. General words restricted to things ejusdem generis.
§ 2319. In favor of validity of contract.
§ 2320. Against person using doubtful language.

§ 2308. Form of — Signing, etc. — To bind a party to a written contract, it is not essential that his signature should be at the end of it. "If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature."[1] A note not signed at the bottom of the instrument, but at the end of the last sentence but one, binds the signer.[2] One may sign a contract with the English translation of his French name;[3] or with his initials;[4] or his signature may be affixed by procuration or adoption.[5] A contract may bind both parties named therein, although signed only by one.[6] Except when required by statute, a written contract need not state its consideration.[7] At common law, all contracts not under seal are contracts by parol.[8]

[1] Fulshear *v.* Randon, 18 Tex. 275; 70 Am. Dec. 281; Steininger *v.* Hoch, 39 Pa. St. 263; 80 Am. Dec. 521.
[2] Fulshear *v.* Randon, 18 Tex. 275; 70 Am. Dec. 281.
[3] Augur *v.* Couture, 68 Me. 427.
[4] Palmer *v.* Stephens, 1 Denio, 471.
[5] Davis *v.* Cleghorn, 25 Ill. 212.
[6] Cary *v.* McIntyre, 7 Cal. 173; Luckhart *v.* Ogden, 30 Cal. 547.
[7] Bartlett *v.* Matson, 1 Mo. App. 151.
[8] Ouigly *v.* Muse, 15 La. Ann. 197; Stabler *v.* Cowman, 7 Gill & J. 284.

ILLUSTRATIONS. — A written agreement was shown and read to the party, and she took a pencil for the purpose of writing her name, but perceived that her name was already written, and said that she supposed that it was all right. *Held*, a sufficient execution: *Speckels* v. *Sax*, 1 E. D. Smith, 253.

§ 2309. Terms not Included in Final Written Contract not Binding. — Representations made and terms offered during the negotiation of a contract, and which are not comprehended in the final written agreement of the parties, are excluded from the contract.[1]

§ 2310. Written Contract cannot be Varied by Extrinsic Evidence. — A contract in writing cannot be varied, altered, or added to by extrinsic evidence of the intention of the parties.[2] But this rule applies only to a written contract which is in force as a binding obligation.[3]

§ 2311. Exceptions — To Prove Agreement. — Parol evidence is, of course, admissible to prove the agreement; as, for example, the signatures of the parties to the document,[4] also, the time when it was made, where no date appears.[5] So it may be shown that it was signed upon a condition which has not been performed.[6] So a collateral

[1] Hopkins *v.* Tanqueray, 15 Com. B. 130; Cowley *v.* Watts, 22 L. J. Com. P. 591; Tye *v.* Fynmore, 3 Camp. 462; Pickering *v.* Dowson, 4 Taunt. 779.

[2] Goss *v.* Lord Nugent, 5 Barn. & Adol. 64; Perkins *v.* Young, 16 Gray, 389; Cocke *v.* Bailey, 42 Miss. 81; Kirk *v.* Hartman, 63 Pa. St. 97; Halliday *v.* Hart, 30 N. Y. 474; Erwin *v.* Saunders, 1 Cow. 249; 13 Am. Dec. 520; Mott *v.* Richtmeyer, 57 N. Y. 49; Van Bokkelen *v.* Taylor, 62 N. Y. 105; Heilner *v.* Imbrie, 6 Serg. & R. 401; Hagey *v.* Hill, 75 Pa. St. 108; 15 Am. Rep. 583; Pennsylvania Canal Co. *v.* Betts, 1 Week. Not. Cas. 328; Gavinzel *v.* Crump, 22 Wall. 308; Eveleth *v.* Wilson, 15 Me. 109; Bromley *v.* Elliott, 38 N. H. 287; 75 Am. Dec. 182; Bond *v.* Clark, 35 Vt. 577; Bleckley *v.* Munson, 13 Conn. 299; Rogers *v.* Colt, 21 N. J. L. 704; Young *v.* Frost, 5 Gill, 287; Hill *v.* Peyton, 21 Gratt. 386; Fankboner *v.* Fankboner, 20 Ind. 62; Johnson *v.* Pollock, 58 Ill. 181; Warren *v.* Crew, 22 Iowa, 315; Irish *v.* Dean, 39 Wis. 562; Ruiz *v.* Norton, 4 Cal. 359; 60 Am. Dec. 618; Lemaster *v.* Burckhart, 2 Bibb, 25; Falconer *v.* Garrison, 1 McCord, 209; Davis *v.* Moody, 15 Ga. 175; West *v.* Kelly, 19 Ala. 353; 54 Am. Dec. 192; Laycock *v.* Davidson, 11 La. Ann. 328; Peers *v.* Davis, 29 Mo. 184; Koehring *v.* Muemminghoff, 61 Mo. 403; 21 Am. Rep. 402; Richardson *v.* Comstock, 21 Ark. 69; Donley *v.* Bush, 44 Tex. 1; Greenl. Ev., secs. 275–281; Knowlton *v.* Keenan, 146 Mass. 86; 4 Am. St. Rep. 283.

[3] McFarland *v.* Sikes, 54 Conn. 250; 1 Am. St. Rep. 111.

[4] Leake on Contracts, 183.

[5] Leake on Contracts, 185.

[6] Pierce *v.* Woodward, 6 Pick. 206; Shugart *v.* Moore, 78 Pa. St. 469.

or additional agreement, made at the time of signing a written agreement, may be separately proved, although not referred to in the written agreement.[1] So extrinsic evidence is necessary to show the identity of the persons charged with the contract with the parties named and described in the written document;[2] to point out the property described in the contract.[3] So it may be shown that the contract was made subject to a usage of trade.[4]

§ 2312. **Exceptions — Want of or Failure of Consideration.** — Evidence is admissible to prove a want of consideration or a failure of consideration.[5]

§ 2313. **Latent Ambiguity.** — Extrinsic evidence is admissible to explain a latent ambiguity in the instrument. "A latent ambiguity is where you show that words apply to two different things or subject-matters, and then evidence is admissible to show which of them was the thing or subject-matter intended."[6] But as to a patent

[1] Leake on Contracts, 188; Malpas v. R. R. Co., L. R. 1 Com. P. 336; Cooke v. Murphy, 70 Ill. 96.

[2] Leake on Contracts, 209.

[3] Leake on Contracts, 211. "Accordingly," says this author, "where the subject of property is described in the contract or conveyance by the locality as being in a particular parish or place; or by its character, quality, or use, as in a contract to sell 'the mill property'; or by the ownership, as in a contract to sell 'my house,' or 'Mr. O.'s house'; or by the occupation of a certain person, — in all such cases evidence is admissible to show what is the property answering to the description of place, character, ownership, or occupation, or what is reputed so to be. . . . . Upon the same principle with a contract for the sale of goods by a specific description, evidence is necessary to ascertain and apply the contract to the goods intended; as a contract expressed in a letter offering to buy 'your wool.'"

[4] Lawson on Usages and Customs, 173.

[5] Foster v. Jolly, 1 Cromp. M. & R. 707.

[6] Smith v. Jeffreys, 15 Mees. & W. 562; Grey v. Harper, 1 Story, 574; Goldshede v. Swan, 1 Ex. 158; Verzan v. McGregor, 23 Cal. 339; Hinneman v. Rosenback, 39 N. Y. 98; Waymack v. Heilman, 26 Ark. 449; Wood v. Augustine, 61 Mo. 46; Baldwin v. Winslow, 2 Minn. 213; Fenderson v. Owen, 54 Me. 374; 92 Am. Dec. 551; Stone v. Aldrich, 43 N. H. 52; Simpson v. Kimberlin, 12 Kan. 579; Jenkins v. Cooper, 50 Ala. 419; American Express Co. v. Schier, 55 Ill. 140; Lowry v. Adams, 22 Vt. 160; Conover v. Wardell, 20 N. J. Eq. 266; Davis v. Shaw, 42 Md. 410; Terrell v. Walker, 69 N. C. 244; Poindexter v. McCannon, 1 Dev. Eq. 373; 18 Am. Dec. 591; Armstrong v. Burrows, 6 Watts, 266; Insurance Co. v. Troop, 22 Mich. 146; Greene v. Day, 34 Iowa, 328; Sargent v. Adams, 3 Gray, 72; 63 Am. Dec. 718.

ambiguity, i. e., one appearing on the face of the instrument itself, extrinsic evidence is not admissible.[1]

§ 2314. **Fraud, Duress, Illegality, etc.** — So evidence is admissible to prove that an agreement was entered into in fact under such circumstances of mistake or accident that no intention of agreement can be imputed; or that it was induced by the fraud, or duress, or improper influence of one of the parties exercised upon the other; or that it was made in furtherance of an illegal object.[2]

§ 2315. **Construction of Written Contracts.** — "The construction of a contract in writing, as of all written instruments, belongs to the court. It is the duty of the jury to take the construction from the court; either absolutely, if there be no words to be construed, as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them."[3] Where two or more instruments are executed at the same time, relate to the same subject-matter, and one refers to the other, either tacitly or expressly, they are to be taken together, and to be construed as one instrument.[4] Where two instruments are executed as parts

[1] Aspden's Estate, 2 Wall. Jr. 368.

[2] Prentiss *v.* Russ, 16 Me. 30; Grider *v.* Clopton, 27 Ark. 244; Horn *v.* Brooks, 61 Pa. St. 407; Burtners *v.* Keran, 24 Gratt. 42; Lull *v.* Cass, 43 N. H. 62; Franchot *v.* Leach, 5 Cow. 508; Mitchell *v.* McDougal, 62 Ill. 498; Jamison *v.* Ludlow, 3 La. Ann. 492; Montgomery *v.* Pickering, 116 Mass. 227; Wray *v.* Wray, 32 Ind. 126; Turner *v.* Turner, 44 Mo. 535; McLean *v.* Clark, 47 Ga. 24; Paxton *v.* Popham, 9 East, 421; Olivari *v.* Menger, 39 Tex. 76; Bosley *v.* Shanner, 26 Ark. 280; Miller *v.* Miller, 68 Pa. St. 486; Hibbard *v.* Mills, 46 Vt. 243; Spaids *v.* Barrett, 57 Ill. 289; 11 Am. Rep. 10; Knapp *v.* Hyde, 60 Barb. 80; Teller *v.* Green, 26 Mich. 70; Cadwallader *v.* West, 48 Mo. 483; Benyon *v.* Nettlefold, 3 Macn. & G. 94; Waymell *v.* Reed, 5 Term Rep. 600; Briggs *v.* Lawrence, 3 Term Rep. 454; Norman *v.* Cole, 3 Esp. 253; Chamberlain *v.* McClurg, 8 Watts & S. 31; Shackford *v.* Newington, 46 N. H. 415; Williams *v.* Donaldson, 8 Iowa, 109; Corbin *v.* Sistrunk, 19 Ala. 203; Wyman *v.* Fiske, 3 Allen, 238; 80 Am. Dec. 66; Martin *v.* Clarke, 8 R. I. 389; 5 Am. Rep. 586; Newsom *v.* Thighen, 30 Miss. 414; Lazare *v.* Jacques, 15 La. Ann. 599; Leppoc *v.* Bank, 32 Md. 136.

[3] Neilson *v.* Harford, 8 Mees. & W. 823. See *ante*, Chapter CVIII., Contracts under Seal.

[4] Vaugine *v.* Taylor, 18 Ark. 65; Dillingham *v.* Estill, 3 Dana, 23; Adams *v.* Hill, 16 Me. 215; Rora-

of the same transaction and agreement, whether at the same or different times, they will be taken or construed together.[1] In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written portion than to the printed words, where they are in conflict and tend to different results.[2] But this rule only applies where the written and printed parts cannot, upon any reasonable construction, be reconciled.[3]

§ 2316. Intent of Parties to be Followed, if Possible.— "In all contracts, where the meaning of language is to be determined by the court, the governing principle must be to ascertain the intention of the parties through the words they have used. This principle is one of universal application."[4] So every part of a document should be construed with reference to the intention of the parties as to the whole contract.[5] To ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view.[6] Where the intent is doubtful,

bacher *v.* Lee, 16 Mich. 169; Rogers *v.* Kneeland, 13 Wend. 114; Spangler *v.* Springer, 22 Pa. St. 454; Sewall *v.* Henry, 9 Ala. 24; Logan *v.* Tibbett, 4 G. Greene, 389.

[1] Stacey *v.* Randall, 17 Ill. 467; Hill *v.* Huntress, 43 N. H. 480; Stephens *v.* Baird, 9 Cow. 274; Makepeace *v.* Harvard College, 10 Pick. 302; 20 Am. Dec. 521; Sibley *v.* Holden, 10 Pick. 250; Hunt *v.* Livermore, 5 Pick. 395; Meriden Brittania Co. *v.* Zingsen, 4 Robt. 312; Brandreth *v.* Sandford, 1 Duer, 390; Cordray *v.* Mordecai, 2 Rich. 518; Wallis *v.* Beauchamp, 15 Tex. 303; Strong *v.* Barnes, 11 Vt. 221; 34 Am. Dec. 684; Duncan *v.* Charles, 5 Ill. 561; Reed *v.* Field, 15 Vt. 672; Norton *v.* Kearney, 10 Wis. 443; Berry *v.* Wisdom, 3 Ohio St. 241.

[2] Clark *v.* Woodruff, 83 N. Y. 518; Russell *v.* Bondie, 51 Mich. 76; Thornton *v.* R. R. Co., 84 Ala. 109; 5 Am. St. Rep. 337; Howland *v.* Commercial Ins. Co., Anth. 31; American Ex. Co. *v.* Pinckney, 29 Ill. 392; Woodruff *v.* Commercial etc. Ins. Co., 2 Hilt. 122; Howard Fire Ins. Co. *v.* Bruner, 23 Pa. St. 50.

[3] Wheeling etc. R. R. Co. *v.* Gourley, 99 Pa. St. 171.

[4] McConnel *v.* Murphy, L. R. 5 P. C. 218; Mathews *v.* Phelps, 61 Mich. 327; 1 Am. St. Rep. 581; Smith *v.* Kerr, 108 N. Y. 31; 2 Am. St. Rep. 362.

[5] Leake on Contracts, 224.

[6] Mobile etc. R. R. Co. *v.* Jurey, 111 U. S. 584; Strong *v.* Gregory, 19 Ala. 46; The Ida, Dav. 407; Lemmons *v.* Flanakin, 1 Hemp. 32; Benjamin *v.* McConnell, 9 Ill. 536; 46 Am. Dec. 474; Conwell *v.* Pumphrey, 9 Ind. 135; 68 Am. Dec. 611; Montgomery *v.* Fireman's Ins. Co., 16 B. Mon. 427; Murray *v.* Carothers, 1 Met. 71; White *v.* Booker, 4 Met. 267; Akin *v.* Drummond, 2 La. Ann. 92.

the manner in which the contract has been executed by both or one of the parties with the express or implied assent of the other furnishes a rule for its interpretation. But regard should be had, not to single acts, but the whole execution of the agreement.[1] Where two clauses in a contract are inconsistent, they must be so construed as to give effect to the intention of the parties as gathered from the whole instrument.[2] Technical rules of construction are not to be resorted to, where the meaning of the parties is obvious.[3]

§ 2317. **Words to be Construed According to their Ordinary Meaning.**—Words are to be understood in their plain, ordinary, and popular sense; but technical words used on technical subjects are to be understood in their technical, which is then their primary, meaning; and mercantile terms used in mercantile contracts are to be understood in their ordinary mercantile meaning.[4] The law will presume that a person meant what his language, by its terms, and under the circumstances in which it was used, would be fairly understood to mean, and this presumption cannot be rebutted by proof that he intended something more or different, which he made no attempt to express, and which a person dealing with him neither understood nor had reason to understand.[5] But too much stress is not to be laid upon the precise meaning of words when the intention is manifest.[6] If no meaning can be given to a word from the connection in which it is used, nor consistently with express provisions of the instrument, nor upon the examination of the whole instrument,

[1] Farrar *v.* Rowley, 2 La. Ann. 475; D'Aquin *v.* Barbour, 4 La. Ann. 441; Casey *v.* Pennoyer, 6 La. Ann. 776; Topliff *v.* Topliff, 122 U. S. 121; Mathews *v.* Danahy, 26 Mo. App. 660; Jennings *v.* Machine Co., 138 Mass. 594.

[2] Bent *v.* Alexander, 15 Mo. App. 181.

[3] Noyes *v.* Nichols, 28 Vt. 159; McConnell *v.* New Orleans, 35 La. Ann. 273.

[4] Hawes *v.* Smith, 12 Me. 429; Mansfield etc. R. R. Co. *v.* Veeder, 17 Ohio, 385.

[5] Clark *v.* Lillie, 39 Vt. 405.

[6] Salmon Falls etc. Co. *v.* Portsmouth Co., 46 N. H. 249.

such word or term will be treated as surplusage.[1] Punctuation may aid in ascertaining the true reading, but a writing may be read and interpreted without such aid.[2]

§ 2318. **General Words Restricted to Things Ejusdem Generis.** — General words following particular or specific terms are considered to be restricted in meaning to those things or matters which are of the same kind with those first mentioned.[3] So general expressions are restricted by particular descriptions or additions appended to them.[4]

§ 2319. **In Favor of Validity of Contract.** — As between different meanings, that will prevail which will support the instrument.[5] Where the meaning of the language used is doubtful, or susceptible of two senses, that is to be adopted which would give effect to the instrument as a legal contract, rather than that which would render it inoperative.[6]

§ 2320. **Against Person Using Doubtful Words.** — An ambiguity of expression is to be taken most strongly against the party using the words, and in favor of him who has been misled.[7]

[1] Tucker *v.* Meeks, 2 Sweeny, 736.

[2] White *v.* Smith, 33 Pa. St. 186; 75 Am. Dec. 589.

[3] Torrance *v.* McDougald, 12 Ga. 526; Vaughan *v.* Porter, 16 Vt. 266; Baxter *v.* State, 9 Wis. 38.

[4] Leake on Contracts, 228.

[5] Findley *v.* Armstrong, 23 W. Va. 113; Evans *v.* Sanders, 8 Port. 497; 33 Am. Dec. 297; Riley *v.* Vanhouton, 5 Miss. 428; Peckham *v.* Haddock, 36 Ill. 38; Morancy *v.* Dumesnil, 3 La. Ann. 363; Steinspring *v.* Bennett, 16 La. Ann. 201; Archibald *v.* Thomas, 3 Cow. 284; Hunter *v.* Anthony, 8 Jones, 385; 80 Am. Dec. 333.

[6] Thrall *v.* Newall, 19 Vt. 202; 47 Am. Dec. 682.

[7] Barney *v.* Newcomb, 9 Cush. 46; Evans *v.* Sanders, 8 Port. 497; 33 Am. Dec. 297; Livingston *v.* Arrington, 28 Ala. 424; Union Bank *v.* Guice, 2 La. Ann. 249; Crowley *v.* Concordia, 3 La. Ann. 224; Hoover *v.* Miller, 6 La. Ann. 204.

CHAPTER CX.

THE STATUTE OF FRAUDS.

§ 2321. The statute of frauds.
§ 2322. Promise to answer for debt, default, etc., of another.
§ 2323. Agreements made in consideration of marriage.
§ 2324. "Lands, tenements, or hereditaments, or any interest in or concerning them."
§ 2325. Contracts not to be performed within a year.
§ 2326. "Goods, wares, and merchandise" of the value of fifty dollars.
§ 2327. Earnest, or part payment of purchase-money.
§ 2328. Requisites of memorandum.
§ 2329. Must show parties — Promise and consideration.
§ 2330. Must be signed by party charged — Mode of signing.
§ 2331. Acceptance or receipt of goods.
§ 2332. Delivery to carrier or other agent.
§ 2333. Constructive delivery — Goods already in possession of buyer.
§ 2334. Same — Goods remaining in possession of seller.
§ 2335. Part or portion of goods only need be accepted — Sample.
§ 2336. Part or entire performance takes case out of statute.

§ 2321. The Statute of Frauds.—The forms required in entering into contracts are mainly those set out in the celebrated statute of frauds, whose provisions have been generally incorporated into the legislation of the states of the American Union. Section 4 is sometimes, with modifications, and sometimes without, in force in all the states, except Maryland and Louisiana,[1] and so are sections 1, 2, and 17.[2]

The statute does not void such contracts as though required to be in writing, yet are not so, but only inhibits all actions brought to enforce them.[3] It does not restrict parties from a voluntary performance of their parol engagements.[4]

[1] 1 Stimson's American Statute Law, 459. It was not included in the first Pennsylvania statute, and the court held that contracts for the sale of land by word of mouth were valid: Ewing *v.* Tees, 1 Binn. 450; 2 Am. Dec. 455.

[2] 1 Stimson's American Statute Law, 462. Section 17 held not in force in Texas, in Cleveland *v.* Mellams, 29 Tex. 204; 94 Am. Dec. 274.

[3] Fowler *v.* Burget, 16 Ind. 341; Hunter *v.* Giddings, 97 Mass. 41; 93 Am. Dec. 54.

[4] Aicardi *v.* Craig, 42 Ala. 311; Magee *v.* Blankenship, 95 N. C. 563.

A promise which arises by operation of law is not within the statute;[1] nor a parol declaration of trust in lands;[2] nor instruments created under and deriving their obligation from special statutes, without the acceptance or assent of the party for whose ultimate benefit they were given;[3] nor executed contracts.[4] The refusal of a party to a contract to fulfill his promise to put it in writing is not such a fraud as will take the contract out of the statute of frauds.[5] A contract required by the statute of frauds to be in writing cannot be subsequently modified by parol.[6]

The statute, if relied on as a defense, must be pleaded, or it will be deemed waived.[7]

§ 2322. Promise to Answer for Debt, Default, etc., of Another. — In order to fall within this section, there must be a debt of another for which that other remains liable.[8] If the original debtor is discharged, the promise is an independent and original contract, and need not be in writing.[9] So where the promise arises out of some new consideration of benefit or harm between

[1] Smith *v.* Bradley, 1 Root, 150; Goodwin *v.* Gilbert, 9 Mass. 510.

[2] Wiser *v.* Allen, 92 Pa. St. 317.

[3] Doolittle *v.* Dininny, 31 N. Y. 350.

[4] Swanzey *v.* Moore, 22 Ill. 63; 74 Am. Dec. 134; Nutting *v.* McCutcheon, 5 Minn. 382.

[5] Caylor *v.* Roe, 99 Ind. 1.

[6] Abell *v.* Munson, 18 Mich. 306; 100 Am. Dec. 165.

[7] Maybee *v.* Moore, 90 Mo. 340; McClure *v.* Otrich, 118 Ill. 320.

[8] Birkmyr *v.* Darnell, Salk. 27; 1 Smith's Lead. Cas. 57; Underhill *v.* Gibson, 2 N. H. 352; 9 Am. Dec. 82; Corbett *v.* Cochran, 3 Hill (S. C.) 41; 30 Am. Dec. 348; Jones *v.* Hardsty, 10 Gill & J. 404; 32 Am. Dec. 180; Curtis *v.* Brown, 5 Cush. 491; Dows *v.* Sweet, 120 Mass. 323; Eddy *v.* Roberts, 17 Ill. 407; Doyle *v.* White, 26 Me. 341; 45 Am. Dec. 110; Taylor *v.* Drake, 4 Strob. 431; 53 Am. Dec. 680; Dufolt *v.* Gorman, 1 Minn. 301; 66 Am. Dec. 543.

[9] Anderson *v.* Davis, 9 Vt. 126; 31 Am. Dec. 612; Watson *v.* Jacobs, 29 Vt. 171; Spann *v.* Baltzell, 1 Fla. 301; 46 Am. Dec. 346; Warren *v.* Smith, 24 Tex. 484; 76 Am. Dec. 115; Andre *v.* Bodman, 13 Md. 241; 71 Am. Dec. 628; Wallace *v.* Wortham, 25 Miss. 119; 57 Am. Dec. 197; Packer *v.* Benton, 35 Conn. 343; 95 Am. Dec. 249, and see note 250–263; Maurin *v.* Fogelberg, 37 Minn. 23; 5 Am. St. Rep. 815. To ascertain whether an undertaking to pay the debt of another is collateral or original, the inquiry is, To whom was the credit given at the time of the sale and delivery of the goods? And this is a question for the jury: Myer *v.* Grafflin, 31 Md. 350; 100 Am. Dec. 66; Greene *v.* Burton, 59 Vt. 423; Grant *v.* Wolf, 34 Minn. 32; Cole *v.* Hutchinson, 34 Minn. 410.

the creditor and the third party.[1] And the promise must be made to the creditor, and not to the debtor himself.[2]

The following agreements have been held to be within the statute, and not enforceable if not in writing, viz.: A promise by A to B, who was working for C, that if C did not pay him, he, A, would;[3] a promise by A to B's creditor that if he will discontinue an action commenced

[1] Alger *v.* Scoville, 1 Gray, 397; Jepherson *v.* Hunt, 2 Allen, 423; Burr *v.* Wilcox, 13 Allen, 273; Furbish *v.* Goodnow, 98 Mass. 300; Ames *v.* Foster, 106 Mass. 403; 13 Am. Rep. 343; Willis *v.* Brown, 118 Mass. 138; Pratt *v.* U. S., 22 Wall. 506; Stewart *v.* Hinckley, 1 Bond, 568; Clifford *v.* Luhring, 69 Ill. 402; Clay *v.* Walton, 9 Cal. 334; Tindal *v.* Touchberry, 3 Strob. 177; 49 Am. Dec. 637; Chapline *v.* Atkinson, 45 Ark. 67; 55 Am. Rep. 531; Farley *v.* Cleveland, 4 Cow. 432; 15 Am. Dec. 387; Durham *v.* Arledge, 1 Strob. 5; 47 Am. Dec. 544; Spooner *v.* Dunn, 7 Ind. 81; 63 Am. Dec. 414; Tighe *v.* Morrison, 41 Hun, 1; Mead *v.* Parker, 41 Hun, 577; Lookout R. R. Co. *v.* Houston, 85 Tenn. 224. In Nelson *v.* Boynton, 3 Met. 396, 37 Am. Dec. 148, it is said: "The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own. The former, whether made before or after or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor. In case one says to another, 'Deliver goods to A, and I will pay you,' it is binding, though by parol, because A, though he receives the goods, is never liable to pay for them. But if, in the same case, he says, 'I will see you paid,' or 'I will pay, if he does not,' or uses words equivalent, showing that the debt is in the first instance the debt of A, the undertaking is collateral, and not valid, unless in writing: Matson *v.* Wharam, 2 Term Rep. 80; Anderson *v.* Hayman, 1 H. Black. 120. In these cases, the same consideration, which is the consideration of the promise of the principal, is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal, as the collateral promise of the surety, and is a good consideration for both: D'Wolf *v.* Rabaud, 1 Pet. 500; Townsley *v.* Sumrall, 2 Pet. 182. The distinction between the different classes of cases is well stated in Leonard *v.* Vredenburgh, 8 Johns. 29; 5 Am. Dec. 317; and Farley *v.* Cleveland, 4 Cow. 432; 15 Am. Dec. 387."

[2] Eastwood *v.* Kenyon, 11 Ad. & E. 438; Barker *v.* Bucklin, 2 Denio, 45; 47 Am. Dec. 726; Runde *v.* Runde, 59 Ill. 102; Fullam *v.* Adams, 37 Vt. 397; Blunt *v.* Boyd, 3 Barb. 211; Westfall *v.* Parsons, 16 Barb. 649; Leman *v.* Hasbrouck, 35 Barb. 155; Steinhart *v.* Doellner, Jones & S. 221; Phillips *v.* Gray, 3 E. D. Smith, 69; Cottrell *v.* Stevens, 10 Wis. 425; Pratt *v.* Humphrey, 22 Conn. 325; Green *v.* Brookins, 23 Mich. 53; 9 Am. Rep. 74; Sweatman *v.* Parker, 49 Miss. 29; Jones *v.* Shorter, 1 Ga. 294; 44 Am. Dec. 649; Goetz *v.* Foss, 14 Minn. 265; 100 Am. Dec. 218; Soulisby *v.* Keely, 7 Fed. Rep. 449; Ware *v.* Allen, 64 Miss. 545; 60 Am. Rep. 67.

[3] Aldrich *v.* Jewell, 12 Vt. 125; 36 Am. Dec. 330.

by him on the debt, or refrain from issuing execution, he will pay the debt;[1] a promise to indemnify one if he will become security for a third person;[2] a promise to indemnify the plaintiff from all costs and damages by reason of any suits brought against him on account of certain goods in his possession seized in execution, and alleged to belong to the defendant;[3] a promise to indorse a note for a purchaser of goods, in consideration that the vendor will sell to him;[4] an agreement to execute a note as surety for another;[5] a promise by the president of a bank to a depositor that if the latter will not draw out his funds, but permit them to remain in the bank, the former will pay the total deposit if the bank should close;[6] a promise to answer in part for the debt of another;[7] a promise to pay rent of premises occupied by the promisor's mother, where the mother entered the house at an agreed rental, and the plaintiff, being solicitous about the rent, mentioned the matter to the defendant, who verbally promised to pay the rent during the time she should occupy the house.[8]

On the other hand, the following have been held not within the statute, viz.: A promise by a purchaser to pay a part of the consideration to a creditor of the seller;[9] an agreement by the vendee of land to pay the debt of the vendor as a part of the consideration;[10] a promise to pay the debt of a minor;[11] a promise to pay the debt of another out of his property, placed in the hands of the promisor

[1] Nelson *v.* Boynton, 3 Met. 396; 37 Am. Dec. 148; Allshouse *v.* Ramsay, 6 Whart. 331; 37 Am. Dec. 417; Durham *v.* Aldridge, 1 Strob. 5; 47 Am. Dec. 544; Duffy *v.* Wunsch, 42 N. Y. 243; 1 Am. Rep. 514.

[2] Nugent *v.* Wolfe, 111 Pa. St. 471; 56 Am. Rep. 291; Mayo *v.* Williams, 61 Miss. 125; 48 Am. Rep. 80; Bissig *v.* Button, 59 Mo. 204; 21 Am. Rep. 379.

[3] Nixon *v.* Vanhise, 5 N. J. L. 491; 8 Am. Dec. 618.

[4] Carville *v.* Crane, 5 Hill, 483; 40 Am. Dec. 364.

[5] Dee *v.* Downs, 57 Iowa, 589; State *v.* Shinn, 42 N. J. L. 138.

[6] Walther *v.* Merrell, 6 Mo. App. 370.

[7] Luce *v.* Zeile, 53 Cal. 54.

[8] Moses *v.* Norton, 36 Me. 113; 58 Am. Dec. 738.

[9] Chamberlin *v.* Ingalls, 38 Iowa, 300; Blair etc. Land Co. *v.* Walker, 39 Iowa, 406; Lester *v.* Bowman, 39 Iowa, 611.

[10] McLaren *v.* Hutchinson, 22 Cal. 187; 83 Am. Dec. 59.

[11] King *v.* Summitt, 73 Ind. 312; 38 Am. Rep. 145.

for that purpose;[1] a contract between sureties to the same instrument, whereby one surety undertakes to indemnify another;[2] a promise to indemnify another for becoming bail for a third, indicted for felony;[3] a promise to indemnify another for doing a particular act;[4] a promise to indemnify another for signing a note as a maker;[5] a promise to pay for goods furnished to another upon the credit of such promise;[6] an agreement to pay toll on certain lumber of a third party, if the plaintiff would allow the same to pass through his canal-locks;[7] a promise by one of the owners of a ship to pay a claim for labor and materials furnished in her construction to the builder, provided a libel to be brought on a similar claim should be sustained;[8] a contract by which a third party assumes and manages the defense of a suit;[9] an agreement by the vendor with the vendee of land to remove a mortgage thereon, given to secure the debt of another;[10] an agreement by the vendee of real property that as a part of the consideration of the conveyance, he will take up and pay a note which his vendor owes on the same property;[11] a promise by B to C that he will pay him a debt due from E, if he will remain in B's employ.[12]

ILLUSTRATIONS. — CASES WITHIN THE STATUTE — THE PROMISE SUED ON VOID BECAUSE NOT IN WRITING. — A servant of A was injured by the wrongful act of B. A physician called in by B came to A's house and attended the servant, immediately after which A told the physician about the accident, and that B was responsible for it, and then added, "But, doctor, you need not be at all alarmed about your bill. I will see that you

[1] Mason *v.* Wilson, 84 N. C. 51; 37 Am. Rep. 612; Rogers *v.* Collins, 2 Bail. 581; 23 Am. Dec. 153.

[2] Horn *v.* Bray, 51 Ind. 555; 19 Am. Rep. 742.

[3] Anderson *v.* Spence, 72 Ind. 315; 37 Am. Rep. 162.

[4] Marcy *v.* Crawford, 16 Conn. 549; 41 Am. Dec. 158.

[5] Beaman *v.* Russell, 20 Vt. 205; 49 Am. Dec. 775.

[6] Rhodes *v.* Lee, 3 Stew. & P. 212; 24 Am. Dec. 744.

[7] Proprietors of the Upper Locks *v.* Abbott, 14 N. H. 157; 40 Am. Dec. 184.

[8] Fish *v.* Thomas, 5 Gray, 45; 66 Am. Dec. 348.

[9] Goodspeed *v.* Fuller, 46 Me. 141; 71 Am. Dec. 572.

[10] Green *v.* Randall, 51 Vt. 67.

[11] Jennings *v.* Crider, 2 Bush, 322; 92 Am. Dec. 487.

[12] Wills *v.* Cutler, 61 N. H. 405.

are paid." The physician continued his treatment until the patient was cured: *Rose* v. *O'Linn*, 10 Neb. 364. A employed B to build certain houses, and B employed C to do the carpenter-work. In consequence of C's refusal to work longer, A orally promised to pay him if B did not: *Morrissey* v. *Kinsey*, 16 Neb. 17. B. indorsed notes for H. at H.'s father's request, and in reliance on the father's promise to save B. harmless: *In re Clement*, 52 Conn. 464. The mortgagee of part of a vessel promised persons who had furnished her with supplies, for which they had no lien on her, to pay the debt if they would not attach the interest of the other part owners: *Ames* v. *Foster*, 106 Mass. 400; 8 Am. Rep. 343. Defendant, a creditor of W. & M., who were engaged in running a saw-mill, agreed to take the mill, manufacture the logs into lumber, market them, and apply the net proceeds to his own demand, and to other debts, among which was one due the plaintiff for work. The defendant explained the arrangement to the plaintiff, employing him upon wages in his own service, and reiterating the promise to pay the debt of W. & M. The defendant having disposed of about one half the lumber, the plaintiff sued upon the promise to pay that debt: *Belknap* v. *Bender*, 75 N. Y. 446; 31 Am. Rep. 476. P. was induced to loan money to O. by means of false and fraudulent oral representations made by D., concerning the financial credit and ability of O. The money was paid by P. to D., who passed it over to O.: *Hunter* v. *Randall*, 62 Me. 423; 16 Am. Rep. 490. Manufacturers contracted with lumber-dealers to convert certain standing timber into shingles and siding. A logger contracted with the manufacturers to cut and haul the timber. Subsequently the dealers orally promised the logger to pay him on orders from the manufacturers. Several payments were so made, and then payment being refused, an action was brought to enforce it: *Preston* v. *Young*, 46 Mich. 103; 41 Am. Rep. 148. A lent to B certain instruments, on the strength of C's verbal promise to be answerable for their return: *Hollowbush's Estate*, 13 Phila. 217. A contractor building a house for M. employed G. to furnish the stone, but failed to pay him, and M. promised G. orally that if he would finish the work, he, M., would pay him; but the contractor was not discharged from his liability to G.: *Gill* v. *Herrick*, 111 Mass. 501. A village having been enjoined against paying its attorneys in pending prosecutions for selling liquor, its president promised to pay for past and future services in case of the attorneys' inability to collect from the village: *Hooker* v. *Russell*, 67 Wis. 257.

Illustrations (Continued). — Cases not within the Statute — Writing Held not Requisite. — Defendant, being bound to indemnify a third person in a suit in which the latter

had been arrested, requested the plaintiff to become a special bail for this third person, and promised to indemnify him: *Harrison* v. *Sawtel*, 10 Johns. 242; 6 Am. Dec. 337. A surrendered a bond for a deed which he held against B, in consideration that B would pay to C the amount of a note: *Mathers* v. *Carter*, 7 Ill. App. 225. A debtor promised orally to pay part of his debt by paying the debt of his creditor to a third person, to which arrangement the latter subsequently assented: *Putnam* v. *Farnham*, 27 Wis. 187; 9 Am. Rep. 459. A mechanic repaired a chattel which was mortgaged, at the request of the mortgagor, and returned it to him, relinquishing his lien upon it upon the oral promise of the mortgagee to pay for the repairs: *Conradt* v. *Sullivan*, 45 Ind. 181; 15 Am. Rep. 261. G., owner of a patent hay-fork, and desirous of organizing a company to deal therein, orally promised B. that if he would become one of the company, and take shares and give his note therefor, he, G., as soon as the company was organized, would find a man to take the shares and pay the notes, without charge of expense to B.: *Green* v. *Brookins*, 23 Mich. 48; 9 Am. Rep. 74. Defendant orally promised to indemnify plaintiff for indorsing the promissory note of another, and plaintiff, relying solely upon such promise, indorsed the note: *Vogel* v. *Melms*, 31 Wis. 306; 11 Am. Rep. 608. Plaintiff became surety on the note of an individual member of a firm, on the assurance of the firm that the money to be raised was for their use, and that they would pay it. The maker of the note became insolvent, and plaintiff paid the note and brought suit against the remaining partner for the amount: *Garner* v. *Hudgins*, 46 Mo. 399; 2 Am. Rep. 520. A stockholder and president of a corporation orally promised M. that if he would subscribe and pay five hundred dollars to the capital stock, he should receive fifteen per cent on that amount in a year: *Moorhouse* v. *Crangle*, 36 Ohio St. 130; 38 Am. Rep. 564. A is indebted to B, and places sufficient property in the hands of C for the purpose of paying the debt, and C converts the property into money and promises B to pay the debt: *Raymer* v. *Sim*, 3 Har. & McH. 451; 1 Am. Dec. 379. A widow orally promised to pay the amount of a chattel mortgage executed by her deceased husband on a stock of goods, in consideration that the creditor should not foreclose, and should continue to furnish goods to her: *Muller* v. *Riviere*, 59 Tex. 640; 46 Am. Rep. 291. A mortgagor paid the mortgage before maturity, and the mortgagee promised to procure a release of another mortgage upon the premises: *McCraith* v. *Mohawk Valley Bank*, 104 N. Y. 414. A father, whose son wished to buy goods, agreed with the owner that if he would let the son have the goods, the father would see the debt paid, or would pay it: *Baldwin* v. *Hiers*, 73 Ga. 739. On the assignment of a lease of

real estate, the assignee orally agreed to assume the covenants and pay the rent: *Wolke* v. *Fleming*, 103 Ind. 105; 53 Am. Rep. 495. Defendant called a physician to attend his mother, and told him that he would pay him: *De Witt* v. *Root*, 18 Neb. 567. A surety on a non-negotiable note conveyed his property to defendant in consideration of the grantor's future support and payment of his debts. Subsequently, defendant verbally promised plaintiff, who had become the owner of the note by inheritance, to pay it if the principal did not: *Bailey* v. *Bailey*, 56 Vt. 398. A married woman who had purchased on her own credit a stove which was used in the family afterwards separated from her husband, and asked the seller to take back the stove, which he agreed to do on her promise to pay for the use of it. Subsequently, the husband told the seller that if he would leave the stove he would pay for it: *Palmer* v. *Witcherly*, 15 Neb. 98. A and B contracted to cultivate land, dividing the crops. Subsequently, B, becoming indebted to C, abandoned the crop, which was stored with A, who orally agreed with C that the latter, having gathered the crop, should first pay his own claim and then pay over the balance to A: *Thornton* v. *Williams*, 71 Ala. 555.

§ 2323. Agreements Made in Consideration of Marriage.— Mutual agreements to marry are not within the statute.[1] The kinds of agreements which the statute covers are agreements to pay money or convey property or make a will, in consideration of marriage;[2] or an agreement in contemplation of marriage, securing the intended wife's property to her separate use, and releasing her claim to dower.[3] And a verbal contract to marry,

[1] Short *v.* Stotts, 58 Ind. 29; Withers *v.* Richardson, 5 T. B. Mon. 94; 17 Am. Dec. 44.

[2] Leake on Contracts, 248. "If a person, in order to induce a marriage, make a representation of facts, upon the faith of which the marriage takes place, he may be bound upon principles of equity to make good the representation. But the liability in such case rests upon the ground that he would be guilty of a fraud, or at least would have caused a mistake in another, if the facts were not as represented, and not upon the ground of contract; therefore it is not required that the representation should be in writing under the statute in order to charge him with the consequences. But representations of future intentions made upon consideration of marriage, if intended to be binding, being equivalent to promises, are within the statute; consequently, writing is necessary to establish them, notwithstanding the marriage may have taken place upon the faith of their performance; for marriage alone does not constitute such part performance of a parol contract as would take it out of the operation of the statute upon equitable grounds": Leake on Contracts, 248.

[3] Finch *v.* Finch, 10 Ohio St. 501.

on condition that an antenuptial contract be prepared and executed, is within the statute.[1] The agreement may be contained in letters written by the party to be charged.[2]

§ 2324. **"Lands, Tenements, or Hereditaments, or any Interest in or concerning Them."**—A verbal contract for purchase of land never reduced to writing, nor accompanied by a payment of any part of the purchase-money, is void under the statute.[3] The following are held to come within the above phrase, viz.: A contract to give or take a lease or tenancy of a house or land; or to assign a tenancy; a contract to surrender a tenancy to the landlord in favor of another; a contract merely to give up possession of a house to another; a contract for the sale of a business, as a milk-walk, or a brick-yard, accompanied with possession of the premises where it is carried on; a contract to procure a lease or interest in land for another, although the contractor himself have no interest, and act merely as broker or agent in the matter;[4] an agreement to make an equitable mortgage by deposit of title deeds;[5] a contract for the sale of a growing crop of grass;[6] or a growing crop of fruit on trees;[7] or a growing crop of wheat;[8] a contract for the hire of lodgings in a house;[9] an agreement by a landlord to abate his tenant's rent;[10] a sale of land by a sheriff;[11] a submission to arbitration concerning the title to land;[12] an agreement to create an easement;[13] an agreement to establish a passway through land;[14] a judicial sale of land;[15] an agree-

[1] Caylor *v.* Roe, 99 Ind. 1; Chase *v.* Fitz, 132 Mass. 59.
[2] Peck *v.* Vandemark, 33 Hun, 214; 99 N. Y. 29.
[3] Williams *v.* Gibson, 84 Ala. 228; 5 Am. St. Rep. 368.
[4] Leake on Contracts, 249.
[5] Ex parte Coombe, 4 Madd. 249.
[6] Crosby *v.* Woodworth, 6 East, 602; Powers *v.* Clarkson, 17 Kan. 218.
[7] Rodwell *v.* Phillips, 9 Mees. & W. 501.
[8] Kerr *v.* Hill, 27 W. Va. 576.
[9] Inman *v.* Stamp, 1 Stark. 12.
[10] O'Connor *v.* Spaight, 1 Schoales & L. 306.
[11] Jackson *v.* Catlin, 2 Johns. 248; 3 Am. Dec. 415.
[12] Stark *v.* Cannady, 3 Litt. 399; 14 Am. Dec. 76.
[13] Robinson *v.* Thrailkill, 110 Ind. 117.
[14] Hall *v.* McLeod, 2 Met. (Ky.) 98; 74 Am. Dec. 400.
[15] Hutton *v.* Williams, 35 Ala. 503; 76 Am. Dec. 297.

ment to pay the grantee of land for all that shall fall short of the amount conveyed;[1] an agreement extending the time within which a person having an option to purchase land shall exercise the option;[2] a contract for the sale of growing trees;[3] a promise in the alternative to compensate a party by will either "in land or money";[4] a contract of sale of an equitable estate in land;[5] an agreement to devise land;[6] an agreement between C. and E. for E. to hold land as security for future advances made by E. to C.;[7] an agreement between a landlord and tenant that the latter should surrender the residue of his term in the premises leased to a purchaser, in consideration of which the landlord agreed to give up the rent in arrear;[8] an agreement by a railroad company to establish a permanent turnout-track and stopping-place near the premises of another, and to stop there with passenger and freight trains;[9] an agreement between adjoining landowners to abandon all claim to any particular lines, and to have the land set off according to the courses and distances in a certain deed;[10] a contract between the owners of adjoining lots limiting the use which one of them should make of his lot, or the manner in which he should build upon or occupy it;[11] a contract under which one is to buy land at public auction on the joint account of himself and another;[12] a supplemental lease between landlord

[1] Bradley *v.* Blodget, Kirby, 22; 1 Am. Dec. 11. *Contra*, Mott *v.* Hurd, 1 Root, 73; Baxter *v.* Gay, 14 Conn. 122; Green *v.* Vardiman, 2 Blackf. 324.

[2] Heith *v.* Woolridge, 6 Rand. 605.

[3] Mizell *v.* Burnett, 4 Jones, 249; 69 Am. Dec. 744; Harrell *v.* Miller, 35 Miss. 700; 72 Am. Dec. 154; Slocum *v.* Seymour, 36 N. J. L. 138; 13 Am. Rep. 432; Owen *v.* Lewis, 46 Ind. 488; 15 Am. Rep. 295; Scovell *v.* Boxall, 1 Younge & J. 376; Putney *v.* Day, 6 N. H. 430; 25 Am. Dec. 471; Pattison's Appeal, 61 Pa. St. 294; 100 Am. Dec. 637; Kingsley *v.* Holbrook, 45 N. H. 313; 86 Am. Dec. 173; Huff *v.* McCauley, 53 Pa. St. 206; 91 Am. Dec. 203.

[4] Howard *v.* Brower, 37 Ohio St. 402.

[5] Holmes *v.* Holmes, 86 N. C. 205.

[6] Gooding *v.* Brown, 35 Hun, 148.

[7] Curle *v.* Eddy, 24 Mo. 117; 66 Am. Dec. 699.

[8] Lammott *v.* Gist, 2 Har. & G. 433; 18 Am. Dec. 295.

[9] Pitkin *v.* R. R. Co., 2 Barb. Ch. 221; 47 Am. Dec. 320.

[10] Nichol *v.* Lytle's Lessee, 4 Yerg. 456; 26 Am. Dec. 240.

[11] Rice *v.* Roberts, 24 Wis. 461; 1 Am. Rep. 195.

[12] Parsons *v.* Phelan, 134 Mass. 109.

and tenant in possession under a subsisting lease;[1] an agreement between a man and a woman that if the latter shall live with the former and serve him until he dies, she shall have his property, consisting of land;[2] a transfer or resale of lands to the original owner by one in possession under a contract of purchase;[3] an agreement giving the right to use a church edifice to worship in when unoccupied by the church to which it belongs;[4] an agreement whereby G. and D. agree to become jointly purchasers of certain real estate, each party to furnish one half the purchase-money, and to hold the same in undivided moieties.[5]

And the following are not within the statute: A sale of implements, as the crops of land, raised by industry and labor;[6] an agreement for the use of a dock for the repair of a ship;[7] a contract for a mere license or permission to reside in or use premises, or a specific part of premises, not involving the exclusive possession, as a contract for board and lodging in the house of another;[8] a contract for the sale of crops, or trees, or fruit, or produce of land, to be delivered as goods, and to pass no interest until severed;[9] a contract of agistment of cattle;[10] a contract by a landlord to make repairs and build on the land during the term;[11] a partnership agreement, the object of the partnership being the buying and selling of land;[12] an agreement between two or more persons to

[1] Crawford *v.* Wick, 18 Ohio St. 190; 98 Am. Dec. 103.

[2] Wallace *v.* Long, 105 Ind. 522; 55 Am. Rep. 222.

[3] Catlett *v.* Dougherty, 21 Ill. App. 116.

[4] Brumfield *v.* Carson, 33 Ind. 94; 5 Am. Rep. 184.

[5] Green *v.* Drummond, 31 Md. 71; 1 Am. Rep. 14.

[6] Davis *v.* McFarlane, 37 Cal. 634; 99 Am. Dec. 340; Evans *v.* Roberts, 5 Barn. & C. 829.

[7] Wells *v.* Kingston-on-Hull, L. R. 10 Com. P. 402.

[8] Wright *v.* Stavert, 2 El. & E. 721; White *v.* Maynard, 111 Mass. 250; 15 Am. Rep. 28.

[9] Leake on Contracts, 252; Claflin *v.* Carpenter, 4 Met. 580; 38 Am. Dec. 381; Poor *v.* Oakman, 104 Mass. 316; Purner *v.* Piercy, 46 Md. 212; 17 Am. Rep. 591; Byassee *v.* Reese, 4 Met. (Ky.) 372; 83 Am. Dec. 481; Vulcevich *v.* Skinner, 77 Cal. 339.

[10] Jones *v.* Flint, 10 Ad. & El. 753.

[11] Mann *v.* Nunn, 43 L. J. Com. P. 241.

[12] Dale *v.* Hamilton, 5 Hare, 369. But see Kilbourn *v.* Latta, 5 Mackey, 304; 60 Am. Rep. 373; Caddick *v.* Skidmore, 2 De Gex & J. 52; Babcock

explore the public domain and discover and locate lodes for the joint benefit of all;[1] a contract under which one is to make bricks on the land of another, the property in the bricks to remain in the owner of the soil until he has been paid for his clay and wood used and consumed in their manufacture;[2] an agreement to pay for improvements made on land;[3] an agreement to abide by a division line;[4] an agreement to purchase land sold at an execution sale and hold it for the debtor;[5] an agreement by a husband to convey land to his wife in consideration of her relinquishing her inchoate interest in other lands;[6] an agreement to buy a mortgage on A's land, sell the premises for his benefit, and account for the balance over disbursements;[7] an agreement to let a hall on four certain days;[8] a sale of a building not permanently annexed to the land, with right of removal;[9] a contract by which one person agreed with another that if the latter would transport the former, his family, and their effects to the state of Texas, he would deed to such person one half of the land which would become his by virtue of his immigration;[10] an agreement to return leased premises in the same condition as when taken;[11] the agreement of the purchaser of land to pay part of the price to a third person;[12] an agreement between the vendor and purchaser of land that at the expiration of four years from the date of the

v. Reed, 99 N. Y. 609; Holmes *v.* McCray, 51 Ind. 358; 19 Am. Rep. 735; Treat *v.* Hiles, 68 Wis. 344; 60 Am. Rep. 859. *Contra*, Raub *v.* Smith, 61 Mich. 543; 1 Am. St. Rep. 619.

[1] Murley *v.* Ennis, 2 Col. 300.

[2] Brown *v.* Morris, 83 N. C. 251.

[3] Frear *v.* Hardenbergh, 5 Johns. 274; 4 Am. Dec. 356; Godeffroy *v.* Caldwell, 2 Cal. 489; 56 Am. Dec. 360. As on public lands: Zickafosse *v.* Hulick, 1 Morris (Iowa), 175; 39 Am. Dec. 458.

[4] Jackson *v.* Dysling, 2 Caines, 198. Or that one of the owners will build and maintain the partition fence: Talmadge *v.* R. R. Co., 13 Barb. 493.

[5] Martin *v.* Martin, 16 B. Mon. 8; Mulholland *v.* York, 82 N. C. 510. *Contra*, McKee *v.* Vail, 79 N. C. 194; Barnet *v.* Dougherty, 32 Pa. St. 371; Dollar Sav. Bank *v.* Bennett, 76 Pa. St. 402.

[6] Brown *v.* Rawlings, 72 Ind. 505.

[7] McGinnis *v.* Cook, 57 Vt. 36; 52 Am. Rep. 115.

[8] Johnson *v.* Wilkinson, 139 Mass. 3; 52 Am. Rep. 698.

[9] Rogers *v.* Cox, 96 Ind. 157; 49 Am. Rep. 152.

[10] Miller *v.* Roberts, 18 Tex. 16; 67 Am. Dec. 688.

[11] Halbut *v.* Forrest City, 34 Ark. 246.

[12] Strong *v.* Kamm, 13 Or. 172.

sale the land would be worth four dollars an acre, and that the vendor would then purchase it back at that price if the buyer should desire to sell;[1] a promise to pay B one half the proceeds of a piece of land when he, the promisor, should sell it;[2] an agreement under which defendant advanced money for plaintiff to pay certain installments upon a contract for the purchase of land, defendant being named in the contract as the purchaser, but really acting for plaintiff;[3] an oral agreement to purchase land for another, providing that when the latter shall sell the profits shall be equally divided between them.[4]

If an agreement is entire, and part of it is for a sale of land, the whole of it is within the statute.[5]

§ 2325. "Contracts not to be Performed within a Year." —This phrase refers to such contracts only as are incapable of being completely performed within a year; therefore contracts which may be performed within the year, or the performance of which depends upon a contingency which may happen within the year, are not within the statute.[6] Thus a contract for personal services for an indefinite period, or a term of years, and which will terminate with the death of the party making it, is not within the statute, because such a contract may by the death of the party be fully performed within one year.[7] Contracts which may be performed within the year on one side only, though they cannot be performed within the year on the other side, are not within the

[1] Burrell *v.* Root, 40 N. Y. 496.

[2] Mahagan *v.* Mead, 63 N. H. 130; Bruce *v.* Hastings, 41 Vt. 380; 98 Am. Dec. 592.

[3] Walton *v.* Karnes, 67 Cal. 25.

[4] Snyder *v.* Wolford, 33 Minn. 175; 53 Am. Rep. 22.

[5] Praute *v.* Schulte, 18 Ill. App. 62.

[6] Lyon *v.* King, 11 Met. 411; 45 Am. Dec. 219; Moore *v.* Fox, 10 Johns. 244; 6 Am. Dec. 338; Peters *v.* Westborough, 19 Pick. 364; 31 Am. Dec. 142; Linscott *v.* McIntire, 15 Me. 201; 33 Am. Dec. 602; Gadsden *v.* Lance, 1 McMull. Eq. 87; 37 Am. Dec. 548; Lapham *v.* Whipple, 8 Met. 57; 41 Am. Dec. 487; Blanding *v.* Sargent, 33 N. H. 239; 66 Am. Dec. 721; Worthy *v.* Jones, 11 Gray, 170; 71 Am. Dec. 696; Homer *v.* Frazer, 65 Md. 1.

[7] Hill *v.* Jamieson, 16 Ind. 125; 79 Am. Dec. 414. And see Worthy *v.* Jones, 11 Gray, 168; 71 Am. Dec. 696; Doyle *v.* Dixon, 97 Mass. 212; 93 Am. Dec. 80.

statute.[1] But performance within the year will not enable the party so performing to sue on the agreement, when the performance inured to the benefit of another than the other party to the agreement.[2] Contracts which by their terms are not to be fully performed within a year are within the statute.[3] A contract which cannot be performed within a year is not taken out of the statute because it may be terminated or defeated within a year.[4] A parol contract of hiring for more than a year is within the statute, although, in a given event, it is subject to determination in less than a year.[5]

The following have been held to be within the statute, and to require a writing, viz.: A contract for the hire of a carriage from a coach-maker, for five years, for an annual payment, which, by the custom of the trade, is determinable at any time within that period on payment of a year's hire;[6] a contract of service for a term of more than a year determinable by notice within a year;[7] an agreement with a solicitor that he should do all the business of a company, and should not be removed unless for misconduct;[8] a contract in the spring of one year to raise potatoes in the following year and deliver them;[9] a contract to work for another for a year from the following month;[10] a contract for service, to begin as soon as the employer could, and actually beginning a week after the

[1] Bracegirdle *v.* Heald, 1 Barn. & Ald. 727; Blanding *v.* Sargent, 33 N. H. 239; 66 Am. Dec. 720; Smalley *v.* Greene, 52 Iowa, 241; 35 Am. Rep. 267; McClellan *v.* Sandford, 26 Wis. 595; Sheehy *v.* Adarene, 41 Vt. 541; 98 Am. Dec. 623.

[2] Kimmins *v.* Oldham, 27 W. Va. 258.

[3] Foote *v.* Emerson, 10 Vt. 338; 33 Am. Dec. 205; Lockwood *v.* Barnes, 3 Hill, 128; 38 Am. Dec. 620; Croswell *v.* Crane, 7 Barb. 200; Weir *v.* Hill, 2 Lans. 282; Amburger *v.* Marvin, 4 E. D. Smith, 395.

[4] Meyer *v.* Roberts, 46 Ark. 80; 55 Am. Rep. 567.

[5] Meyer *v.* Roberts, 46 Ark. 80; 55 Am. Rep. 567.

[6] Birch *v.* Earl of Liverpool, 9 Barn. & C. 392.

[7] Dobson *v.* Collis, 1 Hurl. & N. 81; 25 L. J. Ex. 267. See Roberts *v.* Tucker, 3 Ex. 632.

[8] Eley *v.* Positive Security Ass. Co., L. R. 1 Ex. 20; 45 L. J. Ex. 58.

[9] Pitkin *v.* Noyes, 48 N. H. 294; 97 Am. Dec. 615.

[10] Scroggin *v.* Blackwell, 36 Ala. 351; Amburger *v.* Marvin, 4 E. D. Smith, 393; Little *v.* Wilson, 4 E. D. Smith, 422; Squire *v.* Whipple, 1 Vt. 69; Hinckley *v.* Southgate, 11 Vt. 428.

agreement;[1] an agreement by an employee that he will not leave the service of his employer for two years, nor in the summer, nor without two weeks' notice;[2] an agreement made December 31st, for services to be rendered for a year, to terminate December 31st next;[3] an agreement to work for two years for one hundred dollars the first and two hundred dollars the second year;[4] an agreement to employ an infant for five years, and to pay his father certain sums semi-annually for his services;[5] a contract to employ a laborer for three years, at so much per day;[6] an agreement for board and rooms in a boarding-house for one year, made before the commencement of the year;[7] a contract whereby A sells a horse to B, and warrants that it shall be sound for one year thereafter, and agrees that if, after the expiration of one year, the horse prove unsound, he will take it back, and pay the plaintiff one hundred dollars;[8] a contract to deliver a crop of hemp raised the present year, and what may be raised in two succeeding years, by the vendor;[9] an agreement to pay money after the lapse of a year, for land to be presently conveyed;[10] an agreement made December 14, 1856, to rent a house for the year 1857;[11] a contract to pay for a right to use an invention on a certain boat, "at so much a year during the term of a patent having twelve years to run," if the boat should so long last;[12] an agreement of a vendor, upon the sales of a patent right, to repay the consideration, if the vendee did not, within three years, realize a certain amount out of the profits of such patent right;[13] an agreement to buy goods of B, exclusively, for

[1] Sutcliffe *v.* Atlantic Mills, 13 R. I. 480; 43 Am. Rep. 39.
[2] Bernier *v.* Cabot Manufacturing Co., 71 Me. 506; 36 Am. Rep. 343.
[3] Levison *v.* Stix, 10 Daly, 229.
[4] Emery *v.* Smith, 46 N. H. 151.
[5] Hill *v.* Hooper, 1 Gray, 131.
[6] Tuttle *v.* Swett, 31 Me. 555.
[7] Wilson *v.* Martin, 1 Denio, 602; Spencer *v.* Halstead, 1 Denio, 606.
[8] Shipley *v.* Patton, 21 Ind. 169.
[9] Holloway *v.* Hampton, 4 B. Mon. 415.
[10] Marcy *v.* Marcy, 9 Allen, 8.
[11] Atwood *v.* Norton, 31 Ga. 507.
[12] Packet Co. *v.* Sickles, 5 Wall. 580.
[13] Lapham *v.* Whipple, 8 Met. 59; 41 Am. Dec. 487.

five years, if B shall sell as reasonably as others;[1] an agreement to stop cars permanently at a certain place;[2] a contract by a railroad company to support the widow of a person killed by one of its trains, and her three minor children, during her life;[3] a promise to pay a father, for naming his infant son for the promisor, one hundred dollars, by deposit, etc., in four equal annual installments.[4]

This section of the statute does not apply to contracts concerning lands, or any interest therein;[5] nor to agreements to marry.[6]

And the following have been held not within the statute, viz.: A contract to pay money upon the return of a ship which might return within a year, although the ship in fact did not return within two years;[7] a contract to pay a sum of money to a person on the day of his marriage, although the marriage did not take place within a year;[8] a promise to marry after the defendant's return from a contemplated voyage, on which it was expected he would be absent eighteen months or more;[9] a marriage contract providing for the disposition of the property of the parties to their respective heirs;[10] an agreement for a year's lease, to begin at a future time;[11] an agreement to construct in a year and twenty days a road which could be constructed within the year, the twenty days being added for contingencies;[12] an agreement that a policy of fire insurance shall be renewed from year to year, either party being at liberty to give notice at any time that the arrangement shall not be continued;[13] a promise to sup-

[1] Mallett *v.* Lewis, 61 Miss. 105.
[2] Pitkin *v.* Long Island R. R. Co., 2 Barb. Ch. 221; 47 Am. Dec. 320.
[3] Deaton *v.* R. R. Co., 12 Heisk. 650.
[4] Parks *v.* Francis, 50 Vt. 626; 28 Am. Rep. 517.
[5] Fall *v.* Hazelrigg, 45 Ind. 586; 15 Am. Rep. 278; Railsback *v.* Walke, 81 Ind. 412; Mason *v.* Breslin, 9 Abb. Pr., N. S., 432; 40 How. Pr. 441; 2 Sweeny, 392; Reeder *v.* Sayre, 6 Hun, 564; Young *v.* Dake, 5 N. Y. 463; 55 Am. Dec. 356.
[6] Brick *v.* Gannar, 36 Hun, 52. *Aliter*, Derby *v.* Phelps, 2 N. H. 515.
[7] Anonymous, 1 Salk. 280.
[8] Peter *v.* Compton, Skin. 353; 1 Smith's Lead. Cas., 5th ed., 283.
[9] Clark *v.* Pendleton, 20 Conn. 495.
[10] Houghton *v.* Houghton, 14 Ind. 505; 77 Am. Dec. 69.
[11] Whiting *v.* Ohlert, 52 Mich. 462; 50 Am. Rep. 265.
[12] Jones *v.* Pouch, 41 Ohio St. 146.
[13] Trustees of First Baptist Church *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305.

port a person during his life;[1] an agreement to labor for a company "for the term of five years, or so long as A shall continue to be agent of the company";[2] an agreement by infant to work seven years for his board;[3] a contract by which a son agreed to work for his father while he lived, to be paid at his death;[4] a contract entered into on December 21, 1870, whereby plaintiff agreed to serve as clerk for defendants for a year commencing on the day thereafter, and ending on December, 22, 1871;[5] an agreement entered into in October, 1876, to teach a school for the year ending October 1, 1877, also for a further term of one year, at the same salary, if no notice to the contrary be given at least two weeks prior to that date;[6] a contract whereby plaintiff paid a certain sum in consideration of acting as defendant's agent for a "reasonable time";[7] a contract of partnership without any fixed time for its continuance, and the business of which may be completed within a year;[8] an agreement by one not to sell, or assist others in selling, musical instruments;[9] an agreement by the vendor of a business not to carry on the same business in the same place;[10] an agreement to erect a store within seven months, and to rent the same, when built, for a term of years;[11] an agreement to reward another for past services by testamentary bequest;[12] an agreement to render services to be paid for after the employer's death;[13] a lease "for the crop season of 1880," which might or might not be for more than twelve months;[14]

[1] Bull *v.* McCrea, 8 B. Mon. 422; Howard *v.* Burgen, 4 Dana, 137; Hutchinson *v.* Hutchinson, 46 Me. 154; Dresser *v.* Dresser, 35 Barb. 573.

[2] Roberts *v.* Rockbottom Co., 7 Met. 46.

[3] Wilhelm *v.* Hardman, 13 Md. 140.

[4] Updike *v.* Ten Broeck, 32 N. J. L. 105.

[5] Dickson *v.* Frisbee, 52 Ala. 165; 23 Am. Rep. 565.

[6] Smith *v.* Comlin, 19 Hun, 234.

[7] Niagara Fire Ins. Co. *v.* Greene, 77 Ind. 590.

[8] Jordan *v.* Miller, 75 Va. 442.

[9] Hill *v.* Jamieson, 16 Ind. 125; 79 Am. Dec. 414.

[10] Worthy *v.* Jones, 11 Gray, 168; 71 Am. Dec. 696; Doyle *v.* Dixon, 97 Mass. 212; 93 Am. Dec. 80; Lyon *v.* King, 11 Met. 411; 45 Am. Dec. 219.

[11] Eaton *v.* Whitaker, 18 Conn. 222; 44 Am. Dec. 586.

[12] Jilson *v.* Gilbert, 26 Wis. 637; 7 Am. Rep. 100.

[13] Kent *v.* Kent, 62 N. Y. 560; 20 Am. Rep. 502.

[14] Chaffe *v.* Benoit, 60 Miss. 34.

an agreement connected with a contract letting lands, that the tenant will "during the term" (three years) erect a fence;[1] a contract "to continue as long as the parties are mutually satisfied";[2] a contract for eight months, which may be extended at the end of that time by mutual agreement;[3] an agreement made in December, 1876, for a lease of a storehouse for two years from November 2, 1877;[4] a contract to insure, the insurance to commence within a year.[5]

§ 2326. "Goods, Wares, and Merchandise" of the Value of Fifty Dollars. — Most of the state statutes follow the "ten pounds" of the English statute, though in Maine, New Jersey, Missouri, and Arkansas the limit is thirty dollars, in New Hampshire thirty-three dollars, in Vermont forty dollars, in California two hundred dollars, and in Florida and Iowa there is no limit of value at all.[6] An oral contract for sale and delivery of an article to be subsequently manufactured by the vendor is within the statute, unless the agreement calls for the peculiar skill, labor, or care of the manufacturer, in which case it is for work and labor, and not within the statute.[7] A contract is not one of sale when it states or implies that the thing is to be made by the seller, and also blends together the price of the thing and compensation for work, labor, skill, and material, so that they cannot be discriminated; but such a contract is one of hiring and service, or a bargain by which one party undertakes to labor in a certain way for the other, who is thereupon to pay him a certain compensation.[8] The fact that goods sold are to be boxed and transported to the place of delivery by the seller does not

[1] Marley *v.* Noblett, 42 Ind. 85.
[2] Greene *v.* Harris, 9 R. I. 401.
[3] Brigham *v.* Carlisle, 78 Ala. 243.
[4] Winters *v.* Cherry, 78 Mo. 344.
[5] Wiebeler *v.* Milwaukee Mechanics' Mut. Ins. Co., 30 Minn. 464.
[6] Stimson's American Statute Law, 462.
[7] Prescott *v.* Locke, 51 N. H. 94; 12 Am. Rep. 55.
[8] Phipps *v.* McFarlane, 3 Minn. 109; 74 Am. Dec. 743.

take the sale out of the operation of the statute.[1] Where the contract is for several articles, each less in value than fifty dollars, but all together more, it is within the statute.[2]

The following have been held to be contracts for "goods, wares, and merchandise" within the statute: A contract for the sale of shares of stock in corporations,[3] emblements, or *fructus industriales;*[4] a contract for the manufacture and delivery of a machine;[5] a contract with a tailor or shoemaker for the making of articles of their trade;[6] a contract with a miller for the delivery of flour,[7] or with any manufacturer for the delivery of the produce of his manufacture;[8] a contract to make a set of artificial teeth to fit the mouth of a person;[9] a contract with an artist for a work of art;[10] a contract between a dealer in furniture, who keeps articles on hand, nearly, but not quite, completed, to be finished according to the taste of the purchaser, — in this case sofas and chairs not covered, — and a customer, for finishing and delivering such articles;[11] a contract to deliver a certain number of feet of plank for the price of more than fifty dollars, although stipulating that the manufacturer should saw a part of the logs into plank of various dimensions, under the direction of the purchaser;[12] an agreement for the delivery of a quantity of planks for ship-building, at a future time, and at a specified price;[13] a contract for a quantity of cheese, to be delivered and paid for thereafter;[14] an auction sale of chattels.[15]

[1] Atwater *v.* Hough, 29 Conn. 508; 79 Am. Dec. 229.
[2] Baldey *v.* Parker, 2 Barn. & C. 37; Gilman *v.* Hill, 36 N. H. 311.
[3] Tisdale *v.* Harris, 20 Pick. 9; Colvin *v.* Williams, 3 Har. & J. 38; 5 Am. Dec. 417; North *v.* Forest, 15 Conn. 400; Southern Ins. Co. *v.* Cole, 4 Fla. 359.
[4] Leake on Contracts, 258.
[5] Atkinson *v.* Bell, 8 Barn. & C. 277.
[6] Grafton *v.* Armitage, 2 Com. B. 341.
[7] Garbutt *v.* Watson, 5 Barn. & Ald. 613; Rondeau *v.* Wyatt, 2 H. Black. 67.
[8] Wilks *v.* Atkinson, 6 Taunt. 11.
[9] Lee *v.* Griffin, 1 Best & S. 272; 30 L. J. Q. B. 252.
[10] Lee *v.* Griffin, 1 Best & S. 272; 30 L. J. Q. B. 252.
[11] Flint *v.* Corbitt, 6 Daly, 429.
[12] Clark *v.* Nichols, 107 Mass. 547.
[13] Waterman *v.* Meigs, 4 Cush. 497.
[14] Newman *v.* Morris, 4 Har. & McH. 421.
[15] Davis *v.* Rowell, 2 Pick. 64; 13 Am. Dec. 398; Meadows *v.* Meadows, 3 McCord, 458; 15 Am. Dec. 645. See Auctions, Principal and Agent.

And the following have been held not to be within the statute: The employment of a carrier to buy goods and deliver them to the employer;[1] a contract for work expended in making goods with the materials of the employer;[2] a contract with an attorney to prepare a deed;[3] a contract for contriving a machine for a certain purpose;[4] a contract with a printer to print a book,[5] or of an artist to paint a picture;[6] a contract to make and deliver a wagon at a future day;[7] an agreement to manufacture certain articles, and furnish materials;[8] an agreement by A to

[1] Cobbold *v.* Caston, 1 Bing. 399.

[2] Atkinson *v.* Bell, 8 Barn. & C. 283.

[3] Grafton *v.* Armitage, 2 Com. B. 339; Lee *v.* Griffin, 1 Best & S. 277; 30 L. J. Q. B. 254.

[4] Grafton *v.* Armitage, 2 Com. B. 336.

[5] Clay *v.* Yates, 1 Hurl. & N. 73.

[6] Turner *v.* Mason, 65 Mich. 662.

[7] Crookshank *v.* Burrell, 18 Johns. 58; 9 Am. Dec. 187; Mixer *v.* Howarth, 21 Pick. 205; 32 Am. Dec. 256. In Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 115, it is said: "According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute: Crookshank *v.* Burrell, 18 Johns. 58; 9 Am. Dec. 187; Sewall *v.* Fitch, 8 Cow. 215; Robertson *v.* Vaughn, 5 Sand. 1; Downs *v.* Ross, 23 Wend. 270; Eichelberger *v.* McCauley, 5 Har. & J. 213; 9 Am. Dec. 514. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale as substantially contracts for the sale of chattels; and the decision in Lee *v.* Griffin, 1 Best & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley *v.* Sheppard, 10 Bing. 99; Howe *v.* Palmer, 3 Barn. & Ald. 321; Baldey *v.* Parker, 2 Barn. & C. 37; Atkinson *v.* Bell, 8 Barn. & C. 277. In this commonwealth a rule avoiding both of these extremes was established in Mixer *v.* Howarth, 21 Pick. 205, 32 Am. Dec. 256, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute: Spencer *v.* Cone, 1 Met. 283. 'The distinction,' says Chief Justice Shaw, in Lamb *v.* Crafts, 12 Met. 353, 'we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise when the article is made pursuant to the agreement.' In Gardner *v.* Joy, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale, and within the statute. To the same general effect are Waterman *v.* Meigs, 4 Cush. 497, and Clark *v.* Nichols, 107 Mass. 547."

[8] Allen *v.* Jarvis, 20 Conn. 38; Hight *v.* Ripley, 19 Me. 137; Mixer *v.* Howarth, 21 Pick. 205; 32 Am. Dec. 256;

cut B's wood, and to make it into charcoal for a certain price per cord and bushel;[1] a contract to manufacture and deliver quantity of paper, such paper to be thereafter manufactured at the contractor's mills;[2] an agreement to furnish materials, and complete the carpenter's work and turning, for buildings;[3] an agreement to procure and deliver at a certain time and place one half of a frame for a vessel, to be hewn and fashioned according to certain molds;[4] a contract for the manufacture of a carriage of a kind not in stock, nor usually kept on hand, but according to special order and specifications furnished, and a model selected by the purchaser;[5] an agreement to manufacture lamps that are not usually kept in stock, nor usually manufactured for purposes of sale;[6] an order to a merchant to send to Germany, and have made certain sashes;[7] a contract to deliver a quantity of wheat, unthrashed and in the straw;[8] an agreement to take a share in a trading adventure, being merely executory;[9] an agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties, he having bought it through a broker, on a margin.[10]

§ 2327. Earnest, or Part Payment of Purchase-money. —The statute excepts from its operation the cases in which "the seller shall give something in earnest to bind the bargain, or in part payment."[11] A cash payment on a sale of realty by parol will take the case out of the stat-

Spencer *v.* Cone, 1 Met. 283; Phipps *v.* McFarlane, 3 Minn. 109; 74 Am. Dec. 743; O'Neil *v.* New York etc. Mining Co., 3 Nev. 141; Sewall *v.* Litch, 8 Cow. 215; Bronson *v.* Wiman, 10 Barb. 406; Donovan *v.* Wilson, 26 Barb. 138; Parker *v.* Schenck, 28 Ind. 38; Robertson *v.* Vaughn, 3 Sand. 1; Parsons *v.* Loucks, 4 Robt. 216.

[1] Puget Sound Iron Co. *v.* Worthington, 2 Wash. 472.

[2] Parsons *v.* Loucks, 48 N. Y. 17; 8 Am. Rep. 517.

[3] Courtright *v.* Stewart, 19 Barb. 455.

[4] Abbott *v.* Gilchrist, 38 Me. 260.

[5] Meincke *v.* Falk, 55 Wis. 427; 42 Am. Rep. 722.

[6] Donnell *v.* Hearn, 12 Daly, 230.

[7] Bird *v.* Muhlinbrink, 1 Rich. 199; 44 Am. Dec. 247.

[8] Eichelberger *v.* McCauley, 5 Har. & J. 213; 9 Am. Dec. 514.

[9] Coleman *v.* Eyre, 45 N. Y. 38; Green *v.* Brookins, 23 Mich. 48; 9 Am. Rep. 74.

[10] Bullard *v.* Smith, 139 Mass. 492.

[11] Leake on Contracts, 291.

ute.[1] A promise to pay to the seller's creditor, accepted by the latter, who thereupon discharges the seller, is a part payment within the statute.[2] A part payment will not take a contract out of the statute of frauds, unless the part payment is made at the time of making the contract.[3] If it is made subsequently, it must be made and received for the express purpose of fulfilling the statute, or when made, the parties must substantially restate and reaffirm the terms of the contract.[4]

ILLUSTRATIONS.—Parties made an oral contract for the sale of goods, void under the statute of frauds. Subsequently the purchaser gave and the seller accepted a check for a part of the price. At that time the essential terms of the original contract were restated. The check was good when delivered, and was duly paid. *Held*, a payment "at the time" of the contract: *Hunter* v. *Wetsell*, 84 N. Y. 549; 38 Am. Rep. 544. Plaintiff contracted by parol with the defendant for thirty-one sheep at a certain price, to be delivered as wanted. The plaintiff received twenty upon the contract, and paid for them the contract price when they were delivered. The defendant refused to deliver the remaining eleven sheep, and the plaintiff brought his action to recover the damages he sustained in consequence of such refusal. *Held*, part payment: *Richardson* v. *Squires*, 37 Vt. 640. Plaintiff and defendant made an oral contract for the sale of property by the plaintiff to the defendant, and each deposited a sum of money with a third party, to be paid by him to either in case the other should fail to fulfill his part of the contract. *Held*, that the deposit was not an "earnest": *Howe* v. *Hayward*, 108 Mass. 54; 11 Am. Rep. 306. A demand of more than fifty dollars against a third person was assigned verbally, in consideration of the assignee's crediting the amount of the demand upon a precedent debt due from the assignor to the assignee. *Held*, not a part payment of the purchase-money: *Artcher* v. *Zeh*, 5 Hill, 200.

§ 2328. Requisites of Memorandum.—No particular form is required of the memorandum.[5] It is not neces-

[1] Nau *v.* Jackman, 58 Iowa, 359.
[2] Cotterill *v.* Stevens, 10 Wis. 422.
[3] Bissell *v.* Balcom, 40 Barb. 98. Reversed in part in 39 N. Y. 275.
[4] Hunter *v.* Wetsell, 57 N. Y. 375; 15 Am. Rep. 508; 84 N. Y. 549; 38 Am. Rep. 544; Paine *v.* Fulton, 34 Wis. 83.
[5] Hurley *v.* Brown, 98 Mass. 545; 96 Am. Dec. 671. In McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661, the court say: "1. There is no form of lan-

sary that all the details of the bargain shall be given. But the memorandum must state the contract with reasonable certainty, so that the substance of it can be understood without having recourse to parol proof,[1] either directly from the writing itself, or by reference to some other instrument, record, or other matter by which such certainty is attainable.[2] But a memorandum will not satisfy the

guage necessary; anything from which the intention may be gathered, as in other contracts, will be sufficient. 2. Any kind of writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, will suffice: Doty *v.* Wilder, 15 Ill. 407; 60 Am. Dec. 756; Johnson *v.* Dodge, 17 Ill. 433; Buckmaster *v.* Harrop, 7 Ves. 341, note 3; Clerk *v.* Wright, 1 Atk. 12; Pipkin *v.* James, 1 Humph. 326; 34 Am. Dec. 652; Anderson *v.* Harold, 10 Ohio, 402; Allen *v.* Roberts, 2 Bibb, 98; Harrison *v.* Lane, 4 Bibb, 466; Ide *v.* Stanton, 15 Vt. 685; 40 Am. Dec. 698; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Thayer *v.* Rock, 13 Wend. 53; Frith *v.* Lawrence, 1 Paige Ch. 434; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262; Loomis *v.* Newhall, 15 Pick. 159; Nichols *v.* Johnson, 10 Conn. 192. 3. The writings, notes, or memoranda shall contain on their face or by reference to others that are traceable, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest, or preperty, as will be capable of identification and separation from other of like kind, together with the terms, conditions, and price to be paid, or other consideration to be given: Barry *v.* Coombe, 1 Pet. 647, 650; Doty *v.* Wilder, 15 Ill. 407; 60 Am. Dec. 756; Blagden *v.* Bradbear, 12 Ves. 466; Clerk *v.* Wright, 1 Atk. 12; Clinan *v.* Cook, 1 Schoales & L. 31; Champion *v.* Plummer, 1 Bos. & P. N. R. 252; Dock *v.* Hart, 7 Watts & S. 172; Pipkin *v.* James, 1 Humph. 326; 34 Am. Dec. 652; Anderson *v.* Harold, 10 Ohio, 402; Webster *v.* Ela, 5 N. H. 540; Sherburne *v.* Shaw, 1 N. H. 158; 8 Am. Dec. 47; Allen *v.* Roberts, 2 Bibb, 98; Harrison *v.* Lane, 4 Bibb, 466; Fowler *v.* Lewis, 3 A. K. Marsh. 443; Tharp *v.* Feltz, 6 B. Mon. 100; Dorsey *v.* Wayman, 6 Gill, 66; Taney *v.* Bachtell, 9 Gill, 205; Ide *v.* Stanton, 15 Vt. 685; 40 Am. Dec. 698; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Abeel *v.* Radcliff, 13 Johns. 296; 7 Am. Dec. 377; Van Alstine *v.* Wimple, 5 Cow. 162; Frith *v.* Lawrence, 1 Paige Ch. 434; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262; Loomis *v.* Newhall, 15 Pick. 159; Bean *v.* Burbank, 16 Me. 458; 33 Am. Dec. 681; Nichols *v.* Johnson, 10 Conn. 192; Hill *v.* Roderick, 4 Watts & S. 221. 4. The party to be charged, or vendor of land, etc., or his lawfully authorized agent, shall sign it. 5. A verbal or parol agency is sufficient for this purpose: Doty *v.* Wilder, 15 Ill. 407; 60 Am. Dec. 756; Johnson *v.* Dodge, 17 Ill. 433; Clinan *v.* Cooke, 1 Schoales & L. 31. 6. The signing will be sufficient in the caption, or body of the memorandum, or by a subscription to it: Anderson *v.* Harold, 10 Ohio, 402; Barry *v.* Coombe, 1 Pet. 647, 650. 7. The contract or obligation must be signed with intent to enter into it, must be mutual, reciprocal, and upon good or valid consideration: Dorsey *v.* Packwood, 12 How. 134; Anderson *v.* Harold, 10 Ohio, 402; Frith *v.* Lawrence, 1 Paige Ch. 434; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262; Utica etc. R. R. Co. *v.* Brinckerhoff, 21 Wend. 139; 34 Am. Dec. 220; Getman *v.* Getman, 1 Barb. Ch. 499; Acker *v.* Phœnix, 4 Paige, 305; Bean *v.* Burbank, 16 Me. 458; 33 Am. Dec. 681; Hill *v.* Roderick, 4 Watts & S. 221."

[1] Bailey *v.* Ogden, 3 Johns. 399; 3 Am. Dec. 509; Abeel *v.* Radcliff, 13 Johns. Ch. 297; 7 Am. Dec. 377; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274; Eggleston *v.* Wagner, 46 Mich. 610; Hazard *v.* Day, 14 Allen, 487; 92 Am. Dec. 790.

[2] Atwood *v.* Cobb, 16 Pick. 227; 26 Am. Dec. 657.

statute if it appears therefrom that some of the details of the contract remain to be settled between the parties.[1] A contract for the sale of goods need not specify time or place of delivery; but if plaintiff testifies that time or place was agreed upon, and the contract does not specify it, he cannot recover on it.[2]

The memorandum may be any kind of a writing; for example, a letter;[3] an invoice or bill of goods;[4] brokers' bought and sold notes.[5] It need not be addressed or delivered to the other contracting party.[6] A memorandum of a contract of sale, signed by one who is the agent of both the buyer and the seller, expressing that certain property has been sold at a certain price, necessarily imports that it has been purchased at that price.[7] The note or memorandum may consist of several writings, if they are sufficiently connected together by internal reference; and evidence is admissible to apply the references and to identify the writings referred to.[8] But several writings cannot be connected by extrinsic evidence only, without any internal reference or connection, for the purpose of making a note or memorandum to satisfy the statute.[9]

Tested by the above rules, the following have been held sufficient, viz.: "A house on Church Street";[10] all the vendor's "title or claim to property bought of A and B, and known as the Gentle property";[11] a draft for the purchase-money of lands, drawn by an agent without disclosing his principal's name;[12] a paper signed by parties

[1] Wardell *v.* Williams, 62 Mich. 50; 4 Am. St. Rep. 814.

[2] Smith *v.* Shell, 82 Mo. 215; 52 Am. Rep. 365.

[3] Jackson *v.* Lowe, 1 Bing. 9; Napier *v.* French, 40 N. Y. Sup. Ct. 122.

[4] Schneider *v.* Norris, 2 Maule & S. 286.

[5] Goom *v.* Aflalo, 6 Barn. & C. 117; Newberry *v.* Wall, 84 N. Y. 576; Greeley-Burnham Co. *v.* Capen, 23 Mo. App. 301; Elliot *v.* Barrett, 144 Mass. 256.

[6] Welford *v.* Beazeley, 3 Atk. 503; Drury *v.* Young, 58 Md. 546; 42 Am. Rep. 343.

[7] Butler *v.* Thomson, 92 U. S. 412.

[8] Peck *v.* Vandemark, 99 N. Y. 29.

[9] Boeckeler *v.* McGowan, 12 Mo. App. 507.

[10] Mead *v.* Parker, 115 Mass. 413; 15 Am. Rep. 110.

[11] Smith *v.* Freeman, 75 Ala. 285.

[12] Neaves *v.* North State Mining Co., 90 N. C. 412; 47 Am. Rep. 529.

in possession of a lot that had been leased for ten thousand years, but without seals, agreeing "to take the lot," describing it, on a ground-rent of sixty dollars";[1] "received of C twenty dollars, being on account of a plantation on the Cypress, sold to him this day for two thousand two hundred dollars, payable in different installments, as per agreement";[2] a receipt in these terms: "Received from A twenty dollars, on account of the purchase of the house and lot No. 38 Hammond, at two thousand nine hundred dollars, subject to a lease to B for four years from the 1st of May next; one thousand dollars may remain by bond and mortgage; the balance the 1st of May, when the deed will be executed and possession given";[3] the minutes of a resolution of the common council of a city, designating an official newspaper, and the signature of the clerk of the common council at the end of the minutes;[4] where, after a note became due, a third person indorsed thereon a guaranty of payment as follows: "I guarantee the payment of the contents of the within note, etc., the one half within six months, and the other half within twelve months."[5]

But the following have been held insufficient, viz.: "Lot adjoining";[6] "two-and-one-half-acre tract of land, being the first half of the five-acre tract along by the fence, just back of the Chicago Catholic burying-ground";[7] "all that piece of property known as the Union Hotel property";[8] "one house and lot in the town of H.";[9] "January 4, 1808, received of J. E. $——, in part pay of a lot he bought of me in the town of V., it being the cash part of the purchase of said lot";[10] "Received of L. Underwood

[1] Cadwalader *v.* App, 81 Pa. St. 194.
[2] Cosack *v.* Descoudres, 1 McCord, 425; 10 Am. Dec. 681.
[3] Westervelt *v.* Matheson, 1 Hoff. Ch. 37.
[4] Argus Co. *v.* Mayor of Albany, 55 N. Y. 495; 14 Am. Rep. 296.
[5] Neelson *v.* Sanborne, 2 N. H. 413; 9 Am. Dec. 108.
[6] Scarritt *v.* Church, 7 Mo. App. 174.
[7] Pierson *v.* Ballard, 32 Minn. 263.
[8] King *v.* Wood, 7 Mo. 389.
[9] Murdock *v.* Anderson, 4 Jones Eq. 77.
[10] Ellis *v.* Deadman, 4 Bibb, 466.

three hundred dollars cash, on payment on house";[1] a "lot on Eighteenth Street, 50 by 180 feet, about 300 feet south of Herbert Street,"[2] "one half acre of land, adjoining K.'s lot on the east, and running due east";[3] an invoice commencing with the words, "Invoice of articles purchased by L. Pipkin and R. Oliver of William R. James, this 29th August, 1836," and after specifying numerous articles, concluding with the words, "one ice-house and lot, $140";[4] a memorandum signed by the plaintiff, and accepted in writing by the defendant, to give a certain sum, "for the whole property, from cellar to top, including lease, press, and boiler," various fixtures and furniture described, and, in addition, pay other sums, including the ground-rent since a specified day;[5] an instrument reciting the sale of the signer's hops, but not designating the vendee, and by its literal interpretation apparently signifying that the vendor and signer was to pay himself the price on delivery;[6] the signing of a receipt for money paid on the oral consummation of a trade for land;[7] a traveling agent's order to his principal, "Send to B.; terms, net thirty days; freight allowed," signed by him as agent, and followed by a list of the goods and prices, with directions for shipping, signed by B.;[8] a paper containing merely the date of an agreement, the name and place where written, certain figures, and the names of certain parties, and the signature of the party intended to be charged;[9] "lots Nos. 1 and 2 on F. Street," without reference to any plan by which the premises could be identified;[10] a memorandum by an agent of an agreement to convey an estate on C. Street, when the owner has two estates on C. Street, and has only empowered

[1] Patterson *v.* Underwood, 29 Ind. 607.
[2] Schroeder *v.* Taaffe, 11 Mo. App. 267.
[3] Sherer *v.* Trowbridge, 135 Mass. 500.
[4] Pipkin *v.* James, 1 Humph. 325; 34 Am. Dec. 652.
[5] Farwell *v.* Mather, 10 Allen, 322; 87 Am. Dec. 641.
[6] Calkins *v.* Falk, 39 Barb. 620.
[7] Wright *v.* Mischo, 52 N. Y. Sup. Ct. 241.
[8] Banks *v.* Chas. P. Harris Mfg. Co., 20 Fed. Rep. 667.
[9] Reid *v.* Kenworthy, 25 Kan. 701.
[10] Clark *v.* Chamberlin, 112 Mass. 19.

the agent to sell one of them;[1] a telegram from a principal, saying he would take certain property for the purchase of which his agent had negotiated, where it did not express the terms of the contract, but these would have to be ascertained from the oral negotiations between the agent and the seller;[2] letters between the parties to an alleged sale of fruit-jars, stating the price, but not the precise number thereof, nor the time and manner of delivery;[3] letters showing a marriage engagement, without stating the time therefor.[4]

The memorandum may be made at any time before the action is brought.[5]

§ 2329. Must Show Parties, Promise, and Consideration. — It must show on its face who are the parties to it.[6] If the person named as party be an agent, it may be shown by parol who is the principal, for the purpose of charging him or entitling him to sue, notwithstanding the statute.[7] The christian name of the vendee need not appear in the memorandum of sale.[8] It may show the parties to the contract, sufficiently to satisfy the statute of frauds, by description as well as by name; and parol evidence is admissible to apply the description.[9] The promise or undertaking must be clearly set out, and with certainty.[10] The memorandum of sale will not satisfy the statute if it appears therefrom that some of the details of the contract remain to be settled between the parties.[11] It is held in England that the memorandum must also show the consideration for the promise. This doctrine is followed in

[1] Doherty *v.* Hill, 144 Mass. 465.
[2] McElroy *v.* Buck, 35 Mich. 434.
[3] Oakman *v.* Rogers, 120 Mass. 214.
[4] Ullman *v.* Meyer, 10 Abb. N. C. 281.
[5] Leake on Contracts, 267. But see McMillen *v.* Terrill, 23 Ind. 163.
[6] Leake on Contracts, 268; Sherburne *v.* Shaw, 1 N. H. 157; 8 Am. Dec. 47.
[7] Lerned *v.* Johns, 9 Allen, 419; Violette *v.* Powell, 10 B. Mon. 347; 52 Am. Dec. 548. *Contra*, Newcomb *v.* Clark, 1 Denio, 226.
[8] Lee *v.* Cherry, 85 Tenn. 707; 4 Am. St. Rep. 800.
[9] Jones *v.* Dow, 142 Mass. 130.
[10] Leake on Contracts, 269; Bailey *v.* Ogden, 3 Johns. 399; 3 Am. Dec. 509; Abeel *v.* Radcliff, 13 Johns. 297; 7 Am. Dec. 377.
[11] Wardell *v.* Williams, 62 Mich. 50; 4 Am. St. Rep. 814.

New York and elsewhere,[1] but the weight of authority in the United States appears to be the other way.[2]

§ 2330. Must be Signed by Party Charged — Mode of Signing. — The memorandum must be signed by the party charged; but the insertion of the name in any part of the writing is sufficient.[3] A memorandum signed by one party only is sufficient to charge him, although there be no signed writing upon which to charge the other party; and a party may be thus chargeable with a contract on which the remedy on his part might fail for want of evidence to satisfy the statute.[4] By the words "the party to be charged," the defendant in the action is to be understood.[5] Upon a joint sale to two, both vendees are principals, though the article sold might have

[1] Sears *v.* Brink, 3 Johns. 210; 3 Am. Dec. 475; Justice *v.* Lang, 42 N. Y. 522; 1 Am. Rep. 576; Church *v.* Brown, 21 N. Y. 315; Drake *v.* Seaman, 27 Hun, 63; Wright *v.* Weeks, 3 Bosw. 372; Wilson *v.* Roberts, 5 Bosw. 100; Ide *v.* Stanton, 15 Vt. 685; 40 Am. Dec. 698. See Atwood *v.* Cobb, 16 Pick. 227; 26 Am. Dec. 657.

[2] Packard *v.* Richardson, 17 Mass. 122; 9 Am. Dec. 123; Silkins *v.* Watson, 12 Tex. 199; How *v.* Kimball, 2 McLean, 103; Sage *v.* Wilcox, 6 Conn. 81; Read *v.* Evans, 17 Ohio, 128; Ives *v.* Hazard, 4 R. I. 14; 67 Am. Dec. 501. The words "for value received," in a contract of guaranty indorsed on a promissory note, is a sufficient expression of the consideration within the statute: Osborne *v.* Baker, 34 Minn. 307; 57 Am. Rep. 55.

[3] Leake on Contracts, 273; O'Donnell *v.* Breher, 36 N. J. L. 257; James *v.* Patten, 8 Barb. 344. *Aliter* where the statute uses the word "subscribed": James *v.* Patten, 6 N. Y. 9; 55 Am. Dec. 376; Champlin *v.* Parrish, 11 Paige, 405; McGovern *v.* Fleming, 12 Daly, 289.

[4] Laythoarp *v.* Bryant, 2 Bing. N. C. 735. "The party who has not signed may, nevertheless, file a bill and compel an execution of the contract. It is considered that when the party files the bill he does an act that will bind him, and that from that time there is a mutuality, and that the other party cannot plead the statute, because the words only prevent an action from being brought where the agreement is not signed by the party to be charged": Plumer, M. R., in Martin *v.* Mitchell, 2 Jacob & W. 427; Justice *v.* Lang, 42 N. Y. 498; 1 Am. Rep. 576; Douglass *v.* Spears, Nott & McC. 207; 10 Am. Dec. 588; Russell *v.* Nicoll, 3 Wend. 112; 20 Am. Dec. 670; McCrea *v.* Purmort, 16 Wend. 460; 30 Am. Dec. 103; Johnson *v.* Dodge, 17 Ill. 442; Farwell *v.* Lowther, 18 Ill. 255; Estes *v.* Furlong, 59 Ill. 312; Worrall *v.* Minn, 5 N. Y. 246; 55 Am. Dec. 330; Briggs *v.* Partridge, 64 N. Y. 364; 21 Am. Rep. 617; Edwards *v.* Ins. Co., 21 Wend. 492; Champlin *v.* Parrish, 11 Paige, 410; Woodward *v.* Aspinwall, 3 Sand. 276; Earl *v.* Campbell, 14 How. Pr. 332; White *v.* Schuyler, 31 How. Pr. 41; Old Colony R. R. Co. *v.* Evans, 6 Gray, 33; 66 Am. Dec. 394; Ives *v.* Hazard, 4 R. I. 81; 67 Am. Dec. 500; Gattrell *v.* Stafford, 12 Neb. 545; 41 Am. Rep. 767; Mason *v.* Decker, 72 N. Y 575; 28 Am. Rep. 190. *Contra*, Thomas *v.* Trustees, 3 A. K. Marsh. 298; 13 Am. Dec. 165; Corbet *v.* Gas Co., 6 Or. 405; 25 Am. Rep. 540.

[5] Newby *v.* Rogers, 40 Ind. 9.

been intended by them for the individual use of one; and therefore the undertaking of the other is not required by the statute of frauds to be in writing.[1]

The statute does not in terms require signing by name; and it seems that signing may be by a mark,[2] or by initials.[3] Signing a surname without a christian name is sufficient.[4] But a mere description or identification of the person, without intending a signature, as in a letter subscribed only "your affectionate mother," is not sufficient. "It is not enough that the party may be identified, he is required to sign; and after you have completely identified, still the question remains, whether he has signed or not."[5] The signature may be printed, as in a printed letter-head or bill;[6] or it may be impressed with a stamp;[7] it may be signed in pencil; but it must appear that the pencil-writing was intended as a signature, and not merely as a deliberative memorandum.[8] A bill of merchandise containing the buyer's name and a statement of the items and prices, but not signed, is not a memorandum.[9]

§ 2331. **Acceptance or Receipt of Goods.** — The statute as to the sale of goods of the value of fifty dollars, etc., excepts cases where "the buyer shall accept part of the goods so sold and actually receive the same."[10] The acceptance or receipt requires a delivery of and taking the possession as a matter of fact, to be decided by the

[1] Wainwright *v.* Straw, 15 Vt. 215; 40 Am. Dec. 675.

[2] But see Carlisle *v.* Campbell, 76 Ala. 247.

[3] See Sweet *v.* Lee, 3 Man. & G. 460; Phillimore *v.* Barry, 1 Camp. 513; Hubert *v.* Moreau, 2 Car. & P. 528; 12 Moore, 216.

[4] Lobb *v.* Stanley, 5 Q. B. 574.

[5] Selby *v.* Selby, 3 Mer. 2.

[6] Drury *v.* Young, 58 Md. 542; 42 Am. Rep. 345; Saunderson *v.* Jackson, 2 Bos. & P. 239; Schneider *v.* Norris, 2 Maule & S. 286. But see Jackssessor *v.* Poppe, 3 Bosw. 171.

[7] See Bennett *v.* Brumfitt, L. R. 3 Com. P. 28; 37 L. J. Com. P. 25.

[8] Lucas *v.* James, 7 Hare, 419. See In re Adams, L. R. 2 P. D. 367; 41 L J. P. D. 31; Clason *v.* Merritt, 14 Johns. 484.

[9] McElroy *v.* Seery, 61 Md. 389; 48 Am. Rep. 110.

[10] McTaggart *v.* Rose, 14 Ind. 230; Lay *v.* Neville, 25 Cal. 545; Kane *v.* Drake, 27 Ind. 29; Jones *v.* Witter, 13 Mass. 307; Stockbridge *v.* West Stockbridge, 14 Mass. 257; Hill *v.* McDonald, 17 Wis. 97.

court or jury upon the circumstances. "In order to satisfy the statute, there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking to the possession as owner."[1]

The delivery of samples merely as specimens of the chattels is not sufficient;[2] nor if the seller retains a lien on them for the purchase-money;[3] nor the acceptance of a bill of goods stored in a general warehouse, and an order for their delivery, without other notice to the warehouseman;[4] nor a delivery of a bill of parcels;[5] nor the delivery of the export entry;[6] nor where the vendee had the goods in his possession for no greater time than was necessary to enable him to examine their quantity and quality.[7]

Upon a contract for the sale of goods according to a certain description, the buyer, upon their delivery, is entitled to examine them before acceptance, for the purpose of ascertaining whether they satisfy the contract, and to refuse them if they do not; but if he retain the goods beyond a reasonable time for the above purpose, it would be evidence of an acceptance and receipt that might exclude the statute.[8] Upon a sale of specific goods, the property passes at once by force of the contract; the buyer has no right to return the goods, even under a warranty of their quality, and requires no time or facilities for examining them except as to identity; and there-

[1] Phillips *v.* Bistolli, 2 Barn. & C. 513; Snow *v.* Warner, 10 Met. 132; 43 Am. Dec. 417; Dean *v.* Tallman, 105 Mass. 443; Houghtaling *v.* Ball, 19 Mo. 84; 59 Am. Dec. 331; Hewes *v.* Jordan, 39 Md. 472; 17 Am. Rep. 578; Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Boardman *v.* Spooner, 13 Allen, 353; 90 Am. Dec. 196; Jones *v.* Bank, 29 Md. 287; 96 Am. Dec. 533.

[2] Moore *v.* Love, 57 Miss. 765.

[3] Gardet *v.* Belknap, 1 Cal. 399.

[4] Boardman *v.* Spooner, 13 Allen, 353; 90 Am. Dec. 196.

[5] Smith *v.* Mason, Anth. 164.

[6] Johnson *v.* Smith, Anth. 60.

[7] Hewes *v.* Jordan, 39 Md. 472; 17 Am. Rep. 578.

[8] Curtis *v.* Pugh, 10 Q. B. 111. See Nicholson *v.* Bower, 1 El. & E. 172; 28 L. J. Q. B. 97; Grimoldby *v.* Wells, L. R. 10 Com. P. 391; 44 L. J. Com. P. 203; Remick *v.* Sanford, 120 Mass. 309; Pitney *v.* Ins. Co., 61 Barb. 344.

fore there is a stronger presumption in favor of an acceptance and receipt, and slighter evidence is sufficient to prove it.[1] The delivery must be evidenced by acts, not words.[2]

Delivery alone, without acceptance and receipt, is not enough;[3] nor is receipt and acceptance, if the vendor did not intend to deliver the goods. Both parties must concur in the acts.[4] If the buyer refuses to receive the goods, he cannot be held, and his reasons for refusing are not material.[5] The receipt and acceptance need not be contemporaneous with the contract, but may be subsequently made;[6] nor need they be concurrent with each other,—either may precede the other.[7] The statute does not require a delivery of goods sold, where the contract is in writing, or where the purchase-money, or part of it, is paid.[8]

ILLUSTRATIONS.—RECEIPT AND ACCEPTANCE HELD SUFFICIENT.—Goods, having been weighed in the presence of the vendee, were placed by themselves in the vendor's warehouse,

[1] Kershaw *v.* Ogden, 3 Hurl. & C. 717; 34 L. J. Ex. 159; Cusack *v.* Robinson, 1 Best & S. 299; 30 L. J. Q. B. 261.

[2] Shindler *v.* Houston, 1 N. Y. 261; 49 Am. Dec. 316; Pitney *v.* Ins. Co., 65 N. Y. 26; Good *v.* Curtiss, 31 How. Pr. 11; Ham *v.* Van Orden, 4 Hun, 709; Lawrence *v.* Woods, 4 Bosw. 362; Gardet *v.* Belknap, 1 Cal. 402; Malone *v.* Plato, 22 Cal. 103; Bassett *v.* Camp, 54 Vt. 232; Snow *v.* Warner, 10 Met. 136; 43 Am. Dec. 417; Dale *v.* Simpson, 21 Pick. 384; Denny *v.* Williams, 5 Allen, 3; Edwards *v.* R. R. Co., 54 Me. 105; Phillips *v.* Hunnewell, 4 Me. 376; Matthieson *v.* McMahon, 38 N. J. L. 541; Shepherd *v.* Pressey, 32 N. H. 56; Kirby *v.* Johnson, 22 Mo. 354; Allderton *v.* Buchoz, 3 Mich. 322; Hollenbeck *v.* Cochran, 20 Hun, 416.

[3] Maxwell *v.* Brown, 39 Me. 98; 63 Am. Dec. 605; Young *v.* Blaisdell, 60 Me. 275; Harvey *v.* St. Louis etc. Ass'n, 39 Mo. 211; Caulkins *v.* Hellman, 47 N. Y. 449; 7 Am. Rep. 461; Shepherd *v.* Pressey, 32 N. H. 49; Knight *v.* Mann, 118 Mass. 145; Scotten *v.* Sutler, 37 Mich. 526; Grey *v.* Cary, 9 Daly, 363.

[4] Smith *v.* Hudson, 6 Best & S. 431; Brewster *v.* Taylor, 7 Jones & S. 189; Clarke *v.* Tucker, 2 Sand. 157; Baker *v.* Cuyler, 12 Barb. 667; Young *v.* Blaisdell, 60 Me. 274; Matthiessen etc. Co. *v.* McMahon, 38 N. J. L. 536.

[5] Phillips *v.* Bistolli, 2 Barn. & C. 511; Tomkinson *v.* Staight, 17 Com. B. 697; Nicholson *v.* Bower, 1 El. & E. 172; Knight *v.* Mann, 118 Mass. 145; Hewes *v.* Jordan, 39 Md. 480; 17 Am. Rep. 578.

[6] Bush *v.* Holmes, 53 Me. 417; Boutwell *v.* O'Keefe, 32 Barb. 434; McKnight *v.* Dunlop, 5 N. Y. 537; 55 Am. Dec. 370; Davis *v.* Eastman, 1 Allen, 422; Marsh *v.* Hyde, 3 Gray, 331; Rickey *v.* Ten Brock, 63 Mo. 563; Gault *v.* Brown, 48 N. H. 183; 2 Am. Rep. 210; McCarthy *v.* Nash, 14 Minn. 127; Richardson *v.* Squires, 37 Vt. 640; Amson *v.* Dreber, 35 Wis. 615.

[7] Garfield *v.* Paris, 96 U. S. 536; Pinkham *v.* Mattox, 53 N. H. 604; Knight *v.* Mann, 118 Mass. 143.

[8] Pierce *v.* Gibson, 2 Ind. 408.

marked with the vendee's name, and to be delivered when sent for: *Ex parte Safford*, 2 Low. 463. A sold to B a sewing-machine for eighty dollars, to be paid for in monthly installments of from five dollars to ten dollars, at the option of the buyer; and it was agreed that the machine should remain the property of A until paid for. The machine was delivered and accepted at the time of the contract. B paid nothing until forty-five dollars was due at the rate of five dollars per month: *Pinkham* v. *Mattox*, 53 N. H. 600. The subject of sale was ninety-three tons of iron, lying by itself; the parties met at the place where the iron was, and agreed upon the price and the mode of payment; they then stepped up to the iron, and the vendor said to the vendee, "I deliver you this iron at that price," after which, before the iron was moved, it was claimed and taken away by a third person: *Calkins* v. *Lockwood*, 17 Conn. 154; 42 Am. Dec. 729. The parties entered into a parol agreement for the sale of a large quantity of bricks, to be delivered within a month; after the expiration of the month the defendant called upon plaintiff's agent, who had charge of the kiln, took away eight hundred of the bricks, and told the agent that he would call for the remainder the following week. Defendant did not call for them, nor did the plaintiff separate the bricks from the rest of the kiln: *Damon* v. *Osborn*, 1 Pick. 476; 11 Am. Dec. 229.

ILLUSTRATIONS (CONTINUED).— RECEIPT AND ACCEPTANCE HELD INSUFFICIENT.— Defendants verbally ordered lumber of plaintiffs, to be taken from certain lots designated by defendants in plaintiffs' yard, and to be cut by plaintiffs into sizes required by defendants and placed on plaintiffs' dock, and notice to be given to defendants, who agreed thereupon to take it. Plaintiffs filled the order, placed the lumber on the dock, and gave notice to defendants as agreed, but before they removed it, it was accidentally burned: *Cooke* v. *Millard*, 65 N. Y. 352; 22 Am. Rep. 619. An agent of the seller was invoicing certain goods, and the purchaser said he thought he would take them at a certain amount, to which the seller, who was standing by, assented: *Dehority* v. *Paxson*, 97 Ind. 253. Defendant verbally agreed to purchase goods of the plaintiff, and in accordance with the terms of the bargain, the plaintiff deposited the goods at a point in the highway designated by the defendant, and afterwards notified the defendant thereof, who promised to pay for them: *Finney* v. *Apgar*, 31 N. J. L. 266. Plaintiff called upon defendant and offered to sell him a cargo of coal at a certain rate, defendant to pay the freight, which offer the defendant accepted, and plaintiff accordingly sent him the coal by a vessel which was wrecked on the way, thereby preventing defendant from receiving the same: *Maxwell* v. *Brown*, 39 Me.

98; 63 Am. Dec. 605. The plaintiff, at the verbal request of the defendant, went to P. and surveyed fifty thousand feet of boards, and took them to a wharf, where defendant said a vessel would be ready to receive them. The vessel was not there, nor was any agent of defendants; plaintiff marked the boards with defendant's name, and directed his men to deliver them on the vessel when she should arrive. The boards were never shipped: *Howard* v. *Borden*, 13 Allen, 299. D. contracted orally to purchase a wagon of plaintiffs for $475; the wagon was fitted with shafts for one horse; D. desired a wagon for two horses, and plaintiffs agreed to fit a pole belonging to D. to the wagon, if it could be done; this, upon examining the pole, they decided could not be done, and, without further consultation with D., sent the wagon to a stable where D. had directed it to be delivered: *Brewster* v. *Taylor*, 63 N. Y. 587. D. verbally agreed to sell to plaintiff one hundred unbroken horses from a band, at a certain price per horse, plaintiff to select and break the horses a few at a time, they to remain in D.'s pasture until all should be selected and broken. Plaintiff selected twenty, broke them, and turned them into D.'s pasture. D. then refused further to perform: *Terney* v. *Doten*, 70 Cal. 399.

§ 2332. Delivery to Carrier or Other Agent.—The delivery of goods to a carrier appointed by the buyer is not, as a rule, a delivery or a receipt of the goods within the statute.[1] But a delivery to a carrier after acceptance will satisfy the statute.[2] Delivery to and acceptance by an authorized agent is sufficient.[3] But a delivery to a carrier who has no independent or separate authority to act for the buyer in accepting them is insufficient.[4] Where the goods at the time of the sale are in the possession of an agent, a constructive acceptance and receipt may be

[1] Leake on Contracts, 285; Maxwell *v.* Brown, 39 Me. 98; 63 Am. Dec. 605; Jones *v.* Bank, 29 Md. 297; Shepherd *v.* Pressey, 32 N. H. 55; Grimes *v.* Van Vechten, 20 Mich. 410; Cross *v.* O'Donnell, 44 N. Y. 661; 4 Am. Rep. 721; Keiwert *v.* Meyer, 62 Ind. 587; 30 Am. Rep. 206; Allard *v.* Greasert, 61 N. Y. 1; Atherton *v.* Newhall, 123 Mass. 141; 25 Am. Rep. 47; Lyons *v.* Hill, 46 N. H. 47; Johnson *v.* Cuttle, 105 Mass. 447; 7 Am. Rep. 545; Hauseman *v.* Nye, 62 Ind. 485; 30 Am. Rep. 199. *Contra*, Bullock *v.* Tscheagi, 13 Fed. Rep. 345; Spencer *v.* Hale, 30 Vt. 314; 73 Am. Dec. 309; Strong *v.* Dodds, 47 Vt. 348; Stafford *v.* Walter, 67 Ill. 83.

[2] Cross *v.* O'Donnell, 44 N. Y. 661; 4 Am. Rep. 721.

[3] Jones *v.* Bank, 29 Md. 287; Wilcox Co. *v.* Green, 72 N. Y. 17; Gaff *v.* Homeyer, 59 Mo. 345; Snow *v.* Warner, 10 Met. 132; 43 Am. Dec. 417; Quintard *v.* Bacon, 99 Mass. 185.

[4] Smith *v.* Brennan, 62 Mich. 349; 4 Am. St. Rep. 867.

effected by all the parties consenting to a transfer of the right of possession, and by the agent continuing to hold them as agent or bailee of the buyer.[1]

§ 2333. Constructive Delivery — Goods Already in Possession of Buyer. — Where the goods are already in the possession of the buyer in right of another, a constructive delivery and receipt may be effected by the parties consenting to a change of the possession to the buyer in his own right.[2]

ILLUSTRATIONS. — Goods were in the possession of a person as agent for sale, and it was verbally agreed between him and the owner that he should buy them himself, and he thereupon resold them to a third party. *Held*, that there was sufficient evidence of an acceptance and receipt: *Edan* v. *Dudfield*, 1 Q. B. 302.

§ 2334. Goods Remaining in Possession of Seller. — A constructive acceptance and receipt may take place where the goods remain in the seller's possession, by a transfer of the right of possession to the buyer.[3] Actual or manual delivery of goods is not necessary in order to satisfy the statute of frauds, where they are ponderous and incapable of being handed over from one to another, and where the buyer so far accepts them as to treat them as his own; or where the delivery is symbolical; or where actual delivery is impracticable, and can only be by such symbolical means as the circumstances of the case will allow.[4]

ILLUSTRATIONS. — S. bought two horses of E., a livery-stable keeper, requesting E. to keep them for him at livery, as he had

[1] Leake on Contracts, 290.

[2] "If it appears that the conduct of a person in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds; as, for instance, if he sells, or attempts to sell, the goods, or if he disposes absolutely of the whole or of any part of them, or attempts to do so, or alters the nature of the property, or the like": Lillywhite *v.* Devereux, 15 Mees. & W. 291.

[3] Castle *v.* Sworder, 6 Hurl. & N. 828; Bailey *v.* Ogden, 3 Johns. 399; 3 Am. Dec. 509; Sahlman *v.* Mills, 3 Strob. 384; 51 Am. Dec. 630.

[4] Atwell *v.* Miller, 6 Md. 10; 61 Am. Dec. 294.

no stable ready. *Held*, a receipt of the horses within the statute: *Elmore* v. *Stone*, 1 Taunt. 458. A person, having sold a horse to another, requested the buyer to lend it to him for a journey, which the buyer assented to. *Held*, to be an acceptance and receipt of the horse within the statute: *Marvin* v. *Wallace*, 6 El. & B. 726; 25 L. J. Q. B. 369. A buyer selected and bought casks of wine, which he marked as his own, and left in the cellars of the wine merchant. *Held*, an acceptance and receipt: *Anderson* v. *Scot*, 1 Camp. 235. Trees standing on the seller's land were sold as timber for immediate removal, and the buyer cut down some and sold the top and lop. *Held*, a sufficient acceptance and receipt: *Marshall* v. *Green*, L. R. 1 C. P. D. 35. Defendant agreed to buy some cotton-bagging of the plaintiff at a certain price, and was told that it remained in the plaintiff's store at his risk; he then had some of it turned out of the store, but afterwards returned it, and refused to complete his contract. *Held*, a sufficient delivery: *Jackson* v. *Watts*, 1 McCord, 288. Parties orally agreed for the purchase and sale of a lot of cotton, consisting of six bales, weighed and stored in a warehouse, and the seller gave the purchaser an order on the warehouseman for it. The seller notified the warehouseman of the sale, and the purchaser applied to him for the cotton, but delivery was postponed by agreement of the warehouseman and the purchaser until the next morning. No money passed, and no other writing was executed. *Held*, a valid delivery and acceptance: *King* v. *Jarman*, 35 Ark. 190; 37 Am. Rep. 11. Defendant agreed to purchase a steam-engine, the boiler of which was set in bricks, in the plaintiff's shop, and could not be removed until they were taken away. The next week after the agreement was made, the plaintiff removed the bricks. The bargain was not in writing, and the defendant did not pay or secure any part of the price, and did not take away the engine. *Held*, no delivery: *Dole* v. *Stimpson*, 21 Pick. 384.

§ 2335. Part or Portion of Goods only need be Accepted—Sample.—A sample of the goods is sufficient, if accepted as part of the bulk.[1] But as a rule, a sample is given merely as a specimen of the goods contracted to be delivered, and not as part of the bulk; and as such the receipt of it is not sufficient.[2] And taking and using a

[1] Hinde *v.* Whitehouse, 7 East, 558; Atwood *v.* Lucas, 53 Me. 508; 89 Am. Dec. 713; Smith *v.* Stoller, 26 Wis. 671; Jackson *v.* Watts, 1 McCord, 288; Jenness *v.* Wendell, 51 N. H. 63; 12 Am. Rep. 48; Steam Saw-mill *v.* Guttshall, 3 Col. 8; Danforth *v.* Walker, 40 Vt. 257.

[2] Cooper *v.* Elston, 7 Term Rep. 14.

sample out of the bulk merely for the purpose of examining the quality with a view to acceptance is not alone an acceptance and receipt within the statute.[1] Where an order is given for several articles, or a purchase made of several parcels or kinds of goods, at the same time, in a manner to constitute one contract for the whole, the acceptance and receipt of one article or of one parcel or kind of the goods is sufficient to take the whole contract out of the statute.[2] Under an entire oral order for goods, the acceptance of a part, though shipped at a different time from the rest, will validate the entire contract.[3]

§ 2336. Part or Entire Performance Takes Case out of Statute.—A part or an entire performance under a parol contract takes the case out of the statute.[4] As to agreements for the sale of lands, this has been frequently held in equity in suits for specific performance.[5]

An agreement executed on one part is not within the statute of frauds.[6] One having voluntarily performed an

[1] Nicholson *v.* Bower, 1 El. & E. 172; 28 L. J. Q. B. 97; Carver *v.* Lane, 4 E. D. Smith, 168.

[2] Elliott *v.* Thomas, 3 Mees. & W. 170; Bigg *v.* Whisking, 14 Com. B. 195; Scott *v.* R. R. Co., 12 Mees. & W. 33.

[3] Farmer *v.* Gray, 16 Neb. 401.

[4] Browne on Statute of Frauds, 124; Ives *v.* Gilbert, 1 Root, 89; 1 Am. Dec. 35; Stone *v.* Dennison, 13 Pick. 1; 23 Am. Dec. 654; Swanzey *v.* Moore, 22 Ill. 63; 74 Am. Dec. 134; Martin *v.* McCord, 5 Watts, 493; 30 Am. Dec. 342; Lamar *v.* McNamee, 10 Gill & J. 116; 32 Am. Dec. 152; Fay *v.* Wheeler, 44 Vt. 292; Huntley *v.* Huntley, 114 U. S. 394; Horder *v.* Horder, 2 Sand. Ch. 17; Pomeroy *v.* Winship, 12 Mass. 514; 7 Am. Dec. 91; Brown *v.* Bellows, 4 Pick. 179; Newman *v.* Nellis, 97 N. Y. 285; Tatum *v.* Brooks, 51 Md. 148; Erskine *v.* Plummer, 7 Me. 447; 22 Am. Dec. 216; Warren *v.* Warren, 105 Ill. 568; Towsley *v.* Moore, 30 Ohio St. 185; 27 Am. Rep. 434; Moss *v.* Culver, 64 Pa. St. 414; 3 Am. Rep. 601; Reedy *v.* Smith, 42 Cal. 245; Ranson *v.* Bell, 46 Ga. 19; Rosser *v.* Harris, 48 Ga. 512. A contract for the sale of goods is not taken out of the statute of frauds by the vendee's preparation for receiving them: Harris *v.* Rounsevel, 61 N. H. 250. Marriage is not a sufficient part performance of a contract made in consideration of marriage to take the contract out of the statute of frauds: Brown *v.* Conger, 8 Hun, 625.

[5] See *post*, Title Specific Performance; Chapman *v.* Allen, Kirby, 399; 1 Am. Dec. 24. See McKowen *v.* McDonald, 43 Pa. St. 441; 82 Am. Dec. 576. *Aliter* in actions at law for the purchase-money or for damages for breach of contract: Kidder *v.* Hunt, 1 Pick. 328; 11 Am. Dec. 183; Norton *v.* Preston, 15 Me. 14; 32 Am. Dec. 128; Johnson *v.* Hanson, 6 Ala. 351; 41 Am. Dec. 55; Baldwin *v.* Palmer, 10 N. Y. 232; 61 Am. Dec. 743.

[6] Noyes *v.* Moore, 1 Root, 142; Chittington *v.* Fowler, 2 Root, 387; Cone *v.* Tracy, 1 Root, 479; Rogers *v.* Tracy, 1 Root, 233; Watrous *v.* Chalker, 7 Conn. 224; Pinney *v.* Pin-

agreement on his part cannot allege that it was void by he statute.[1] A contract within the statute is not illegal, but only not capable of being proved by parol, — an immunity which may be waived by the one sought to be bound.[2] Therefore an action will not lie to recover the consideration paid upon an oral agreement for the purchase of lands, if the vendor is willing to fulfill.[3] Where a party to an agreement void by the statute of frauds fails to execute it, the price advanced, or the value of articles delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. In such cases, the law raises, by implication, a promise to pay advances made upon the faith of the contract, and for which no consideration has been paid.[4]

ney, 2 Root, 191; Washburn *v.* Dosch, 68 Wis. 436; 60 Am. Rep. 873; Suggett *v.* Cason, 26 Mo. 221; Frazer *v.* Gates, 118 Ill. 99; McCue *v.* Smith, 9 Minn. 252; 86 Am. Dec. 100.

[1] Westfall *v.* Parsons, 16 Barb. 645.

[2] Montgomery *v.* Edwards, 46 Vt. 151; 14 Am. Rep. 618.

[3] Galway *v.* Shields, 66 Mo. 313; 27 Am. Rep. 351; Coughlin *v.* Knowles, 7 Met. 57; 39 Am. Dec. 759.

[4] Smith *v.* Smith, 28 N. J. L. 208; 78 Am. Dec. 49.

CHAPTER CXI.

MISTAKE, FRAUD, DURESS, AND UNDUE INFLUENCE.

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§ 2337. Mistake in Making the Agreement. — A party may show that, by mistake, he has entered into a different kind of agreement than that which he intended to make;[1]

[1] Leake on Contracts, 313. In Foster *v.* Mackinnon, L. R. 4 Com. P. 704, it is said: "It is plain, on principle and on authority, that if a blind man, or a man who cannot read, or who for some reason (not implying

for example, that he has signed a bill of exchange believing that it was simply a guaranty;[1] or that he has signed as a party to a bond when he intended only to sign as a witness.[2] So a note executed by mistake for too large an amount is a good ground for relief in equity.[3] To establish mistake, the party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt; at any rate a mere preponderance of evidence is not sufficient.[4]

ILLUSTRATIONS.—An illiterate man signed a paper, which was falsely represented to be a petition, but which was really a bond. *Held*, that he was not liable thereon: *Schuylkill County* v. *Copley*, 67 Pa. St. 386; 5 Am. Rep. 441. A deed was signed by one who believed it to be the duplicate of a lease of a portion of the premises conveyed, which he had signed after it had been read to and by him, the lessee therein having placed the two documents, which closely resembled each other, together upon the table to be signed, and it having been previously agreed that two copies of the lease should be signed. *Held*, not the deed of the signer: *McGinn* v. *Tobey*, 62 Mich. 252; 4 Am. St. Rep. 848. A conveyed a tract of land by a warranty deed, in which the consideration was expressed to be eighty-six pounds. B brought a suit against A on the warranty, and recovered judgment for eighty-six pounds. It was proved that forty-three pounds was the consideration really paid, eighty-six pounds having been inserted in the deed by mistake. *Held*, that A was entitled to relief: *Yelton* v. *Hawkins*, 2 J. J. Marsh. 1.

§ 2338. Mistake in Expressing the Agreement — Mistake of One Party only. — Where there is a mistake in

negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature, in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended": Smentek *v.* Cornhauser, 17 Ill. App. 266. But see Weller's Appeal, 103 Pa. St. 594.

[1] Foster *v.* Mackinnon, L. R. 4 Com. P. 704.

[2] Wake *v.* Harrop, 6 Hurl. & N. 768, per Bramwell, B.

[3] Harrison *v.* Jameson, 3 J. J. Marsh. 232; Rigsbee *v.* Trees, 21 Ind. 227.

[4] Parker *v.* Hull, 71 Wis. 368; 5 Am. St. Rep. 224.

expressing the agreement, but the mistake is of one of the parties only, the agreement is not affected.[1] Equity does not enforce specific performance in cases of mistake, but leaves the parties to the ordinary legal remedies for damages; and therefore a party may allege a mistake in expressing the contract, materially altering its effect, in answer to a suit for specific performance.[2] But if the mistake is known to the other party at the time, and the contract is not reduced to writing, there is no contract which the law will enforce.[3] A mistake will not be corrected in equity, where the parties to an instrument have equal knowledge, or equal means of obtaining knowledge, of the mistake, and there has been no concealment, surprise, or imposition.[4] Ignorance of a stipulation in the contract is no ground for relief against the stipulation, where there is no evidence that he was deceived or misled by any misrepresentation or concealment of the fact, and his mistake must be ascribed solely to his own carelessness or inattention.[5] A person who is *sui juris* cannot, in the absence of fraud, deny his written obligation by showing that when he signed it he had not read it.[6] Where the contract, under these circumstances, is in writing, a party cannot prove a different state of facts or intention than that expressed in it.[7] But in equity a mistake of the one party known to the other may not only preclude the latter from obtaining specific performance; but may also be a

[1] Leake on Contracts, 314.

[2] Leake on Contracts, 316.

[3] In Smith *v.* Hughes, L. R. 6 Q. B. 597, Hannen, J., says: "The promisor is not bound to fulfill a promise in a sense in which the promisee knew at the time the promisor did not intend it. And in considering the question in what sense a promisee is entitled to enforce the promise, it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent."

[4] Belt *v.* Mehen, 2 Cal. 159; 56 Am. Dec. 329; Jackson *v.* Olney, 140 Mass. 195.

[5] Robertson *v.* Smith, 11 Tex. 211; 60 Am. Dec. 234.

[6] Rothschild *v.* Frensdorf, 21 Mo. App. 318.

[7] Leake on Contracts, 319.

ground for setting aside the contract altogether, as not being founded upon a real agreement.[1]

§ 2339. **Mistake of Both Parties.**—Where a written contract contains a mistake common to both parties, while the law will not permit it to be varied by parol evidence, equity will relieve by restraining proceedings on the contract at law, or by rectifying it in accordance with the real intention of the parties.[2] Where there is a common mistake as to the identity of the subject of sale, one party having one thing in view, the other another, there is no sale of either.[3] Equity will correct a mistake, either as to fact or law, made by the draughtsman of a conveyance or other instrument which does not fulfill or which violates the manifest intention of the parties to the agreement.[4] It will correct a mistake in a bond, whether the relief be sought for the purpose of enforcing the bond, or to defeat it when set up to rebut an equity.[5] A contract for the sale of lands, made under the mistaken idea that the legislative power would pass laws which would greatly enhance the value of the land, which expectation was the only inducement to entering into the contract, will be relieved from in equity, if such laws are not passed, without any fault imputable to the parties to the contract.[6]

Mistakes of the following nature have been corrected in equity: Where an attorney, in drawing a contract, by mistake omitted an important provision;[7] a mistake made by

[1] Leake on Contracts, 318.

[2] Leake on Contracts, 319; Chapman v. Allen, Kirby, 399; 1 Am. Dec. 24; Coger v. McGee, 2 Bibb, 321; 5 Am. Dec. 610; Walker v. Dunlop, 5 Hayw. (Tenn.) 271; 9 Am. Dec. 787; Aschom v. Smith, 2 Penr. & W. 211; 21 Am. Dec. 437; Rogers v. Collier, 2 Bail. 581; 23 Am. Dec. 153; Lawrence v. Beaubien, 2 Bail. 623; 23 Am. Dec. 155; Chamberlain v. Thompson, 10 Conn. 243; 26 Am. Dec. 390; Hargous v. Ablon, 3 Denio, 406; 45 Am. Dec. 481; Ross v. Armstrong, 25 Tex. Supplement, 354; 78 Am. Dec. 574; Montgomery v. Shockey, 37 Iowa, 107.

[3] Sheldon v. Capron, 3 R. I. 171; Montgomery v. Shockey, 37 Iowa, 107.

[4] Leitensdorfer v. Delphy, 15 Mo. 160; 55 Am. Dec. 137.

[5] Smith v. Allen, 1 N. J. Eq. 43; 21 Am. Dec. 33.

[6] Miles v. Stevens, 3 Pa. St. 21; 45 Am. Dec. 621.

[7] Waterman v. Dutton, 6 Wis. 265.

the surveyor, by which a larger amount of land was contracted for than there was in reality;[1] where a mortgage showed upon its face that by a scrivener's mistake the word "quarterly" was used instead of the word "annually";[2] where a material (not simply a slight) mistake is made in the quantity of land conveyed.[3] Where the parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties.[4] A mistake in a deed or written contract will not be relieved against, unless express proof be adduced as to the intention of the parties.[5]

§ 2340. **Mistake of One Party Caused by the Other.** — If the other party have caused the mistake by misrepresentation, designedly, and for the purpose of inducing the contract, it is a fraud; and the contract may be avoided at law and in equity upon that ground.[6]

§ 2341. **Mistake as to Matters of Law.** — A mistake, to be a ground for avoiding an agreement, must be as to some fact, and not a mistake of law.[7] But the common-law rule which refuses relief against ignorance or mistake of law, and which is equally applicable in courts of law

[1] Jenks *v.* Fritz, 7 Watts & S. 201; 42 Am. Dec. 227; Gilmore *v.* Morgan, 2 J. J. Marsh. 65.

[2] Fowler *v.* Woodward, 26 Minn. 347.

[3] Ladd *v.* Pleasants, 39 Tex. 415; Paine *v.* Upton, 87 N. Y. 327; 41 Am. Rep. 371. See *ante*, Deeds.

[4] Perkins *v.* Gay, 3 Serg. & R. 327; 8 Am. Dec. 653.

[5] M oore *v.* Vick, 2 How. (Miss.) 746; 32 Am. Dec. 301.

[6] Leake on Contracts, 336; Phillips *v.* Hollister, 2 Cold. 269; Beebe *v.* Young, 14 Mich. 136.

[7] Leake on Contracts, 345; State *v.* Paup, 13 Ark. 129; 56 Am. Dec. 303; Fisher *v.* May, 2 Bibb, 448; 5 Am. Dec. 626; Storrs *v.* Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316; Hunt *v.* Rousmanier, 8 Wheat. 174; 1 Pet. 1; Pitcher *v.* Hennessey, 48 N. Y. 415; State *v.* Reigart, 1 Gill, 1; 39 Am. Dec. 628; Trigg *v.* Read, 5 Humph. 529; 42 Am. Dec. 447; Farnsworth *v.* Dinsmore, 2 Swan, 42; Pierson *v.* Armstrong, 1 Iowa, 282; 63 Am. Dec. 441; McDaniels *v.* Bank, 29 Vt. 230; 70 Am. Dec. 406; Drew *v.* Clark, Cooke (Tenn.), 373; 5 Am. Dec. 698; Good *v.* Herr, 7 Watts & S. 253; 42 Am. Dec. 236; Burkhauser *v.* Schmidt, 45 Wis. 316; 30 Am. Rep. 740.

and equity, is not enforced in equity where such ignorance or mistake is induced by fraud, or imposition, or undue influence, or an abuse of confidence springing out of the peculiar relations existing between the parties.[1] In Arkansas it is said that courts have tried to uphold the maxim that ignorance of law shall not excuse, but in cases of peculiar hardship they have distinguished between ignorance of the existence of a law and of its legal effect.[2] Where one, through a mistake of the law, acknowledges himself under an obligation, which the law will not impose on him, he shall not be bound thereby.[3] A mistake of fact, occasioned by acting on the representations of another, which representations were in turn occasioned by a mistake of law, is sufficient ground for relief in equity.[4] If two parties enter into a contract under a mistake of law, equity will relieve upon the ground of surprise; and if one party is mistaken as to the law, and the other, with knowledge, contracts with him, it will relieve upon the ground of fraud.[5]

ILLUSTRATIONS.—Plaintiff purchased from defendants county warrants drawn by the auditor upon the treasurer, but which were upon their face invalid, and not a charge upon the county. *Held*, that plaintiff, in the absence of fraud or misrepresentations, could not recover the price paid: *Christy* v. *Sullivan*, 50 Cal. 337; 19 Am. Rep. 655. An administrator sold land of his intestate to B, both supposing the fee was conveyed, whereas only an equity of redemption passed. *Held*, that equity would relieve the purchaser: *Griffith* v. *Townley*, 69 Mo. 13; 33 Am. Rep. 476.

§ 2342. False Representations, in General. — A false representation made by a seller, and known to him to be false, by reason of which the purchaser is induced to buy,

[1] Hardigree *v.* Mitchum, 51 Ala. 151; Dill *v.* Shahan, 25 Ala. 694; 60 Am. Dec. 540; Benson *v.* Markoe, 37 Minn. 30; 5 Am. St. Rep. 816.

[2] State *v.* Paup, 13 Ark. 129; 56 Am. Dec. 303.

[3] Warder *v.* Tucker, 7 Mass. 449; 5 Am. Dec. 62; Freeman *v.* Boynton, 7 Mass. 483; May *v.* Coffin, 4 Mass. 347; Offutt *v.* Parrott, 1 Cranch C. C. 154.

[4] Champlain *v.* Layton, 18 Wend. 407; 31 Am. Dec. 382.

[5] State *v.* Paup, 13 Ark. 129; 56 Am. Dec. 303.

is a fraud which equity will relieve against.[1] And literal speaking of the truth, if intended to accomplish a fraud, may be as fraudulent as a falsehood.[2] So false representations, not sufficient to sustain an indictment for false pretenses, may be sufficient to vitiate the contract thereby obtained.[3]

§ 2343. **Misrepresentation of Matter of Law.** — An erroneous representation or statement of a matter of law is not a fraud.[4] False representations as to the legal effect of an instrument are no bar to an action thereon, as a party signing such an instrument is presumed to know its contents, and has no right to rely upon the representations of the other party as to its legal effect.[5]

§ 2344. **False Representation of Intention.** — A representation of intention as to some future act or performance, though it may have induced the agreement, is not a sufficient ground of fraud merely by reason that it is not afterwards carried into effect.[6] It must have been made with intent to deceive.[7]

§ 2345. **Matters of Opinion.** — A mere representation of opinion, though erroneous, is not fraud against which the law will relieve.[8] Expressions of opinion by the vendor of property, relative to the title, the quantity, or the value, etc., if they do not amount to a misstatement of matters of fact, will not, although the opinion is erroneous or ill founded, entitle the purchaser to relief on the ground of fraud;[9] as representations by the president of a

[1] Walker *v.* Dunlop, 5 Hayw. (Tenn.) 271; 9 Am. Dec. 787; Bean *v.* Herrick, 12 Me. 262; 28 Am. Dec. 176; Campbell *v.* Hellman, 15 B. Mon. 508; 61 Am. Dec. 195.

[2] Mulligan *v.* Bailey, 28 Ga. 507; Denny *v.* Gilman, 26 Me. 149; Buford *v.* Caldwell, 3 Mo. 477.

[3] Nichols *v.* Michael, 23 N. Y. 264; 80 Am. Dec. 259.

[4] Leake on Contracts, 351; Platt *v.* Scott, 6 Blackf. 389; 39 Am. Dec. 436.

[5] Clem *v.* R. R. Co., 9 Ind. 488; 68 Am. Dec. 653; Thompson *v.* Phœnix Ins. Co., 75 Me. 55; 46 Am. Rep. 357.

[6] Leake on Contracts, 353.

[7] Miller *v.* Howell, 1 Scam. 499; 32 Am. Dec. 36.

[8] Leake on Contracts, 355.

[9] Curry *v.* Keyser, 30 Ind. 214; Drake *v.* Latham, 50 Ill. 270.

railroad company that a certain harbor and depot property was worth three times its actual value,[1] or representations by the purchaser that if a contract were to be made he had capital, and would make improvements which would induce the immigration of mechanics, etc.[2] But statements of a vendor of mining stock as to the amount of ore which had been taken out of the mine, and as to its richness, and as to there being plenty of wood, lumber, and water near the mine, are not mere matters of opinion which the vendee has no right to rely upon.[3]

§ 2346. Concealment or Non-disclosure of Material Fact.—The active concealment of a material fact may have the same effect as an express misrepresentation in operating a fraud, and in entitling a party to avoid an agreement induced by it.[4] And the non-disclosure of a material fact of which the other party is known to be ignorant may, under the circumstances of the case, be equivalent to an active concealment; for the non-disclosure may have the effect of impliedly representing that the fact does not exist, or of rendering the facts disclosed absolutely false.[5] On the sale of a horse, the buyer has a right to inquire if the horse is injured in any way, and the seller, if he make any representation, is bound to disclose the truth, and the whole truth, as far as he possesses any knowledge upon the subject, and this he must do, not partially, but fully and positively.[6] If he who has a legal title by his acts and conversation induces another to purchase the premises under another title, and stands by and sees him take a deed and pay his money for it, it is a fraud *per se*.[7]

[1] McClellan *v.* Scott, 24 Wis. 81.

[2] Fackler *v.* Ford, McCahon (Kan.), 21.

[3] Gifford *v.* Carvill, 29 Cal. 589.

[4] Leake on Contracts, 358; Beard *v.* Campbell, 2 A. K. Marsh. 125; 12 Am. Dec. 362; Hanks *v.* McKee, 2 Litt. 227; 13 Am. Dec. 265; Morris *v.* Budlong, 16 Hun, 570.

[5] Leake on Contracts, 358; Beard *v.* Campbell, 2 A. K. Marsh. 125; 12 Am. Dec. 362; Page *v.* Parker, 43 N. H. 363; 80 Am. Dec. 172.

[6] Baker *v.* Seahorn, 1 Swan, 54; 55 Am. Dec. 724.

[7] Tomlin *v.* Den, 19 N. J. L. 76; Harrison *v.* Edwards, 3 Litt. 340; Gray *v.* Bartlett, 20 Pick. 186; 32 Am.

But a non-disclosure of a fact, where there is no duty on the party to disclose, or no evidence of a fraudulent intention in not informing the other, is not a ground for avoiding a contract.[1] So one party to a controversy concerning land is not bound to disclose to his adversary defects in his own title.[2]

ILLUSTRATIONS. — A person sold a vessel with all faults, and, before the sale, had taken her from the ways on which she lay and placed her afloat in a dock for the purpose of preventing an examination of the bottom, which he knew to be unsound. *Held*, that the buyer was entitled to avoid the sale: *Schneider* v. *Heath*, 3 Camp. 506. A person, in order to sell a log of mahogany, turned it so as to conceal a hole in the underneath side. *Held*, a fraud on the buyer: *Udell* v. *Atherton*, 7 Hurl. & N. 172; 30 L. J. Ex. 337. Defendant, in payment of a horse, delivered bank bills to the plaintiff, which were known to the defendant to be worthless at the time, and unknown to the plaintiff, with an agreement that if the notes were not returned in a given time, the defendant should not be bound to receive them. *Held*, that it was a fraud, and that the plaintiff had a right to recover the value of the horse, though he did not return the notes within the time limited: *Smith* v. *Click*, 4 Humph. 186.

§ 2347. Non-disclosure of Latent Defect. — A person knowingly selling a chattel with a material latent defect, without disclosing it to the buyer, is guilty of a fraud entitling the buyer to avoid the sale.[3] Where on the sale of a horse known by the seller to be unsound in a certain respect, the seller conceals the defect, and gives evasive and artful answers to inquiries, with the intent to deceive, and thereby deceives and injures the purchaser, the latter may rescind.[4]

Dec. 208; Skinner *v.* Strouse, 4 Mo. 93; Engle *v.* Burns, 5 Call, 463; 2 Am. Dec. 593.

[1] Leake on Contracts, 359; Juzan *v.* Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Graffenstein *v.* Epstein, 23 Kan. 443; 33 Am. Rep. 171; Kohl *v.* Lindley, 39 Ill. 195; 89 Am. Dec. 294.

[2] Mills's Heirs *v.* Lee, 6 T. B. Mon. 91; 17 Am. Dec. 118.

[3] Leake on Contracts, 360; Paddock *v.* Strobridge, 29 Vt. 470; Hughes *v.* Robertson, 1 T. B. Mon. 215; 15 Am. Dec. 105; Maynard *v.* Maynard, 49 Vt. 297; Graham *v.* Stiles, 38 Vt. 578; French *v.* Vining, 102 Mass. 135; 3 Am. Rep. 440; Hanson *v.* Edgerly, 29 N. H. 343; Brown *v.* Montgomery, 20 N. Y. 287; 75 Am. Dec. 404; Brown *v.* Gray, 6 Jones, 103; 72 Am. Dec. 563; Singleton *v.* Kennedy, 9 B. Mon. 222; Hadley *v.* Clinton Importing Co., 13 Ohio, St. 502; 82 Am. Dec. 454; Cecil *v.* Springer, 32 Mo. 462; 82 Am. Dec. 140.

[4] Croyle *v.* Moses, 90 Pa. St. 250; 35 Am. Rep. 654.

§ 2348. **Non-disclosure of Patent Defect.** — If a person sell a chattel with a patent defect, and the buyer have the opportunity of inspecting it, and be understood to rely upon his own judgment, it is no fraud in the seller not to point out the defect.[1] But the rule as to visible defects does not apply where the property sold was not present at the sale, and where the vendee was obliged to rely upon the representations of the vendor.[2]

§ 2349. **Sale "with All Faults."** — If a seller expressly stipulate that he sells "with all faults," it is then immaterial what faults exist, even to the knowledge of the seller, unless he be guilty of fraud in concealing the faults.[3]

§ 2350. **Non-disclosure by Purchaser.** — A purchaser is not obliged to disclose a fact which, unknown to the other party, increases the value of the property.[4] A purchaser of the right to mine is not bound to disclose his knowledge of minerals on the land, of the value of which the vendor was ignorant, although he knew of the deposit; and the mere fact of the knowledge on the one side, and the ignorance on the other, will not be a ground for impugning the validity of the deed.[5] But where the purchaser stands in a fiduciary position to the vendor, he is bound to communicate all the information he has acquired which is material for the seller to know, in order to enable him to judge of the value of his property.[6]

[1] Leake on Contracts, 361; Brown *v.* Gray, 6 Jones, 103; 72 Am. Dec. 563.

[2] Hanks *v.* McKee, 2 Litt. 227; 13 Am. Dec. 265.

[3] Schneider *v.* Heath, 3 Camp. 506. In Baglehole *v.* Walters, 3 Camp. 154, Ellenborough, C. J., said: "I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch, and instead of giving a warranty of soundness, to sell him with all faults. By acceding to buy the horse with all faults, the buyer takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. In a contract such as this I think there is no fraud, unless the seller by positive means renders it impossible for the buyer to detect latent faults": West *v.* Anderson, 9 Conn. 107; 21 Am. Dec. 737. See George *v.* Johnson, 6 Humph. 36; 44 Am. Dec. 288.

[4] Leake on Contracts, 364; Fox *v.* Mackreth, 2 Brown Ch. 420; Laidlaw *v.* Organ, 2 Wheat. 178; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262.

[5] Harris *v.* Tyson, 24 Pa. St. 347; 64 Am. Dec. 661.

[6] Leake on Contracts, 366.

ILLUSTRATIONS.— A purchases a piece of land from B, keeping from B the fact that there is, unknown to him, a mine under the land. *Held*, that A was under no legal obligation to disclose to B: *Fox* v. *Mackreth*, 2 Brown Ch. 420; *Smith* v. *Beatty*, 2 Ired. Eq. 456; 40 Am. Dec. 435. The purchaser in New York knew of an advance in the price of copper in Europe, but his broker in Boston was ignorant of the advance, and on being asked by the seller, just before the sale, whether there was any advance, replied, "None that I know of," *held*, that there was no such concealment as would invalidate the contract: *Coddington* v. *Goddard*, 82 Mass. 436.

§ 2351. Representation Believed to be True.—A representation made with a belief in its truth, though not true in point of fact, is not, as a rule, a legal fraud.[1] But if the representation is of a material fact, and induces the contract, it is, even when innocently made, a good ground for setting aside the contract.[2] On a sale of a business establishment, if the purchaser has no knowledge of the business, and relies on the seller's statement as to the value, and the seller knows of such reliance, and those statements are false, to the purchaser's injury, although the seller believed them true, the purchaser may be relieved.[3] If the party is negligent, or ought to have known or remembered the truth, and did not, the rule is different.[4]

[1] Ormrod *v.* Huth, 14 Mees. & W. 664; Evans *v.* Collins, 5 Q. B. 804; Haycroft *v.* Creasy, 2 East, 92; Taylor *v.* Ashton, 11 Mees. & W. 401; Rawlings *v.* Bell, 1 Com. B. 951; Shrewsbury *v.* Blount, 2 Man. & G. 475; Griswold *v.* Sabin, 51 N. H. 167; 12 Am. Rep. 76; Mamlock *v.* Fairbanks, 46 Wis. 415; 32 Am. Rep. 716.

[2] Shackelford *v.* Handley, 1 A. K. Marsh. 496; 10 Am. Dec. 753.

[3] Bower *v.* Fenn, 90 Pa. St. 359; 35 Am. Rep. 662.

[4] East *v.* Matheny, 1 A. K. Marsh. 192; 10 Am. Dec. 721. In Pulsford *v.* Richards, 17 Beav. 94, the court say: "The principle applies, not merely to cases where the statements were known to be false by those who made them, but to cases where statements false in fact were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatived the representation made." A person wrote a letter stating his willingness to grant a lease, for the purpose of the letter being shown to a person proposing to lend money to the lessee upon the security of the lease; and it appeared that he had before granted a concurrent lease of the same property, which he alleged that he had forgotten. Held, that he was responsible for his statement and for the repayment of the loan made upon the faith of it: Slim *v.* Croucher, 2 Giff. 37.

§ 2352. Representation not Known to be True.—"But if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue."[1] Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.[2] Where a party makes a misrepresentation of a fact supposed to be peculiarly within his knowledge, whether he knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial.[3]

ILLUSTRATIONS.— A machinist sold a machine, sent by himself, which was wholly worthless, representing it to be a good one. *Held*, to be a fraud, although the vendor was, through want of skill in his business, ignorant that the machine was not a good one: *Donelson* v. *Young*, Meigs, 155. A vendor of land, to induce the sale, stated the quantity as of his own knowledge,

[1] Reese Silver Mining Co. *v.* Smith, L. R. 4 H. L. 79; Snyder *v.* Findley, 1 N. J. L. 78; 1 Am. Dec. 193; Thompson *v.* Tate, 1 Murph. 97; 3 Am. Dec. 678; Waters *v.* Mattingly, 1 Bibb, 244; 4 Am. Dec. 631; Monroe *v.* Pritchett, 16 Ala. 785; 50 Am. Dec. 203; Alvarez *v.* Brannan, 7 Cal. 503; 68 Am. Dec. 274; Frenzel *v.* Miller, 37 Ind. 1; 10 Am. Rep. 62. In an English case two persons in a bank, upon treaty with an incoming partner, joined in presenting to him a false statement of the affairs of the bank, by which he was induced to become a partner; the statement was false to the knowledge of one of them, who was acquainted with the affairs of the bank, but not to the knowledge of the other, who joined in it in reliance upon his partner. It was held that the incoming partner was entitled to rescind the contract and to claim restitution against both partners. As regards the innocent partner, it was explained to be "at least a representation of a fact of which he knew nothing whatever, whether it was true or not. And if on the treaty for a purchase one party makes a representation he cannot be afterwards heard to say that he knew nothing about the matter; nor can he be allowed to retain any benefit which he might have acquired from the representation which he has made": Rawlins *v.* Wickham, 3 De Gex & J. 304.

[2] Smith *v.* Richards, 13 Pet. 26; Smith *v.* Babcock, 2 Wood. & M. 246; Foster *v.* Kennedy, 38 Ala. 359; 81 Am. Dec. 56; Terhune *v.* Dever, 36 Ga. 648; Harding *v.* Randall, 15 Me. 332; Hazard *v.* Irwin, 18 Pick. 95; Bennett *v.* Judson, 21 N. Y. 238; Hubbard *v.* Briggs, 31 N. Y. 518, 540; People *v.* Sully, 5 Park. Cr. 142; Craig *v.* Ward, 36 Barb. 377; Sharp *v.* New York, 40 Barb. 256.

[3] Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

and the vendee, relying on such statement, purchased. The statement was untrue, though believed by the vendor to be true. *Held*, that the vendor, in representing as a fact that as to which he only had a belief, was guilty of fraud, and liable to the vendee for the damage sustained: *Cabot* v. *Christie*, 42 Vt. 121; 1 Am. Rep. 313.

§ 2353. Representation Subsequently Becoming False or True. — If a person make a representation believing it to be true, but afterwards he discovers it to be false, he must not allow the party to go on and act on the faith of the representation.[1] But a representation that was false at the time it was made may, by a change of circumstances, become a true representation at the time it is acted upon.[2]

§ 2354. Representation must have been Material and have Induced Contract. — The misrepresentation must be material, — that is, it must have induced the contract, — otherwise it will not be a ground for avoiding it.[3] It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place.[4] Representations do not constitute a war-

[1] Reynall *v.* Sprye, 1 De Gex, M. & G. 660. "If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party who made the representation, but not to the knowledge of the party to whom the representation was made, it is the imperative duty of the party who has made the representation to communicate the alteration of those circumstances, and the court will not hold the other party bound unless such a communication has been made": Traill *v.* Baring, 4 De Gex, J. & S. 318.

[2] Leake on Contracts, 375. A company issued a prospectus representing that more than half the capital had been subscribed, by which a person was induced to apply for shares; the representation was not true at the time when the prospectus was issued, but it had become true at the time of his application. Held that there was no misrepresentation entitling him to relief: Ship *v.* Crosskill, L. R. 10 Eq. 73.

[3] Leake on Contracts, 379; Connersville *v.* Wadleigh, 7 Blackf. 102; 41 Am. Dec. 214.

[4] Adams *v.* Schiffer, 11 Col. 15; 7 Am. St. Rep. 202. "To use the expression of the Roman law, it must be a representation *dans locum contractui*, — that is, a representation giving occasion to the contract, — the proper interpretation of which appears to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether": Romilly, M. R., in Pulsford *v.* Richards, 17 Beav. 96.

ranty where they were made after the sale was complete, and did not enter into the consideration of the parties before the sale.[1]

ILLUSTRATIONS. — The buyer, in negotiating a purchase, alleged falsely, as the reason for the limited amount of his offer, that his partner would not consent to his giving more. *Held*, to be immaterial to the validity of the contract: *Vernon* v. *Keys*, 12 East, 632. Upon the negotiation for a loan of money, the lenders represented that it was lent by a joint-stock loan company, but in fact it was lent by themselves only, who called themselves the company, which did not otherwise exist. *Held*, to be immaterial, the real inducement to the borrower being the advance of the money: *Green* v. *Gosden*, 3 Man. & G. 446.

§ 2355. Representation to Person having Knowledge or Means of Knowledge. — A representation which the other party knows to be untrue cannot have induced the contract, and is not a ground for avoiding it.[2] So if the means of knowledge are at the party's hand, he may be presumed to have had such knowledge, and the court will not relieve him.[3] One proposing to buy an interest in a business and a stock of goods, having ample opportunity to examine and investigate, may not rely on the seller's representations as to value of the goods or extent of the business.[4] Where a party, from blind confidence, signs a contract without reading it, he cannot be relieved from it on the ground of fraud or mistake.[5] Where a seller of goods knowingly makes false representations to the buyer as to their quality, but the buyer does not rely upon such representations, and is not deceived thereby, — as where the buyer in making the purchase relies on a test of their

[1] Cady *v.* Walker, 62 Mich. 157; 4 Am. St. Rep. 834.

[2] Leake on Contracts, 380; Anderson *v.* Burnett, 5 How. (Miss.) 165; 35 Am. Dec. 425; Bell *v.* Henderson, 6 How. (Miss.) 313; Ely *v.* Stewart, 2 Md. 408.

[3] Leake on Contracts, 381; Moore *v.* Turbeville, 2 Bibb, 602; 5 Am. Dec. 642; Williams *v.* Hicks, 2 Vt. 36; 19 Am. Dec. 693; Dugan *v.* Cureton, 1 Ark. 31; 31 Am. Dec. 727; Foley *v.* Cowgill, 5 Blackf. 18; 32 Am. Dec. 49; McDaniels *v.* Bank, 29 Vt. 230; 70 Am. Dec. 406; Montgomery *v.* Scott, 9 S. C. 20; 30 Am. Rep. 1.

[4] Poland *v.* Brownell, 131 Mass. 138; 41 Am. Rep. 215.

[5] Watson *v.* Planters' Bank, 22 La Ann. 14.

quality made by his own agent, who is not prevented by any act or word of the seller from testing the goods, — the seller is not liable for deceit.[1]

On the other hand, where a person in fact relies upon the misrepresentation, as intended by the party making it, he may be entitled to avoid the agreement, notwithstanding he had the means of information, of which he did not avail himself. And in general, where a misrepresentation is in fact made, the burden of proof lies upon the party making it to show not only that the other party had the means of information, but that he relied upon his own information or judgment, and was not in fact misled by the misrepresentation.[2]

ILLUSTRATIONS. — A person induced another to carry goods for him at so much per hundred-weight, by a false statement of the weight of the goods. *Held*, no fraud, because the carrier might have ascertained the correct weight for himself: *Bayley* v. *Merrell*, Cro. Jac. 386. The sale of a business or manufacture was effected by means of misrepresentations of its value. The buyer may avoid the sale as having been induced by such representations, although he had access to the books and works, and might have inspected them and formed his own judgment: *Dobell* v. *Stevens*, 3 Barn. & C. 623; *Rawlins* v. *Wickham*, 3 De Gex & J. 304. The vendor of a reversionary estate represented the rents to be greater than they in fact were, and the purchaser bought in faith of the representation, without inquiring of the tenants. *Held*, that the vendor was responsible for the misrepresentation: *Lysney* v. *Selby*, 2 Ld. Raym. 1118. A farm was sold under the description of being in a "ring-fence." The purchaser saw the farm before the purchase, had lived in the neighborhood, and must have known whether it did lie in a ring-fence or not. *Held*, that he was liable on the contract, notwithstanding the farm was so misdescribed: *Dyer* v. *Hargrave*, 10 Ves. 505.

§ 2356. Representation as to One of Several Matters. — A misrepresentation as to one of several matters that is material, or a representation including several matters that is false in one material point, is sufficient to vitiate

[1] Hagee v. Grossman, 31 Ind. 223. [2] Leake on Contracts, 381.

the whole agreement.[1] It is not sufficient for the party to show that there were other representations or inducements in operation, without further proving that the agreement was due to them only, to the entire exclusion of the false representation.[2] And although the misrepresentation affects part only of the agreement, it in general vitiates it *in toto;* the party who made it is not entitled, by waiving the part affected, to enforce the rest.[3]

§ 2357. **Fraud of Third Party Inducing Contract.**— A contract cannot be set aside because of the fraud of a third person, in which the other party was not implicated.[4]

§ 2358. **Party may Elect to Avoid or Treat Binding Fraudulent Contract.**— On discovering the fraud, the party defrauded may elect whether he will treat the contract as binding or refuse to be bound by it; but until he so elects, it continues valid. An agreement procured by mistake or fraud is voidable, not void.[5] One who executes a contract for the purpose of defrauding another will not be protected against it when it is used against himself.[6]

[1] Reynell *v.* Sprye, 21 L. J. Ch. 660. See per Wood, V. C., in Hollows *v.* Fernie, L. R. 3 Eq. 539; 36 L. J. Ch. P. 273.

[2] See per Turner, L. J., in Nicol's Case, 3 De Gex & J. 387; 28 L. J. Ch. 270.

[3] Leake on Contracts, 379.

[4] In Master *v.* Miller, 4 Term Rep. 337, Buller, J., said: "It is a common saying in our law-books that fraud vitiates everything. But the principle is always applied *ad hominem.* He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree that as against the person who has committed the fraud, and who endeavors to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and *bona fide* contract between two others."

[5] Smith *v.* Hornback, 4 Litt. 232; 14 Am. Dec. 122; McCorkle *v.* Doby, 1 Strob. 396; 47 Am. Dec. 560; Nyton *v.* Thurlow, 23 Kan. 30; Brown *v.* Pierce, 97 Mass. 46; 93 Am. Dec. 57. "So long as he has made no election, he retains the right to determine it either way; subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest, or if, in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind; and lapse of time without rescinding will furnish evidence that he has determined to affirm the contract": Clough *v.* London etc. R. R. Co., L. R. 7 Ex. 35.

[6] Rankin *v.* Simpson, 19 Pa. St. 471; 57 Am. Dec. 668.

§ 2359. How Election may be Made.—The election to rescind may be by express words or by acts evidencing an intention to treat the contract as not binding.[1]

§ 2360. Remedies of Party Defrauded.—The vendor, when he discovers the fraud, may rescind the sale, and recover the property from the vendee, or from any one into whose hands it may have gone.[2] A person who, by the form of a sale, fraudulently obtains possession of chattels with intent never to pay for them has no property which his attaching creditor can hold against the vendor.[3] But to rescind the sale for fraud, the vendor must restore the consideration, or otherwise put the other party *in statu quo*.[4] The right to rescind for fraud is not defeated by the vendor's having obtained judgment for the price in ignorance of the fraud.[5]

§ 2361. Effect of Affirmance of Contract.—If after discovering the fraud the party defrauded elect to affirm the contract in any manner, he cannot afterwards revoke his election, and avail himself of the fraud in avoidance of the contract.[6] One whose tender to the seller of the chattel for the purpose of rescinding the sale is refused, and who takes it back, and uses it as his own, waives the bene-

[1] Leake on Contracts, 388.

[2] Thurston *v.* Blanchard, 22 Pick. 18; 33 Am. Dec. 700; Moody *v.* Blake, 117 Mass. 23; 19 Am. Rep. 394; Barker *v.* Dinsmore, 72 Pa. St. 427; 13 Am. Rep. 697; Knowles *v.* Lord, 4 Whart. 500; 34 Am. Dec. 525; Cary *v.* Hotailing, 1 Hill, 311; 37 Am. Dec. 323.

[3] Wiggin *v.* Day, 9 Gray, 97; Dow *v.* Sanborn, 3 Allen, 181; Pike *v.* Wieting, 49 Barb. 314; Hall *v.* Naylor, 6 Duer, 71; King *v.* Phillips, 8 How. 603; Hoffman *v.* Strohecker, 7 Watts, 86; 32 Am. Dec. 740; Mackinley *v.* McGregor, 3 Whart. 369; Belding *v.* Frankland, 8 Lea, 67; 41 Am. Rep. 630. And the vendor may recapture the property, if it can be done without unnecessary violence to the person, and without breach of the peace: Hodgeden *v.* Hubbard and Ayres, 18 Vt. 504; 46 Am. Dec. 167.

[4] Curtiss *v.* Howell, 39 N. Y. 215. Cobb *v.* Hatfield, 46 N. Y. 533; Guckenheimer *v.* Angewine, 81 N. Y. 394; Bartlett *v.* Drake, 100 Mass. 176; 97 Am. Dec. 92; Poor *v.* Woodburn, 25 Vt. 234; Thurston *v.* Blanchard, 22 Pick. 18; 33 Am. Dec. 700; Johnson *v.* McLane, 7 Blackf. 501; 43 Am. Dec. 102.

[5] Kraus *v.* Thompson, 30 Minn. 64; 44 Am. Rep. 182.

[6] Leake on Contracts, 391; Southern etc. Ins. Co. *v.* Lanier, 5 Fla. 110; 58 Am. Dec. 448.

fit of his tender, and his remedy is an action at law for damages.[1]

§ 2362. **Laches — Effect of Delay in Election.** — Delay in taking steps to set aside a fraudulent contract may have the effect of affirming it.[2] Laches are not imputable to the party defrauded, until he has had such knowledge, or means of knowledge, as he was bound to avail himself of.[3] But where want of diligence in discovering the fraud does not deprive the injured party of his right to rescind, he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, it is sufficient.[4]

§ 2363. **Parties must be Placed in Statu Quo.** — The contract can only be avoided where it is possible to put the parties back in their original position and with their original rights. "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance or the fraud must resort to an action for damages."[5] Thus, for example, where a person has been induced by fraud to buy goods upon credit, in order to avoid the contract upon the dis-

[1] McCulloch *v.* Scott, 13 B. Mon. 172; 56 Am. Dec. 561.

[2] "Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined": Clough *v.* R. R. Co., L. R. 7 Ex. 35. "But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay, and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy": Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 240. See Gillespie *v.* Moon, 2 Johns. Ch. 585; 7 Am. Dec. 559.

[3] Brown *v.* Norman, 65 Miss. 369; 7 Am. St. Rep. 663.

[4] Baker *v.* Lever, 67 N. Y. 304; 23 Am. Rep. 117.

[5] Sheffield Nickel Co. *v.* Unwin, L. R. 2 Q. B. 214; Hynson *v.* Dunn, 5 Ark. 395; 41 Am. Dec. 100.

covery of the fraud, he must return the goods; and if he does not or cannot do so, he must pay the price, or at least the value, of the goods. After consuming the goods, wholly or in part, the buyer cannot avoid the contract by which he obtained them, because he can no longer return them.[1] So in the case of a promissory note given for goods sold and delivered, the buyer cannot avoid the bill on the ground of the sale being fraudulent, so long as he retains the goods.[2] But though a party rescinding a contract for fraud must return what he has received on it, or offer to do so, he is not required to put the other party in the same situation in which he was before the contract, where the latter has rendered it impossible by the nature of his fraud.[3]

§ 2364. Duress Defined—Duress by Imprisonment or Threats.—Duress is where one of the parties to an agreement has been induced to consent by fear created by the violence or threats of the other. This is, under certain circumstances, a good ground upon which to avoid the agreement.[4] Duress may consist either in actual imprisonment of the person, or in threats to imprison or do personal violence.[5] It consists, not merely in the act of imprisonment or other hardship to which the party was subjected, but in the state of mind produced by those circumstances, and in which the act sought to be avoided was done.[6]

[1] Clarke *v.* Dickson, El. B. & E. 148.

[2] Sully *v.* Frean, 10 Ex. 535.

[3] Masson *v.* Bovet, 1 Denio, 69; 43 Am. Dec. 651.

[4] Brooks *v.* Berrymore, 20 Ind. 97; Foshay *v.* Ferguson, 5 Hill, 158; Richards *v.* Vanderpool, 1 Daly, 71; Strong *v.* Grannis, 26 Barb. 122; Taylor *v.* Cottrell, 16 Ill. 93; Richardson *v.* Duncan, 3 N. H. 508; Severance *v.* Kimball, 8 N. H. 386; Walbridge *v.* Arnold, 21 Conn. 424; Breck *v.* Blanchard, 22 Conn. 303; Stouffer *v.* Latshaw, 2 Watts, 167; 27 Am. Dec. 297; Fisher *v.* Shattuck, 17 Pick. 252; Hackett *v.* King, 6 Allen, 58; Tapley *v.* Tapley, 10 Minn. 448; 88 Am. Dec. 76; Moore *v.* Adams, 8 Ohio, 372; 32 Am. Dec. 723.

[5] Leake on Contracts, 423; Baker *v.* Morton, 12 Wall. 158; United States *v.* Huckabee, 16 Wall. 431; McCartney *v.* Wade, 2 Heisk. 369; Wilkerson *v.* Bishop, 7 Cold. 24; Wood *v.* Willis, 32 Tex. 670.

[6] Blair *v.* Coffman, 2 Over. 176; 5 Am. Dec. 659.

The imprisonment must be illegal. A legal imprisonment is not duress.[1] But the process may be regular; yet if the arrest and imprisonment is malicious, and without probable cause, there is duress which will avoid a contract.[2] Where the only coercion influencing the person's mind is the fear of the consequences of his own criminal act, this is not legal duress.[3]

ILLUSTRATIONS.—A note and mortgage was obtained from an irregular medical practitioner by threats to send him to the penitentiary for indelicate treatment of the daughter of the holder while treating her for supposed suppression of the menses. *Held*, void: *Hullhorst* v. *Scharner*, 15 Neb. 57. Plaintiff induced defendant, who was in ill health, to go into a secluded place, where he was charged with an offense of which he was not guilty, and persuaded that a person who was with and assisted plaintiff was a police-officer, having power to arrest. In consequence of a threat of immediate arrest and imprisonment, defendant executed certain promissory notes. *Held*, duress, as would render the notes voidable: *Bush* v. *Brown*, 49 Ind. 573; 19 Am. Rep. 695. A party having a warrant for an arrest issued by a justice of one state for an offense committed in another state threatened to execute it, unless the accused should enter into a certain contract. *Held*, sufficient duress to avoid the contract: *Bane* v. *Detrick*, 52 Ill. 19. A creditor extorted from his debtor's father a note for the amount of the son's debt by arresting said debtor on a criminal charge. *Held*, void: *Shenk* v. *Phelps*, 6 Ill. App. 612. A prisoner on execution was informed by the sheriff that he was directed to release him if he would sign an agreement not to sue the creditor for false imprisonment, and that if he did not sign he would have to stay in jail a long time. He signed, and was discharged. *Held*, that the agreement was void for duress: *Guilleaume* v. *Rowe*, 94 N. Y. 269; 46 Am. Rep. 141.

[1] Stouffer *v.* Latshaw, 2 Watts, 167; 27 Am. Dec. 297; Eddy *v.* Herrin, 17 Me. 338; 35 Am. Dec. 261; Alexander *v.* Pierce, 10 N. H. 49; Prichard *v.* Sheupe, 51 Mich. 432. To constitute duress, the arrest must be made without cause or lawful authority, or an improper use made of the process: Meek *v.* Atkinson, 1 Bail. 84; 19 Am. Dec. 653. An agreement to submit a matter to reference by the defendant under a legal arrest or a settlement made by him is not void on the ground of duress: Shephard *v.* Watrous, 3 Caines, 166. It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution: Hilborn *v.* Bucknam 78 Me. 482; 57 Am. Rep. 816.

[2] Watkins *v.* Baird, 6 Mass. 506; 4 Am. Dec. 170; Brown *v.* Pierce, 7 Wall. 215; Hatter *v.* Greenlee, 1 Port. 222; 26 Am. Dec. 370; Fay *v.* Oatley, 6 Wis. 45.

[3] Felton *v.* Gregory, 130 Mass. 176; Sieber *v.* Weiden, 17 Neb. 582.

§ 2365. Duress of Goods not a Ground for Setting Contract Aside. — But duress of goods or other property is not a ground for setting aside a contract,[1] though recognized as such in a few cases.[2] The constraint which takes away free agency, and destroys the power of withholding assent to a contract, must be one which is imminent and without immediate means of prevention, and such as would operate on a person of a reasonable firmness of purpose.[3] To avoid a contract on the ground of duress, the threats must be such as to strike with fear a person of common firmness and constancy of mind. Duress by mere advice, direction, influence, and persuasion is not recognized in law.[4] Thus a threat to withhold payment of a debt, or to refuse performance of a contract, or to do an injury which may be at once redressed by legal process, is not duress *per minas*.[5] Neither is a threat of an expensive lawsuit,[6] or legal process.[7]

It was therefore held not legal duress sufficient to avoid a contract, where a wife, in order to settle a suit in which her husband was involved, and which he was very desirous of compromising, and which disturbed, and perhaps distressed, him, gave a mortgage on property, the title

[1] Wilcox *v.* Howland, 23 Pick. 167; Bingham *v.* Sessions, 14 Miss. 13; Hazlerig *v.* Donaldson, 2 Met. (Ky.) 445; Edwards *v.* Handley, Hardin, 602; 3 Am. Dec. 745; Fleetwood *v.* New York, 2 Sand. 475; Seymour *v.* Prescott, 69 Me. 376. In Skeate *v.* Beale, 11 Ad. & El. 990, the court say: "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former the law is laid down, and the distinction pointed out between duress of or menace to the person and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

[2] Crawford *v.* Cato, 22 Ga. 594; Nelson *v.* Suddarth, 1 Hen. & M. 350; Foshay *v.* Ferguson, 5 Hill, 158; Collins *v.* Westbury, 2 Bay, 211; 1 Am. Dec. 643; Sasportas *v.* Jennings, 1 Bay, 470; Miller *v.* Miller, 68 Pa. St. 486; Spaids *v.* Barrett, 57 Ill. 289; 11 Am. Rep. 10; Williams *v.* Williams, 63 Md. 371; Thurman *v.* Burt, 53 Ill. 129.

[3] Miller *v.* Miller, 68 Pa. St. 486.

[4] Barrett *v.* French, 1 Conn. 354; 6 Am. Dec. 241.

[5] Miller *v.* Miller, 68 Pa. St. 486.

[6] Peckham *v.* Hendren, 76 Ind. 47.

[7] Claflin *v.* McDonough, 33 Mo. 412; 84 Am. Dec. 54.

whereto was in her;[1] where H., the vendor of a house, before delivery of possession, claimed the right to remove the heater and gas-fixtures, which D., the purchaser, denied, and on H.'s threat to remove them, D. gave his note for their value, payable to H. alone;[2] where a note was made as counter-security to sureties upon their threat that otherwise they would compel, by legal process, the settlement of the matters for which they are sureties;[3] where a man induced his wife to mortgage her separate estate by threatening to withdraw himself from her society if she refused;[4] where a husband threatened that unless his wife signed his note as surety he would poison himself;[5] where a wife was induced to sign a mortgage from fear of threats to foreclose an existing mortgage, and to turn her out of house and home.[6]

§ 2366. But Money Obtained by Duress of Goods may be Recovered Back. — But where money is paid to release goods or property from duress, without any other consideration, it may be recovered back as a debt, as having been obtained by compulsion, and without consideration.[7] A settlement of accounts compelled by taking advantage of financial embarrassments, and threatening ruin by

[1] Tooker *v.* Sloan, 30 N. J. Eq. 394.

[2] Hevsham *v.* Dettre, 89 Pa. St. 506.

[3] Hunt *v.* Bass, 2 Dev. Eq. 292; 24 Am. Dec. 274.

[4] Wallach *v.* Hoexter, 17 Abb. N. C. 267.

[5] Wright *v.* Remington, 41 N. J. L. 48; 32 Am. Rep. 180.

[6] Buck *v.* Axt, 85 Ind. 512.

[7] See *post*, chapter Payment; Adams *v.* Schiffer, 11 Col. 15; 7 Am. St. Rep. 202. In Atley *v.* Backhouse, 3 Mees. & W. 650, Parke, B., said: "There is no doubt that if goods are wrongfully taken, and a sum of money is paid simply for the purpose of obtaining possession of these goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back, not on the ground of duress, because I think that the law is clear that in order to avoid a contract by reason of duress it must be duress of a man's person, not of his goods, — and it is so laid down, — but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that, being under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress": Harmony *v.* Bingham, 12 N. Y. 99; 62 Am. Dec. 142; Bates *v.* Ins. Co., 3 Johns. Cas. 238; Joyner *v.* School Dist., 3 Cush. 567; Chandler *v.* Sanger, 114 Mass. 364; 19 Am. Rep. 367; Alston *v.* Durant, 2 Strob. 257; 49 Am Dec. 596; Coady *v.* Curry, 8 Daly, 58.

stopping payments due from others, is obtained by duress, and cannot be sustained.[1]

§ 2367. Who must Impose Duress — Duress on Third Person. — The duress must be the act of the party himself, or imposed with his knowledge, and taken advantage of by him, for the purpose of obtaining the agreement. Duress by a third person would not avoid a contract made with a party who was not cognizant of it.[2] And a contract cannot be avoided because it was obtained by duress on a third person.[3] The duress of a principal will not excuse or cannot be pleaded by a surety.[4] But a parent may plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent.[5] Where a mother signs a note, influenced by a desire to protect her son from exposure and prosecution, equity will compel its cancellation.[6] So a deed given in consideration of the abandonment of a threatened prosecution against the grantor's husband is void.[7] But a threat of lawful arrest of a husband for a crime actually committed by him does not constitute such duress as will relieve the wife from her contract to indemnify the person injured.[8]

[1] Vyne *v.* Glenn, 41 Mich. 112.

[2] Leake on Contracts, 425.

[3] Leake on Contracts, 425.

[4] Plummer *v.* People, 16 Ill. 358; 402; Solinger *v.* Earle, 82 N. Y. 393; Spaulding *v.* Crawford, 27 Tex. 158; Oak *v.* Dustin, 79 Me. 23; 1 Am. St. Rep. 281. *Contra*, State *v.* Brantley, 27 Ala. 44; Fisher *v.* Shattuck, 17 Pick. 252.

[5] Wayne *v.* Sands, 1 Freem. 350; 1 Roll. Abr. 687; Jacob's Law Dict., tit. Duress; Brooks *v.* Berryhill, 20 Ind. 97; Eadie *v.* Slimmon, 26 N. Y. 9; 82 Am. Dec. 395; Solinger *v.* Earle, 82 N. Y. 393; McClintick *v.* Cummins, 3 McLean, 158; Simms *v.* Barefoot, 2 Hayw. (Tenn.) 402; Nat. Bank *v.* Kirk, 90 Pa. St. 51; Harris *v.* Carmody, 131 Mass. 51; 41 Am. Rep. 188; Kocourek *v.* Marak, 54 Tex. 201; 38 Am. Rep. 623; Haynes *v.* Rudd, 30 Hun, 239. *Contra*, Fulton *v.* Hood, 34 Pa. St. 365; 75 Am. Dec. 664. See Gaines *v.* Poor, 3 Met. (Ky.) 503; 79 Am. Dec. 559.

[6] Foley *v.* Greene, 14 R. I. 618; 51 Am. Rep. 419.

[7] McCoy *v.* Green, 83 Mo. 626; McGrory *v.* Reilly, 14 Phila. 111; Williams *v.* Walker, 18 S. C. 577; Nevada Bank *v.* Bryan, 62 Iowa, 42; Eadie *v.* Slimmon, 26 N. Y. 9; 82 Am. Dec. 395. But see Lefebvre *v.* Dutruit, 51 Wis. 326; 37 Am. Rep. 833; Holt *v.* Agnew, 67 Ala. 360; Smith *v.* Rowley, 66 Barb. 502.

[8] Compton *v.* Bunker Hill Bank, 96 Ill. 301; 36 Am. Rep. 147.

§ 2368. Agreement Obtained by Duress may be Avoided or Affirmed. — An agreement induced by duress, like an agreement induced by fraud, is not absolutely void, but voidable only, at the election of the party intimidated.[1] If a person, having been constrained by duress to make a contract, afterwards voluntarily acts upon it, he thereby affirms its validity, and precludes himself from afterwards avoiding it.[2] Duress cannot be set up as against an innocent purchaser without notice.[3] Duress by a husband is no defense in an action by the payee against the wife on a promissory note executed by her, if the payee took the note in ignorance thereof.[4] But property sold under duress may be recovered, even from a subsequent vendee. A purchaser from the vendee of such forced sale stands in no better condition as to title than does the vendor. Assent to a contract of sale is essential to pass title; and assent procured by duress will not carry title to a pretended vendee.[5]

§ 2369. Oppression and Undue Influence. — Equity has always exercised a jurisdiction to set aside agreements which have been induced by undue pressure or influence on one of the parties. An abuse of confidence will not be permitted to work profit to one and injury to another. Contracts made between persons in certain relative positions are treated in equity as subject to the general presumption of weakness on the one side, and oppression or advantage taken of that weakness on the other, and the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair,

[1] Leake on Contracts, 426; Worcester v. Eaton, 13 Mass. 371; 7 Am. Dec. 155.

[2] Ormes v. Beadel, 2 De Gex, F. & J. 333; Bissell v. Bassett, 1 Har. & McH. 211; Bodine v. Morgan, 37 N. J. Eq. 426.

[3] Deputy v. Stapleford, 19 Cal. 302.

[4] Fairbanks v. Snow, 145 Mass. 153; 1 Am. St. Rep. 446.

[5] Belote v. Henderson, 5 Cold. 471; 98 Am. Dec. 432.

just, and reasonable.[1] Where an assent of either is constrained and involuntary, and induced by fraud, by force, or by intimidation, the contract will be declared void either at law or in equity.[2] It is incumbent on a party dealing with an unlettered man, who can neither read nor write, to show that such person fully understood the object and import of the writings upon which he is proceeding to charge him.[3] The burden rests upon one claiming to be a spiritualistic medium to show that a contract made by him with one having implicit belief in the existence of the powers claimed by such medium was free from undue influence.[4] So gifts, contracts, or conveyances whereby a benefit is secured to a parent from a child, if not entered into with scrupulous good faith, and if not reasonable, will be set aside.[5] So agreements made between a ward and his guardian are not recognized in equity, unless the circumstances show the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian.[6]

The same principle applies to medical men and ministers of religion, and persons who repose their confidence in them.[7] And so of the relation of solicitor and client.[8] So of a trustee and *cestui que trust*.[9] A contract with a person for the sale or charge of property in expectancy, whether as reversioner or remainderman, or whether as expectant heir or as expectant devisee or legatee of an-

[1] Earl of Aylesford *v.* Morris, L. R. 8 Ch. 484; Selden *v.* Myers, 20 How. 506; Underwood *v.* Blockner, 4 Dana, 309; 29 Am. Dec. 407. Equity will annul a contract for the purchase of land, entered into by an imbecile, without counsel, by which he agrees to pay twice the true value of the land, and is otherwise imposed upon by the fraudulent representations of the vendor: Garrow *v.* Brown, Winst. Eq. 46; 86 Am. Dec. 450.

[2] Central Bank *v.* Copeland, 18 Md. 305; 81 Am. Dec. 597; Taylor *v.* Weld, 5 Mass. 116; Mead *v.* Bunn, 32 N. Y. 275; Duncan *v.* McCullough, 4 Serg. & R. 483; Morris *v.* Gill, 1 D. Chip. 49.

[3] Selden *v.* Myers, 20 How. 506.

[4] Connor *v.* Stanley, 72 Cal. 556; 1 Am. St. Rep. 84.

[5] Snell's Equity, 402; Pomeroy's Eq. Jur., sec. 962. See *ante*, Title V., Parent and Child, § 838.

[6] Snell's Equity, 402. See *ante*, Title VI., Guardian and Ward, § 879.

[7] Snell's Equity, 403.

[8] See Agency, Subtitle Attorneys; Miles *v.* Ervin, 1 McCord Eq. 524; 16 Am. Dec. 623.

[9] See *ante*, Title Trustees.

other, raises a presumption against the purchaser, which he must be prepared to rebut in order to support the contract.[1]

ILLUSTRATIONS. — A person of very weak mind sold an estate in remainder for a very inadequate price, and there was no proof that he understood the deed or the gross inadequacy of price. *Held*, that the deed must be set aside: *Bunch* v. *Hurst*, 3 Desaus. Eq. 273; 5 Am. Dec. 551. A contract was made with a widow immediately after the death of her husband, by which, for a small consideration, she relinquished a large amount of property devised to her by her husband. *Held*, to be unreasonable: *Stewart* v. *Stewart*, 7 J. J. Marsh. 183; 23 Am. Dec. 396. A party unable to read or write was induced to execute a written instrument without knowing the contents, or, believing the contents to be different, owing to fraudulent misrepresentations of others, from what they really were. *Held*, void: *Jones* v. *Austin*, 17 Ark. 498.

[1] Chesterfield *v.* Jannsen, 2 Ves. Sr. 125; 1 White and Tudor's Lead. Cas. Eq. 483. "The phrase 'expectant heir' (with reference to the doctrine in question) is used as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen": Jessel, M. R., in Beynon *v.* Cook, L. R. 10 Ch. 391.

CHAPTER CXII.

WARRANTIES AND REPRESENTATIONS.

§ 2370. What is a "warranty" — Express warranties.
§ 2371. Animals.
§ 2372. Opinions — Puffing goods.
§ 2373. Implied warranties — No warranty of quality on sale of specific article.
§ 2374. Exception — Article sold for a specific purpose.
§ 2375. Executory contracts.
§ 2376. Sale of goods by description.
§ 2377. Sale of articles of food.
§ 2378. Sale of goods by sample.
§ 2379. Warranty of title.
§ 2380. Right of buyer to examine goods.

§ 2370. What is a "Warranty"—Express Warranties. —Goods are frequently sold with a warranty, i. e., a guaranty or pledge on the part of the seller that they are his, or are of a particular quality or kind. It is not necessary that the word "warrant" should be used, but any affirmance or representation made at the time of a sale, and which is intended and understood by the parties to be a warranty, is sufficient.[1] Affirmations of quantity and quality, or

[1] Carondelet Iron Works v. Moore, 78 Ill. 86; Weimer v. Clement, 37 Pa. St. 147; 78 Am. Dec. 411; Polhemus v. Heiman, 45 Cal. 378; Murphy v. Gay, 37 Mo. 536; Bond v. Clark, 35 Vt. 580; Hahn v. Doolittle, 18 Wis. 197; 86 Am. Dec. 757; Chapman v. Murch, 19 Johns. 290; 10 Am. Dec. 227; Hawkins v. Pemberton, 51 N. Y. 198; 10 Am. Rep. 595; Beeman v. Buck, 3 Vt. 53; 21 Am. Dec. 571; Sparling v. Marks, 86 Ill. 125. In Osgood v. Lewis, 2 Har. & G. 495, 18 Am. Dec. 317, the court say: "Warranties on the sales of personal property have usually been divided into two classes, express and implied. To create an express warranty, the word 'warrant' need not be used, nor is any precise form of expression required. Any affirmation of the quality or condition of the thing sold (not uttered as matter of opinion or belief), made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. And in cases of oral contracts on the existence of these necessary ingredients to such a warranty, it is the province of the jury to decide, upon considering all the circumstances attending the transaction. But of written contracts the court are the expositors. Whether the instrument contain an express warranty or not, they must determine; not leaving the question to be inferred by a jury from a consideration of facts *aliunde*. Implied warranties arise by implied operation of law; they exist without any intention of the seller to create them; and

condition, pending a sale, are warranties, if they are made with a view to bring about a sale, and have that effect.[1] An offer by letter to sell pianos, directing attention to a circular, at the head of which is printed, "every piano warranted for five years," if accepted, includes the warranty.[2]

That the article sold actually exists is not an implied warranty, but is an essential element of the sale itself, without which there is no contract between the parties at all.[3]

may properly be divided into two kinds. The one untinctured by actual fraud or deceit, as the warranty of title, warranty that provisions purchased for domestic use are wholesome; and the warranty in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be salable as such in the market. The other kind of implied warranties are those where fraud and deceit are of their very essence, without which they do not exist, as in cases where the seller of any article, knowing of its unsoundness, uses any disguise or artifice to conceal it, or represents it (whether in the way of expressing opinion or belief, or otherwise) to be exempt from such defect. Implied warranties are not conclusions or references of fact drawn by a jury, but they are the conclusions or references of law pronounced by the court upon facts admitted or proved before the jury. If the facts be controverted, the court hypothetically instruct the jury that if they find such and such facts, then there is an implied warranty, and their verdict must be given accordingly; but if they do not find those facts, then there is no implied warranty." "A warranty," said Lord Abinger, C. B., in Chanter *v.* Hopkins, 4 Mees. & W. 404, "is an express or implied statement of something which the party undertakes shall be a part of a contract; and though part of the contract, yet collateral to the express object of it." "The best definition of a warranty," said Martin, B., in Stucey *v.* Bailey, "is that given by Lord Abinger, in Chanter *v.* Hopkins"; and the text-writers have almost unanimously adopted the definition of the chief baron with the indorsement of Baron Martin.

[1] Randall *v.* Thornton, 43 Me. 226; 69 Am. Dec. 56; Lamme *v.* Gregg, 1 Met. (Ky.) 444; 71 Am. Dec. 489.

[2] Snow *v.* Schomacker Manufacturing Co., 69 Ala. 111; 44 Am. Rep. 509.

[3] In Terry *v.* Bissell, 26 Conn. 23, the defendants sold the plaintiff a note, not then due, purporting to be signed by A, and indorsed by B. The signature of A was genuine, but the indorsement by B was a forgery. There was no express warranty of the genuineness of the indorsement, and neither party had any suspicion that it was forged. After the note had been protested for non-payment, the plaintiff discovered the fact of the forgery, and immediately offered to return the note to the defendants, and demanded the money paid for it. The defendants refusing to receive the note or refund the money, he brought an action of *assumpsit* for money had and received. It was held that he was entitled to recover. "In the first place," said Ellsworth, J., "there was no sale, because the subject-matter of the sale had no existence. There must be, in order to make a valid contract, a thing sold. If, ignorant of the death of my horse, I sell it, there is no sale, for want of a thing sold. If A and B being together in New York, A sells B his house in Chicago, both being ignorant that it has been burned down, the contract is null, for there is nothing to contract about." "I have often ruled," said Lord Kenyon, in Farrer *v.* Nightingal, 2 Esp. 639, "that where a person sells an interest, and it ap-

In the same manner the matter of the identity of the goods is not strictly a warranty.[1]

An express warranty covers even patent defects, and such as are open to the observation of the purchaser.[2] But when goods have been in existence and in the buyer's custody for some time before the sale, and are then in his custody, there can be no implied warranty of their quality.[3] An express warranty excludes an implied one.[4]

The warranty must be made at the time of the sale. A warranty made afterwards is not enforceable, unless made upon a new consideration.[5] It is not necessary to prove the defendant's knowledge of the unsoundness of a chattel at the time of sale, in an action brought for breach of warranty.[6]

ILLUSTRATIONS. — Defendant agreed to purchase certain apples, if plaintiff "would give his word that they were first-class,

pears that the interest which he pretended to sell was not the true one, — as, for example, if it was for a lesser number of years than he had contracted to sell, — the buyer may consider the contract as at an end, and bring an action for money had and received, to recover back any sum of money he may have paid."

[1] "If a man," said Lord Abinger, C. B., in Chanter *v.* Hopkins, 4 Mees. & W. 404, "offers to buy pease of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him pease; the contract is to sell pease, and if he sells him anything else in their stead, it is a non-performance of it. So if a man were to order copper for sheathing ships, that is, a particular copper, prepared in a particular manner, if the seller sells him a different sort, in that case he does not comply with the contract; and though this may have been considered a warranty, and may have ranged under the class of cases relating to warranties, yet it is not properly so." And in Terry *v.* Bissell, 26 Conn. 23, Ellsworth, J., said: "Suppose the defendant had proposed to sell and had sold a bar of metal as gold which turned out to be mere dross, colored and disguised, without a particle of gold; or a barrel of flour, which was examined on the surface, but below was mere sawdust or gravel; or a barrel of beef, which turned out to have one layer of beef and the rest was brickbats and stones; or a box of chisels, which turned out to be scrap-iron, — would the seller be permitted to insist that it was a sale, and keep his money?"

[2] Stucky *v.* Clyburn, Cheves, 186; 34 Am. Dec. 590. *Contra*, Connersville *v.* Wadleigh, 7 Blackf. 102; 41 Am. Dec. 214; Fisher *v.* Pollard, 2 Head, 314; 75 Am. Dec. 740; Long *v.* Hicks, 2 Humph. 305. See Nye *v.* Iowa City Alcohol Works, 51 Iowa, 129; 33 Am. Rep. 121.

[3] Dooley *v.* Gallagher, 3 Hughes, 214.

[4] Lanier *v.* Auld, 1 Murph. 138; 3 Am. Dec. 680; Mast *v.* Pearce, 58 Iowa, 579; 43 Am. Rep. 125.

[5] Towell *v.* Gatewood, 2 Scam. 22; 33 Am. Dec. 437; Summers *v.* Vaughan, 35 Ind. 323; 9 Am. Rep. 741; Aultman *v.* Kennedy, 33 Minn. 339.

[6] Trice *v.* Cockran, 8 Gratt. 442; 56 Am. Dec. 151; Swayne *v.* Waldo, 73 Iowa, 749; 5 Am. St. Rep. 712.

both in fruit and package," and, after considering, plaintiff accepted defendant's proposition, and stated that "the apples should be in every particular equal to Henning's and Stanley's packing." *Held*, a warranty of quality: *Scott* v. *Raymond*, 31 Minn. 437. Defendant sold a fertilizing preparation in bags, with tags attached stating the chemical ingredients. He also issued circulars, using the words "highest standard," "under my own name and guaranty," "prepared under my inspection and control," "compounded of the purest materials," and referring by name to the chemist who made the analysis, adding, "whose name gives a warrant for its high character," etc. *Held*, an express warranty, not dependent upon the correctness of the chemical analysis: *Robson* v. *Miller*, 12 S. C. 586; 32 Am. Rep. 518. A ordered a machine of B, who knew the purpose for which it was wanted, and who wrote, in accepting the order, "You may rely on having a first-rate machine, which will do your work in a satisfactory manner." *Held*, an express warranty: *Whitehead etc. Machine Co.* v. *Ryder*, 139 Mass. 366. On the sale of a patent right to a churn manufactured by the seller, he exhibited a sample of it, stating that it would produce butter in from three to five minutes; could be operated by a child five or six years old; that it was made of juniper-wood, and that the dasher was nickel-plated; whereas in fact it would not produce butter in less than ten minutes, was too heavy for childen to work it, was made of white pine, and painted, and the dasher was made of polished iron. *Held*, a valid warranty: *Tabor* v. *Peters*, 74 Ala. 90; 49 Am. Rep. 804.

§ 2371. **Animals.** — The warranty of soundness of a horse is broken if the infirmity, although not permanent or incurable, renders the animal less fit for present use;[1] or by cribbing, affecting the health and condition of the horse, so far as to render him less able to perform service, and of less value.[2] A statement that a sore on an animal is "most well" is a warranty that it will get well.[3] A warranty that a horse partly blind is "all right, except that he would sometimes shy," is a warranty that he was sound.[4] A statement that "the horse had the distemper a little" is a warranty that the horse was not otherwise

[1] Roberts v. Jenkins, 21 N. H. 116; 53 Am. Dec. 169. So it includes even visible defects: Kenner v. Harding, 85 Ill. 264; 28 Am. Rep. 615.

[2] Washburn v. Cuddihy, 8 Gray, 430.

[3] Branson v. Turner, 77 Mo. 489.

[4] Kingsley v. Johnson, 49 Conn. 462.

diseased.[1] A warranty that cattle "will work evenly on the yoke" is broken if they will not so work when driven by a person of ordinary skill in the management of oxen.[2] A representation on the sale of a horse that the animal is fourteen years old is a warranty that he is no older.[3] A warranty of the soundness of a horse is not broken by a curable and temporary injury, existing at the date of the sale, not injuring him for immediate service;[4] nor by mere organic or constitutional predisposition to a particular malady;[5] nor by the fact that a mare is with foal.[6] A warranty that a cow is "sound and kind" does not extend to its age.[7] Whether the statement by the seller at the time of sale that "the animal is all right" amounts to a warranty of its soundness is a question for the jury,[8] and evidence of his subsequent assertion that she is all right is admissible.[9]

§ 2372. **Opinions—Puffing Goods.**—The mere expression of opinion of the character or quality of the goods sold is not a warranty; for the seller may praise or puff his goods as he pleases.[10] A seller has the clear right to extol their superior quality by any and all fair means, to procure a good price; and if he refuses to warrant their quality, the buyer will have no right to complain, though

[1] Hull *v.* Kirkpatrick, 4 Ind. 637.
[2] Woodruff *v.* Weeks, 28 Conn. 328.
[3] Burge *v.* Stroberg, 42 Ga. 89.
[4] Roberts *v.* Jenkins, 21 N. H. 116; 53 Am. Dec. 169.
[5] Fry *v.* Throckmorton, 2 B. Mon. 450.
[6] Whitney *v.* Taylor, 54 Barb. 536.
[7] Willard *v.* Stevens, 24 N. H. 271.
[8] Tuttle *v.* Brown, 4 Gray, 457; 64 Am. Dec. 80.
[9] Tuttle *v.* Brown, 4 Gray, 457; 64 Am. Dec. 80.
[10] Matthews *v.* Harston, 3 Pittsb. Rep. 86; Fraley *v.* Bispham, 10 Pa. St. 320; 51 Am. Dec. 486; Carson *v.* Baillie, 19 Pa. St. 375; 57 Am. Dec. 659; Eagan *v.* Call, 34 Pa. St. 236; 75 Am. Dec. 653; McFarland *v.* Newman, 9 Watts, 56; 34 Am. Dec. 497; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59; 34 Am. Dec. 108; McFarland *v.* Newman, 9 Watts, 55; 34 Am. Dec. 497; Hart *v.* Wright, 17 Wend. 267; Salisbury *v.* Stainer, 19 Wend. 159; 32 Am. Dec. 437; Erwin *v.* Maxwell, 3 Murph. 241; 9 Am. Dec. 602; Sweet *v.* Colgate, 20 Johns. 196; 11 Am. Dec. 267; Conner *v.* Henderson, 15 Mass. 320; 8 Am. Dec. 103; Lamb *v.* Crafts, 12 Met. 353; Sweet *v.* Shumway, 102 Mass. 365; Carondelet Iron Works *v.* Moore, 78 Ill. 65; Adams *v.* Johnson, 15 Ill. 346; Reed *v.* Hastings, 61 Ill. 266; Towell *v.* Gatewood, 2 Scam. 22; 33 Am. Dec. 437; Baker *v.* Henderson, 24 Wis. 509; Tenney *v.* Cowles, 67 Wis. 594.

the seller gave it as his opinion that the goods are worth more than was actually realized.[1] Thus it is no warranty for the vendor to say that a machine is a very good machine, and will do nice work;[2] or that he is sure a horse is safe and kind and gentle in harness;[3] or that an article would sell well in Mississippi or anywhere else;[4] or that he will sell as cheap as the same goods can be bought in a city named;[5] or that hogs sold are "suitable and proper for the New York City market."[6]

§ 2373. Implied Warranties — No Warranty of Quality on Sale of Specific Article. — Upon the sale of a specific article, there is, in general, no warranty of the quality of the article sold, and the maxim *caveat emptor* applies. This is well settled by the authorities,[7] except in a few early cases, since overruled,[8] and is the law of all the states except Louisiana and South Carolina.[9] And the

[1] Fauntleroy *v.* Wilcox, 80 Ill. 477; Byrne *v.* Jansen, 50 Cal. 624.

[2] Worth *v.* McConnell, 42 Mich. 473.

[3] Jackson *v.* Wetherill, 7 Serg. & R. 480.

[4] Baldwin *v.* Daniel, 69 Ga. 782.

[5] Falkner *v.* Lane, 58 Ga. 116.

[6] Bartlett *v.* Hoppock, 34 N. Y. 118; 88 Am. Dec. 428.

[7] Dean *v.* Mason, 4 Conn. 428; 10 Am. Dec. 162; Seixas *v.* Woods, 2 Caines, 48; 2 Am. Dec. 215; Holden *v.* Daken, 4 Johns. 421; Hotchkiss *v.* Gage, 26 Barb. 141; Swett *v.* Colgate, 20 Johns. 196; 11 Am. Dec. 266; Defreeze *v.* Trumper, 1 Johns. 274; 3 Am. Dec. 329; Barnard *v.* Kellogg, 10 Wall. 388; Fleming *v.* Slocum, 18 Johns. 403; 9 Am. Dec. 224; Erwin *v.* Maxwell, 3 Murph. 241; 9 Am. Dec. 602; Westmorland *v.* Dixon, 4 Hayw. (Tenn.) 223; 9 Am. Dec. 763; Welsh *v.* Carter, 1 Wend. 185; 19 Am. Dec. 473; Waring *v.* Mason, 18 Wend. 444; West *v.* Cunningham, 9 Port. 104; 33 Am. Dec. 300; Mixer *v.* Coburn, 11 Met. 559; 45 Am. Dec. 230; Kingsbury *v.* Taylor, 29 Me. 508; 50 Am. Dec. 607; Eagan *v.* Call, 34 Pa. St. 236; 75 Am. Dec. 653; Weimer *v.* Clement, 37 Pa. St. 147; 78 Am. Dec. 411; Hight *v.* Bacon, 126 Mass. 10; 30 Am. Rep. 639; Dickson *v.* Jordan, 11 Ired. 166; 53 Am. Dec. 403; Becker *v.* Branner, 18 Ill. App. 39; Johnston *v.* Cope, 3 Har. & J. 69; 5 Am. Dec. 423; Hyatt *v.* Boyle, 5 Gill & J. 119; 25 Am. Dec. 276; Rice *v.* Forsyth, 41 Md. 389; Jones *v.* Jost, L. R. 3 Q. B. 202; Windsor *v.* Lombard, 18 Pick. 60; Salem Rubber Co. *v.* Adams, 23 Pick. 256; Bryant *v.* Pender, 45 Vt. 487; Carley *v.* Wilkens, 6 Barb. 557; Moses *v.* Mead, 1 Denio, 378; 43 Am. Dec. 676; Wilbur *v.* Cartwright, 44 Barb. 536; Frazier *v.* Harvey, 34 Conn. 469; Hahn *v.* Doolittle, 18 Wis. 196; 86 Am. Dec. 757; Otts *v.* Alderson, 10 Smedes & M. 473; Tewksbury *v.* Bennett, 31 Iowa, 83; Hadley *v.* Clinton Co. Imp. Co., 13 Ohio St. 502; 82 Am. Dec. 454; Irving *v.* Thomas, 18 Me. 418.

[8] Bailey *v.* Nickols, 2 Root, 407; 1 Am. Dec. 83; Baker *v.* Frobisher, Quincy, 4.

[9] Parsons on Contracts, 584; Timrod *v.* Shoolbred, 1 Bay, 324; 1 Am. Dec. 620; Whitefield *v.* McLeod, 2 Bay, 380; 1 Am. Dec. 650; Vanderhost *v.* MacTaggart, 1 Brev. 269; 2 Am. Dec. 667; Houston *v.* Gilbert, 3 Brev. 63; 5 Am. Dec. 542.

vendor of personal property does not impliedly warrant that the article sold is of the species or kind contemplated by the parties, where the sale is on inspection, and the vendee's knowledge is equal to that of the vendor.[1] Nor does an implied warranty of quality arise where a purchaser orders goods from the seller, and has no opportunity of seeing them; in such a case the purchaser constitutes the vendor his agent to select for him, and only has a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint because of a defect in the goods.[2] The fact that the merchandise is packed up is no excuse for the purchaser not examining it. That paint was sold in kegs;[3] that crockery was sold in crates;[4] that flour was sold in barrels;[5] that hemp was sold in bales;[6] that tobacco was sold in kegs;[7] that molasses was sold in barrels,[8]—was held in each case to be no reason why the purchaser should not have examined the goods.

The doctrine of implied warranties applies only to such secret defects as a purchaser cannot detect for himself. Therefore where the seller is guilty of no fraud, and the buyer has an opportunity of examining the goods for himself, the law will raise no implied warranty.[9] This doctrine applies as well to property exchanged as to property sold.[10] But the rule of *caveat emptor* does not cover fraudulent concealment or misrepresentation by the ven-

[1] Lord *v.* Grow, 39 Pa. St. 88; 80 Am. Dec. 504.

[2] Dickson *v.* Jordan, 11 Ired. 166; 53 Am. Dec. 403.

[3] Holden *v.* Dakin, 4 Johns. 421.

[4] Thompson *v.* Ashton, 14 Johns. 316.

[5] Hart *v.* Wright, 17 Wend. 267.

[6] Salisbury *v.* Stainer, 19 Wend. 159; 32 Am. Dec. 437.

[7] Hyatt *v.* Boyle, 5 Gill & J. 110; 25 Am. Dec. 276.

[8] Humphreys *v.* Comline, 8 Blackf. 516, the court saying: "If it should be held a sufficient excuse for the neglect to make the examination, that the molasses was in barrels, such an excuse would be equally available in all cases where the article sold is in any kind of inclosure, however readily the vessels or envelopes might be opened. In fact, it would be available in almost every case where the purchaser should not choose to examine the goods he is contracting for."

[9] Carnochan *v.* Gould, 1 Bail. 179; 19 Am. Dec. 668; Stewart *v.* Dugin, 4 Mo. 245; 28 Am. Dec. 348.

[10] Rivers *v.* Grugett, 1 McCord, 100.

dor of any material fact inducing the purchaser to buy.[1] There is no warranty of quality on the sale of lands.[2]

ILLUSTRATIONS. — A market gardener, who had purchased certain cabbage-seeds the year before, inquired for the same kind, and was shown certain seeds, which he bought, and which proved of little value. The seed that he wanted could not be distinguished by its appearance. There was neither fraud nor warranty. *Held*, that he could not maintain an action on the case against the seller: *Shisler* v. *Baxter*, 109 Pa. St. 443; 58 Am. Rep. 738. A contracted at a price certain for all the wheat B might raise on his farm. *Held*, no warranty as to the quality or value of the wheat: *Davis* v. *Murphy*, 14 Ind. 158. A machinist and founder sold a piece of wrought-iron shafting, of which he was not the maker, but which he turned and prepared for the reception of pulleys, and which he supposed to be sound, to be used in running machinery in a carriage-shop, and the shaft, upon being put to the described use, broke, because of a flaw and an imperfect weld. *Held*, no implied warranty of its soundness: *Bragg* v. *Morrill*, 49 Vt. 45; 24 Am. Rep. 102. A drover living at a distance drove cattle to New York, and sold them to a butcher. After they were slaughtered they proved to have been bruised on the journey and rendered less merchantable. There was no proof of misrepresentation or concealment, or that the drover had knowledge of the injury. In an action by the butcher to recover the difference in value, *held*, that the drover was not liable: *Goldrich* v. *Ryan*, 3 E. D. Smith, 324.

§ 2374. Exception — Article Sold for a Particular Purpose. — But if an order be given for the manufacture or supply of an article to satisfy a required purpose, that purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so.[3] But the manufacturer is not bound to furnish the

[1] Wintz *v.* Morrison, 17 Tex. 372; 67 Am. Dec. 658; Carson *v.* Baillie, 19 Pa. St. 375; 57 Am. Dec. 659.

[2] Pollard *v.* Lyman, 1 Day, 156; 2 Am. Dec. 63; Gimblin *v.* Harrison, Sneed, 315; 2 Am. Dec. 720.

[3] Pease *v.* Sabin, 38 Vt. 432; 91 Am. Dec. 364; Brown *v.* Edgington, 2 Man. & G. 279; Ollivant *v.* Bailey, 5 Q. B. 288; Jones *v.* Just, L. R. 3 Q. B. 202; 37 L. J. Q. B. 95; Hoe *v.* Sanborn, 21 N. Y. 552; 78 Am. Dec. 163; Dounce *v.* Dow, 64 N. Y. 411; Rodgers *v.* Niles, 11 Ohio St. 48; 78 Am. Dec. 290; Byers *v.* Chapin, 28 Ohio St. 300; Mason *v.* Chappell, 15 Gratt. 572;

best that are or can be made, but only such as are usually made and used and as are reasonably fit for the

Sims *v.* Howells, 49 Ga. 620; Kimball Mfg. Co. *v.* Vrooman, 35 Mich. 310; 24 Am. Rep. 558; Beers *v.* Williams, 16 Ill. 69; Union Hide Co. *v.* Reissig, 48 Ill. 75; Page *v.* Ford, 12 Ind. 46; Brenton *v.* Davis, 8 Blackf. 317; 44 Am. Dec. 769; Bird *v.* Mayer, 8 Wis. 362; Fisk *v.* Tank, 12 Wis. 276; 78 Am. Dec. 737; Street *v.* Chapman, 29 Ind. 142; Bonn *v.* Clark, 35 Vt. 577; Chapin *v.* Dobson, 78 N. Y. 82; 34 Am. Rep. 512; Getty *v.* Rountree, 2 Pinn. 379; 54 Am. Dec. 138; Beals *v.* Olmstead, 24 Vt. 114; 58 Am. Dec. 150; Wilson *v.* Dunville, L. R. 4 Ir. Rep. 249; Robertson *v.* Amazon Tug Co., L. R. 7 Q. B. D. 598; Smith *v.* Baker, 40 L. J., N. S., 261; Macfarlane *v.* Taylor, L. R. 1 Sc. & Div. 245; Snelgrove *v.* Bruce, 16 U. C. C. P. 561; Baker *v.* Lyman, 38 U. C. Q. B. 498; Bigelow *v.* Boxall, 38 U. C. Q. B. 452; Howard *v.* Hoey, 23 Wend. 350; 35 Am. Dec. 572; Van Wycke *v.* Allen, 69 N. Y. 61; 25 Am. Rep. 136; White *v.* Miller, 71 N. Y. 118; 27 Am. Rep. 13; Hanger *v.* Evans, 38 Ark. 334; Wolcott *v.* Mount, 38 N. J. L. 496; 20 Am. Rep. 425; Taylor *v.* Cole, 111 Mass. 363; Merrill *v.* Nightingale, 39 Wis. 247; Robson *v.* Miller, 12 S. C. 586; 32 Am. Rep. 518; Gerst *v.* Jones, 32 Gratt. 518; 34 Am. Rep. 773; Gammell *v.* Gunby, 52 Ga. 504; Wilcox *v.* Owens, 64 Ga. 601. "If a man," said Best, C. J., in Jones *v.* Bright, 5 Bing. 533, "sells an article, he thereby warrants that it is merchantable; that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose. . . . . Whether or not an article has been sold for a particular purpose is indeed a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . . The law, then, resolves into this: that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." In Gray *v.* Cox, 4 Barn. & C. 108, Abbott, C. J., said: "If a person sells a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." In Brown *v.* Edgington, 2 Man. & G. 279, Tindal, C. J., said: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchase an article upon his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it is designed." In Gerst *v.* Jones, 32 Gratt. 521, 34 Am. Rep. 773, Staples, J., said: "The maxim *caveat emptor* applies in the absence of fraud or express warranty. Several modifications of this rule have, however, been recognized by the courts, perhaps as well established as the rule itself. One of these is, that, upon an executory contract of sale, where goods are ordered for a particular use or purpose, known to the seller, the latter impliedly undertakes they shall be reasonably fit for the use or purpose for which they are intended. Such a case, according to the authorities, is plainly distinguishable from that of an executed sale of a specific chattel selected by the purchaser upon which no implied warranty arises. The distinction seems to be somewhat refined and technical at first view, but it is founded in sound reason, and is sustained by the authorities. Where the purchase is of a defined, ascertained article, the vendor performs his part of the contract by sending the article; and, in the absence of fraud or some positive affirmation amounting to a warranty, he is not liable for any defect in the quality. The purchaser, in selecting the particular article, relies upon his own judgment, and takes upon himself the risk of its answering his purposes. If he desires to secure himself against loss, he ought to require an express warranty. In the absence of such warranty, the rule of *caveat emptor* must govern. Where, however, the purchaser does not desig-

purpose.[1] But an order for a machine from a dealer implies that it shall be new, not second-hand, or the worse for wear; and the dealer cannot impose upon the purchaser a second-hand and worn machine, whether it complies with the terms of his warranty or not as to being good and well made, and that it will do as good work as any other machine of its class.[2]

Where the party supplying articles for a particular purpose is not a manufacturer, but only a dealer, it is held in some cases that he does not impliedly warrant their quality or fitness.[3] It has been held in New York that the im-

nate any specific article, but orders goods of a particular quality, or for a particular purpose, and that purpose is known to the seller, the presumption is, the purchaser relies upon the judgment of the seller, and the latter, by undertaking to furnish the goods, impliedly undertakes they shall be reasonably fit for the purpose for which they are intended, and he will be answerable for any defect in the material or in the construction by which the value is diminished. This rule applies with peculiar force where the seller is the manufacturer." On a sale by a manufacturer of bolts to a manufacturer of barrels, there is an implied warranty that the bolts are fit for the purpose: Ketchum *v.* Wells, 19 Wis. 25. On a sale of leather by a manufacturer to a shoe manufacturer, there is an implied warranty that the leather is suitable to be made into shoes: Downing *v.* Dearborn, 77 Me. 457. On a sale by a manufacturer of pianos of a piano to a dealer in pianos, who buys to resell or to let, there is an implied warranty that the material and workmanship are good, that it is adapted to the uses for which it was made, and is a reasonably good musical instrument: Snow *v.* Schomacker Mfg. Co., 69 Ala. 111; 44 Am. Rep. 509. The manufacturer of a boat impliedly warrants it to be fit for the transportation of goods on a certain river, where he sells it for that purpose: Brenton *v.* Davis, 8 Blackf. 317; 44 Am. Dec. 799. On a sale of whisky-barrels by a manufacturer, there is an implied warranty that they will hold whisky without leaking: Poland *v.* Miller, 95 Ind. 387; 48 Am. Rep. 730. A manufacturer of fertilizers warrants that the article is merchantable and reasonably suited to the use intended. He warrants that it is a manure, that it is reasonably suited for giving additional capacity to land to produce a crop: Wilcox *v.* Hall, 53 Ga. 635. A manufacturer of varnish, selling it to a painter, impliedly warrants that it is of good quality and adapted to the purpose for which it is bought: Bird *v.* Mayer, 8 Wis. 362.

[1] Harris *v.* Waite, 51 Vt. 481; 31 Am. Rep. 694.

[2] Grieb *v.* Cole, 60 Mich. 397; 1 Am. St. Rep. 533.

[3] Dounce *v.* Dow, 64 N. Y. 411; Bartlett *v.* Hoppock, 34 N. Y. 118; 88 Am. Dec. 428; Wright *v.* Hart, 18 Wend. 449; Bragg *v.* Morrill, 49 Vt. 45; 24 Am. Rep. 102; Tilton Co. *v.* Tisdale, 48 Vt. 83; Farrow *v.* Andrews, 69 Ala. 96. But in an English case (Brown *v.* Edgington, 2 Scott N. R. 496), the plaintiff sent to the defendant's shop — the defendant was a dealer in ropes — to purchase a crane-rope, telling him it was wanted for the purpose of raising pipes of wine from a cellar. The defendant, not having a rope of the proper thickness, undertook to have one made, and sent his servant to the plaintiff's premises to take the measure, and afterwards to fix the rope. A short time afterwards, while some of the plaintiff's servants were hauling up a cask of wine, the rope broke, the barrel was stove in, and the wine lost. It was held that there

plied warranty that a manufactured article sold by the manufacturer is free from any latent defect is restricted to such defects as grow out of the process of manufacture, and does not extend to defects in the materials employed.[1] On the other hand, in Ohio, a contrary doctrine has been announced.[2]

There is no implied warranty against a necessary and likely depreciation which may take place in the quality of the goods between the time of the sale and the delivery into the hands of the purchaser. Thus when ale was sold in Chicago to a party in Montana, it was held that there was no warranty that it would bear transportation to Montana.[3] There is an implied warranty, however, that goods are properly packed.[4] The words "sound order," as applied in a contract relating to tobacco to be delivered to a manufacturer, means such order as would, with ordinary care, insure the sound condition of the tobacco at the time of its arrival at the place where it is to be manufactured, and for a reasonable time thereafter, until it could be used in the course of manufacture.[5]

ILLUSTRATIONS. — Plaintiff was a dealer in lamp-black; the defendant, a manufacturer of printer's ink. The plaintiff sold several barrels of lamp-black to the defendant, the latter saying that he must be very particular in having black that would make printer's ink; that black for carriage use would not do. The barrels were not examined. *Held*, that there was an implied warranty that the black should be suitable for the manufacture of printer's ink: *Murray* v. *Smith*, 4 Daly, 277. Plaintiff bought a quantity of hay of defendant in his barn, but did not examine it, saying that he could not tell by that, but he wanted hay for his oxen during spring and summer. Defendant replied that it was good hay, cut round the barn. When plaintiff came

was an implied warranty that the rope should be fit for the purpose for which it was required, and the defendant was held liable; and that the rule was not limited to cases where the vendor was also the manufacturer of the vehicle, but extended to all cases where the buyer relied upon the skill and judgment of the seller. And see Bigge *v.* Parkinson, 7 Hurl. & N. 955; Gammell *v.* Gunby, 52 Ga. 504.

[1] Hoe *v.* Sanborn, 21 N. Y. 552; 78 Am. Dec. 163.

[2] Rodgers *v.* Niles, 11 Ohio St. 48.

[3] Leggat *v.* Sands, 60 Ill. 158.

[4] Mann *v.* Everston, 32 Ind. 355.

[5] Reynolds *v.* Palmer, 21 Fed. Rep. 433.

to receive the hay, he found it worthless, and not such hay as grew around the barn. *Held*, that he could recover on the implied warranty: *Beals* v. *Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *French* v. *Vining*, 102 Mass. 132; 3 Am. Rep. 440. J. & Co. were manufacturers of tobacco, and G. was a manufacturer of tobacco-boxes. It is well known in the trade that boxes for packing tobacco in must be made of dry and seasoned wood, otherwise the tobacco will mold and become damaged. G. agreed to furnish J. & Co. during the season of 1876 as many boxes as the latter would use in their business, at a certain price, and under this agreement did supply a great many, into which J. & Co. packed their tobacco and shipped it. But much of this molded in consequence of the boxes being made of green timber. *Held*, that G. was liable on an implied warranty that the boxes should be fit for the purpose of packing tobacco: *Gerst* v. *Jones*, 32 Gratt. 524; 34 Am. Rep. 773. Cheese was bought for a certain purpose, for a full price, without examination, and the purpose was disclosed to the defendant; but by the unskillfulness in the manufacture, latent maggots were in the cheese, which rendered it unfit for the purpose in view. *Held*, that a warranty would be implied that the article was fit for the purpose specified, and free from latent defects: *Pease* v. *Sabin*, 38 Vt. 432; 91 Am. Dec. 364. Defendant sold to plaintiff a shaft for the purpose of driving machinery, and defendant was not the maker of the shaft, but had turned and prepared it for the pulleys, and the shaft afterwards broke by reason of a defect in the original manufacture, not caused by defendant, and not discoverable by any ordinary inspection or examination. *Held*, that there was no implied warranty, and that defendant was not liable: *Bragg* v. *Morrill*, 49 Vt. 45; 24 Am. Rep. 102. A piano manufacturer sold to a dealer a piano, the case of which soon began to check, and the dealer was obliged to sell it at a reduced price. A third person made the case for the manufacturer, who knew that the dealer bought the piano to sell again. *Held*, that the dealer had no cause of action against the manufacturer: *Wilson* v. *Lawrence*, 139 Mass. 318.

§ 2275. **Executory Contracts.** — In executory contracts of sale, the rule is *caveat venditor*, not *caveat emptor*. "Executory contracts of sale do not depend on the same principles as executed contracts. . . . . Where a contract is executory, — that is, to deliver an article, not defined at the time, on a future day, — whether the vendor has at the time an article of the kind on hand, or it is after-

wards to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable,—at least of medium quality or goodness."[1] But where a known, described, and defined article is ordered, and the purchaser gets what he ordered, there is no warranty that the article will answer the particular purpose for which he bought it.[2] The manufacturer of an article

[1] Hargous *v.* Stone, 5 N. Y. 86; Woodle *v.* Whitney, 23 Wis. 55; 99 Am. Dec. 102; Howard v. Hoey, 23 Wend. 350; 35 Am. Dec. 572; Reed *v.* Randle, 29 N. Y. 385; 86 Am. Dec. 305; Norris *v.* LaFarge, 3 E. D. Smith, 379; Clew *v.* McPherson, 1 Bosw. 486; Hamilton *v.* Ganyard, 3 Keyes, 46; Babcock *v.* Trice, 18 Ill. 420; 68 Am. Dec. 560; Fisk *v.* Tank, 12 Wis. 276; 78 Am. Dec. 737; Page *v.* Ford, 12 Ind. 46; Sweat *v.* Shumway, 102 Mass. 365; 3 Am. Rep. 471. In Edwards *v.* Hathaway, 1 Phila. 547, Sharswood, J., said: "The general rule at law is, that, upon the sale of any article of merchandise, the seller does not become responsible for the quality of the article sold, unless he either expressly warranted the quality, or made a false and fraudulent representation in regard to it. This rule, however, is subject to some reasonable exceptions. It does not apply where the purchaser has no opportunity of inspecting the article. . . . . I take it, the same modification of the general rule applies when a coal-dealer gives an order to the agent for coal to be sent to him from the mine; it is an implied term of the contract that the coal shall be of a merchantable character. It would not be allowed in such a case that the seller should, in compliance with such an order, send an article which, though it might still pass muster by the name of coal, was composed of one half slate or stone. If would be different if a man went into a coal-yard and purchased a quantity of coal there lying. His eyes, in such a case, are his market; and if he distrusts his own judgment, he should take the opinion of those who are acquainted with the article, or require the seller to warrant. But a man's eyes are of no use to him when he is buying something in the bowels of the earth fifty or a hundred miles distant."

[2] Davis *v.* Murphy, 14 Ind. 150; Holden *v.* Clancy, 58 Barb. 590. In Ollivant *v.* Bayley, 5 Q. B. 288, the plaintiff was the owner and manufacturer of a patent machine for printing in two colors. The defendant looked at the machine on the plaintiff's premises, and ordered one, plaintiff undertaking in writing to make him "a two-color printing-machine on my patent principle." The machine was made and delivered, but the defendant refused to pay for it, on the ground that it had been found useless for printing in two colors. The jury were told that if the machine described was a known, ascertained article ordered by the defendant, he was liable, whether it answered his purpose or not; but that if it was not a known, ascertained article, and defendant had merely ordered and plaintiff agreed to supply a machine for printing two colors, the defendant was not liable unless it would do so. The plaintiff had a verdict, which was sustained on appeal, where, the defendant's counsel arguing that the contract was to be construed as requiring an instrument which should be reasonably fit for printing in two colors, Wightman, J., answered: "You contend that if the principle is not really adapted to the purpose he must send something not according to the principle." In Chanter *v.* Evans, 4 Mees. & W. 399, the chief baron said: "The question is, whether or no the order has not been complied with in its terms. What is the order? It is an order for one of those engines of which the plaintiff was known to be the patentee. He was not obliged to know the object or use to which the

according to specifications furnished by his employer does not impliedly warrant that it will answer the purpose for which it was intended by the projector. In such case, the risk is on the latter. A mechanic is bound only to do his work in a skillful manner, and according to directions, and upon so doing, is entitled to reasonable compensation, although the machine wholly fails to perform its intended office.[1] So the law implies that books are to be printed in a skillful and workmanlike manner, where an agreement is made to print and deliver a specified number of copies.[2]

ILLUSTRATIONS. — Defendants agreed to make and deliver to plaintiffs, at a future day, for a stipulated price, three steam-boilers to be used in running the engines in the plaintiffs' rolling-mill. *Held*, that it was impliedly stipulated in the contract that the boilers should be free from all such defects of

defendant meant to apply it, and it is admitted there is no fraud. If, when the plaintiff received such an order, he had known it could not be so applied, and felt that the defendant was under some misapprehension on the subject, and that he was buying a thing on the supposition that he could apply it to that use, when the plaintiff very well knew he could not, in that case it might affect the contract on the ground of the suppression of a material fact. That might be a question for the jury. Or if the terms of the contract were proposed by the plaintiff himself, such as, 'I will send you one of my smoke-consuming furnaces, which shall suit your brewery,' in such a case that would be a warranty that it would suit a brewery. But in this case no fraud whatever is suggested, and the case is that of an order for the purchase of a specific chattel which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but if it does not, he is not the less on that account bound to pay for it. The seller does not know it will not suit his purpose, and the contract is complied with in its terms. It appears to me that this is the ordinary case of a man who has had the misfortune to order a particular chattel on the supposition that it will answer a particular purpose, but he finds it will not." And Parke, B., puts this illustration: "Suppose," says he, "a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse; and it appears to me the present is a similar case. . . . . The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine, and it is the defendant's concern whether it answers the purpose for which he wanted to use it or not. As I read the contract, all the plaintiff has to do is to send his patent machine, and whether it answers the purpose of the defendant or not, with that the plaintiff has nothing to do; he has furnished the machine contracted for, and he is entitled on that contract to recover the stipulated price."

[1] Ricketts *v.* Sisson, 9 Dana, 358; 35 Am. Dec. 141.

[2] Gould *v.* Banks and Gould, 8 Wend. 562; 24 Am. Dec. 90.

material and workmanship, whether latent or otherwise, as would render them unfit for the usual purposes of such boilers: *Rodgers* v. *Niles*, 11 Ohio St. 48; 78 Am. Dec. 290. The defendant, a brewer, sent to the plaintiff, who was the inventor and manufacturer of a furnace known as Chanter's Smoke-consuming Furnace, the following order: "Send me your patent hopper and apparatus, to fit up my brewery copper with your smoke-consuming furnace." The plaintiff did so, the furnace was set up, but it turned out to be no use for the purposes of a brewery. *Held*, that there was no implied warranty that it was suitable for such a purpose: *Chanter* v. *Hopkins*, 4 Mees. & W. 399. The contract was for ten tons of "A No. 1 pig-iron." The defendant purchased it for castings, but it turned out to be not at all the kind of iron for that purpose. *Held*, that there was no warranty that the thing was fit for that purpose: *Port Carbon Iron Co.* v. *Groves*, 68 Pa. St. 149. The defendant sold the plaintiff 150 barrels of an article manufactured by him, called Chappell's Fertilizer, to be used on his land. The stuff turned out to be of little use for fertilizing purposes. *Held*, that no action would lie, there was no warranty, because it was the sale of a specific, ascertained, and defined article: *Mason* v. *Chappell*, 15 Gratt. 572. The defendants ordered of the plaintiff, who was a dealer in iron, ten tons of "XX pipe-iron," to be used in the manufacture of castings for farming instruments, which required soft, tough iron. The plaintiff furnished the iron of the brand specified, but when used by defendants was found not to answer the purpose, being hard and brittle. *Held*, that there was no warranty by plaintiff that the iron was fit for the manufacture of farming implements: *Dounce* v. *Dow*, 6 Thomp & C. 653; 64 N. Y. 411.

§ 2376. **Sale of Goods by Description.** — Upon a sale of goods by kind or description, in the absence of an express stipulation as to the quality, it is an implied condition of the contract that the seller shall supply such goods as are commercially known under the description, and of a merchantable or salable quality, and in a merchantable state.[1] Thus a sale of goods described in a sale

[1] Laing *v.* Fidgeon, 6 Taunt. 108; Gardiner *v.* Gray, 4 Camp. 144; Josling *v.* Kingsford, 13 Com. B., N. S., 447; 32 L. J. Com. P. 94; Jones *v.* Just, L. R. 3 Q. B. 199; 37 L. J. Q. B. 89; Borrekins *v.* Bevan, 3 Rawle, 23; 23 Am. Dec. 85; Dailey *v.* Green, 15 Pa. St. 125; Wieler *v.* Schilizzi, 17 Com. B. 619; Nichols *v.* Godts, 10 Ex. 191; Jennings *v.* Gratz, 3 Rawle, 168; 23 Am. Dec. 111; Henshaw *v.* Robins, 9 Met. 83; 43 Am. Dec. 367; Van Wyck *v.* Allen, 69 N. Y. 61; 25 Am. Rep. 136; Hawkins *v.* Pemberton, 51 N. Y. 198; 10 Am. Rep. 595.

note as "prime quality winter oil" amounts to a warranty that the article sold agrees with this description;[1] so where the goods are described as "winter-pressed sperm oil," this is a warranty that the oil is winter-pressed;[2] a description of the article as "blue paint" is a warranty that it is blue paint;[3] a sale of "Parkins's Crooked Brand" of tobacco imports that it is of that brand;[4] a sale of "ice" imports that it is of a "fairly merchantable quality";[5] a sale of "choice, sugar-cured, canvassed hams" implies a warranty that the hams are as described;[6] the use of the word "Haxall," in a sale note for flour, is a warranty that the flour is "Haxall",[7] if wool sold in sacks be marked on the sacks and described in the invoice, by the authority of the seller, as being of a certain quality, there is a warranty by the seller that the wool is of that quality.[8] But where one agrees to furnish an article similar to a certain model or design, there is no implied warranty of quality beyond conformity to the model or design;[9] and one who in good faith, and without warranty, sold to a refinery as "Manila sugar" an article known in commerce by that designation was held entitled to recover the agreed price, although the article delivered contained four per cent of sand.[10]

ILLUSTRATIONS. — A bottle manufacturer agreed to furnish a lot of "export-beer bottles." *Held*, that there was no implied warranty that the bottles furnished could be subjected to the steaming process, to destroy the germs of fermentation, without breaking. *Ottawa Bottle etc. Co.* v. *Gunther*, 31 Fed. Rep. 208. Upon a sale of coal, the vendor warranted that it "should be of good quality, and of as good quality as certain coal then being

[1] Hastings *v.* Lovering, 2 Pick. 214; 13 Am. Dec. 420.
[2] Osgood *v.* Lewis, 2 Har. & G. 495; 18 Am. Dec. 317.
[3] Borrekins *v.* Bevan, 3 Rawle, 23; 23 Am. Dec. 85.
[4] Hyatt *v.* Boyle, 5 Gill & J. 110; 25 Am. Dec. 276.
[5] Warner *v.* Arctic Ice Co., 74 Me. 475.
[6] Forcheimer *v.* Stewart, 65 Iowa, 594; 54 Am. Rep. 30. But see Ryan *v.* Ulmer, 108 Pa. St. 332; 56 Am. Rep. 210.
[7] Flint *v.* Lyon, 4 Cal. 17; Bertram *v.* Lyon, 1 McAll. 53.
[8] Richmond Trading etc. Co. *v.* Farquar, 8 Blackf. 89.
[9] Cosgrove *v.* Bennett, 32 Minn. 371.
[10] Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331.

landed at the mills of Havens" in the same city. *Held*, that this was a warranty of the good quality of the coal, even though it appeared that there were no such mills as those described in the terms of the warranty: *Pearson* v. *Martin*, 38 Wis. 265. Defendant gave plaintiffs, manufacturers of safes, a written order for a "No. 4 safe with combination lock," and plaintiffs sent a safe answerable to the order. *Held*, that there was no implied warranty as to the merits or usableness of the lock, but only that it should be such as the order called for: *Tilton Safe Co.* v. *Tisdale*, 48 Vt. 83.

§ 2377. Sale of Articles of Food. — On the sale by dealers of articles intended for food, there is an implied warranty that they are wholesome.[1] But this rule does not apply where the articles are sold, not for immediate domestic use, but to be traded in or sold again.[2] Upon the sale of a cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use.[3] So a warranty that hogs are fit for food is not implied, where farmers who are not dealers in provisions kill hogs and sell them, knowing that the purchasers intend them for domestic use.[4]

ILLUSTRATIONS. — One sold, for the purpose of being fed to a cow, part of a lot of hay on which he knew white lead to have been spilt. *Held*, liable for her loss from the effect thereof,

[1] Van Bracklin *v.* Fonda, 12 Johns. 468; 7 Am. Dec. 339; Hyland *v.* Sherman, 2 E. D. Smith, 234; Wright *v.* Hart, 13 Wend. 449; Burch *v.* Spencer, 15 Hun, 504; Ely *v.* O'Leary, 2 E. D. Smith, 361; Miller *v.* Scherder, 2 N. Y. 267; McNaughton *v.* Joy, 1 Week. Not. Cas. 470; Ryder *v.* Neitge, 6 Heisk. 340; Hoover *v.* Peters, 18 Mich. 51; Winsor *v.* Lombard, 18 Pick. 61. A baker impliedly warrants the wholesomeness of the bread which he sells at a discount to the peddler who distributes it: Sinclair *v.* Hathaway, 57 Mich. 60; 58 Am. Rep. 327. A warranty is implied on a sale of drugs by a druggist: Jones *v.* George, 56 Tex. 149; 42 Am. Rep. 689.

[2] Moses *v.* Mead, 1 Denio, 378; 43 Am. Dec. 676; Emerson *v.* Brigham, 10 Mass. 197; 6 Am. Dec. 109; Ryder *v.* Neitge, 21 Minn. 70; Humphreys *v.* Comline, 8 Blackf. 516; Divine *v.* McCormick, 50 Barb. 116; Howard *v.* Emerson, 110 Mass. 320; 14 Am. Rep. 608. Where hogs are bought for market, there is an implied warranty of fitness, the seller knowing the purpose of the purchase: Best *v.* Flint, 58 Vt. 543; 56 Am. Rep. 570.

[3] Howard *v.* Emerson, 110 Mass. 320; 14 Am. Rep. 608.

[4] Giroux *v.* Stedman, 145 Mass. 439; 1 Am. St. Rep. 472.

although he had carefully endeavored to separate and remove the damaged hay and thought he had succeeded: *French* v. *Vining*, 102 Mass. 132; 3 Am. Rep. 440. A farmer bought of a miller a sack of bran for his cows. Before it was removed from the mill, two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the cows swallowed them and was killed thereby. The bran was part of a quantity on hand open to inspection. There was no express warranty. *Held*, that the buyer had no remedy against the seller: *Lukens* v. *Freiund*, 27 Kan. 664; 41 Am. Rep. 429.

§ 2378. **Sale of Goods by Sample.**—If goods are sold by a sample shown to the buyer, the goods delivered must correspond in quality to the sample.[1] On a sale by sample, however, there is no implied warranty of merchantability; "for the seller, by exhibiting the sample, and impliedly agreeing to bind himself that the bulk of the goods sold shall be equal to the sample, is thus supposed to relieve himself from all other liability in the matter, and therefore to exclude from the contract the implied stipulation of merchantability, on the principle of *expressum facit cessare tacitum*."[2] An exception, however, to this rule exists where the quality cannot be judged of from the sample.[3]

[1] Leake on Contracts, 408; Bradford v. Manly, 13 Mass. 138; 7 Am. Dec. 122; Williams v. Spofford, 8 Pick. 250; Dickenson v. Gay, 7 Allen, 29; 83 Am. Dec. 656; Moses v. Mead, 1 Denio, 378; 43 Am. Dec. 676; Oneida Mfg. Soc. v. Lawrence, 4 Cow. 440; Gallagher v. Waring, 9 Wend. 20; Boorman v. Jenkins, 12 Wend. 566; 27 Am. Dec. 158; Waring v. Mason, 18 Wend. 425; Hargous v. Stone, 5 N. Y. 73; Ricks v. Dallahunty, 8 Port. 140; Day v. Raguet, 14 Minn. 273; Brantley v. Thomas, 22 Tex. 270; 73 Am. Dec. 264; Otts v. Alderson, 10 Smedes & M. 476; Borrekins v. Bevan, 3 Rawle, 37; Hanson v. Busse, 45 Ill. 498; Gunther v. Atwell, 19 Md. 157; Magee v. Billingsly, 3 Ala. 679; Gurney v. R. R. Co., 58 N. Y. 564; Fraley v. Bispham, 10 Pa. St. 320; 51 Am. Dec. 487; Fuller v. Cowell, 8 La. Ann. 136; 58 Am. Dec. 676; Mine v. Donnell, 12 La. Ann. 369; Hall v. Plassan, 19 La. Ann. 11; Boyd v. Wilson, 83 Pa. St. 319; 24 Am. Rep. 176. These later Pennsylvania cases hold that on such a sale the warranty is only that the goods shall be of the same kind or species; that there is no warranty that they shall be of the same grade or quality: Myer v. Wheeler, 65 Iowa, 390; Dayton v. Hoagland, 39 Ohio St. 671; Conrad v. Dator, 2 Biss. 342; Foot v. Bently, 44 N. Y. 166; 4 Am. Rep. 652; Hubbard v. George, 49 Ill. 275.

[2] Biddle on Warranty, sec. 159; Parkinson v. Lee, 2 East, 314; Randall v. Newson, L. R. 2 Q. B. Div. 102; Sands v. Taylor, 5 Johns. 395; 4 Am. Dec. 374; Gatchet v. Warren, 72 Ala. 288.

[3] Mody v. Gregson, L. R. 4 Ex. 49; Boyd v. Wilson, 83 Pa. St. 325; 24 Am. Rep. 176.

The mere production of a sample does not make the transaction a sale by sample, so as to raise an implied warranty that the goods in bulk are equal in all respects to the sample exhibited.[1] To constitute a sale by sample, the contract must have been made solely with reference to the sample exhibited; both parties must have understood that they were dealing upon the understanding that the bulk was like the sample;[2] nor when the purchaser of goods in bales cuts open and examines some of them, and has ample opportunity to do so with the rest.[3] The drawing of fresh samples by a purchaser of packed cotton to ascertain if they correspond with the first samples does not make it any the less a sale by sample, and the vendor is liable on his warranty if the bulk of the cotton does not correspond with the samples.[4] If the goods consist of different varieties of the same article, and the sample is formed by mixing proportional parts of the different varieties and qualities together, the warranty is that the whole quantity if mixed together would be of a quality equal to the sample. It is no breach of the warranty that some of the packages are inferior to the sample, so long as it fairly represents the whole.[5] A purchaser of goods by sample, not examining them promptly, but proceeding to sell them from the packages, and continuing to do so for several weeks before giving notice, thereby waives the implied warranty.[6] An examination of samples, where there is an express warranty, is no waiver of the warranty.[7]

§ 2379. **Warranty of Title.**—The vendee of property which the vendor had no title to or authority to sell is

[1] Barnard *v.* Kellogg, 10 Wall. 38; Salisbury *v.* Stainer, 19 Wend. 159; 32 Am. Dec. 437; Beirne *v.* Dord, 5 N. Y. 95; 55 Am. Dec. 321; Cousiney *v.* Pearsall, 40 N. Y. Sup. Ct. 113.

[2] Day *v.* Raguet, 14 Minn. 273.

[3] Salisbury *v.* Stainer, 19 Wend. 159; 32 Am. Dec. 437.

[4] Beebee *v.* Robert, 12 Wend. 413; 27 Am. Dec. 132.

[5] Leonard *v.* Fowler, 44 N. Y. 289.

[6] Muller *v.* Eno, 3 Duer, 421.

[7] Willings *v.* Consequa, 1 Pet. C. C. 301.

not protected against the claim of the true owner, though he purchased in good faith, and for a valuable consideration.[1] In this country, markets overt, as they exist in England, are unknown.[2] The owner of stolen property may maintain an action for its value against a person who has innocently bought it from the thief, and resold it in good faith, if the property itself has passed beyond the reach of the owner.[3] A sale of stolen property by an agent for the benefit of the principal, both being innocent of the fact that the property was stolen, amounts to conversion by the agent, and makes him liable to the owner.[4] But to protect the purchaser, there is on a sale of chattels an implied warranty of title in the seller.[5] On every sale of a chattel there is an implied warranty of its existence, and that the vendor has title to it.[6] An action on the implied warranty of title may be maintained by the vendee of goods, where he has paid for them, but can obtain no title thereto.[7] And a warranty of title is

[1] Williams *v.* Merle, 11 Wend. 80; 25 Am. Dec. 604; Mayer *v.* Wiltberger, Ga. Dec. 20; Burton *v.* Curyea, 40 Ill. 320; 89 Am. Dec. 350; Pool *v.* Adkisson, 1 Dana, 110; Alexander *v.* Gusman, 16 La. Ann. 251; Wheelwright *v.* Depeyster, 1 Johns. 471; 3 Am. Dec. 345; Saltus *v.* Everett, 20 Wend. 267; 32 Am. Dec. 541; Larrowe *v.* Bean, 10 Ohio, 498; Carmichael *v.* Buck, 10 Rich. 332; 70 Am. Dec. 226; Robinson *v.* Skipworth, 23 Ind. 311; Fawcett *v.* Osborn, 32 Ill. 411; 83 Am. Dec. 278; Wilson *v.* Crocket, 43 Mo. 216; 97 Am. Dec. 389; Velsian *v.* Lewis, 15 Or. 539; 3 Am. St. Rep. 184.

[2] Fawcett *v.* Osborn, 32 Ill. 411; 83 Am. Dec. 278; Hardy *v.* Metzgar, 2 Yeates, 347; Leckey *v.* McDermott, 8 Serg. & R. 500; Hosack *v.* Weaver, 1 Yeates, 478; Roland *v.* Gundy, 2 Ohio, 203; Wheelwright *v.* Depeyster, 1 Johns. 471; 3 Am. Dec. 345; Daine *v.* Baldwin, 8 Mass. 518; Towne *v.* Collins, 14 Mass. 499; Griffith *v.* Fowler, 18 Vt. 390.

[3] Sharp *v.* Parks, 48 Ill. 511; 95 Am. Dec. 565; Koch *v.* Branch, 44 Mo. 542; 100 Am. Dec. 325.

[4] Koch *v.* Branch, 44 Mo. 542; 100 Am. Dec. 324.

[5] Defreeze *v.* Trumper, 1 Johns. 274; 3 Am. Dec. 329; Lanier *v.* Auld, 1 Murph. 38; 3 Am. Dec. 680; Chism *v.* Woods, Hardin, 531; 3 Am. Dec. 740; Boyd *v.* Anderson, 1 Over. 438; 3 Am. Dec. 762; Charnley *v.* Dulles, 8 Watts & S. 5; Dorsey *v.* Jackman, 1 Serg. & R. 42; 7 Am. Dec. 611; Perley *v.* Balch, 23 Pick. 283; 34 Am. Dec. 56; Strong *v.* Barnes, 11 Vt. 221; 34 Am. Dec. 684; Chancellor *v.* Wiggins, 4 B. Mon. 201; 39 Am. Dec. 499; Barton *v.* Faherty, 3 G. Greene, 327; 54 Am. Dec. 503; Costigan *v.* Hawkins, 22 Wis. 74; 94 Am. Dec. 583; Burt *v.* Dewey, 40 N. Y. 283; 100 Am. Dec. 482; Whitaker *v.* Eastwick, 75 Pa. St. 229; Fawcett *v.* Osborn, 32 Ill. 411; 83 Am. Dec. 278; Edgerton *v.* Michels, 66 Wis. 124.

[6] Lile *v.* Hopkins, 12 Smedes & M. 299; 51 Am. Dec. 115. Implied warranty of soundness is not excluded by express warranty of title: Trimmier *v.* Thomson, 10 S. C. 164.

[7] Brown *v.* Pierce, 97 Mass. 46; 93 Am. Dec. 57.

implied, also, in a contract of exchange.[1] Such warranty draws to it any after-acquired right of the warrantor.[2] It has reference to the *status* of the chattel at the date of the warranty, and is not intended to protect the title against future events.[3]

On the sale of negotiable paper, the seller warrants that it is his to sell, and that it is genuine.[4] On the sale of a land-warrant, there is an implied warranty that it is valid.[5] On the sale of accounts, there is an implied warranty that they are genuine and owing.[6] The vendor of a share of stock impliedly warrants that the same is issued by the duly constituted officers of the company, and is sealed with the genuine seal of the corporation. But not that the share has not been fraudulently issued in excess of the charter limit.[7] A seller warrants his title where his sale of an exclusive right to manufacture and sell a particular article was procured upon the representation that he owned the exclusive right thereto, and that he acquired it from another under a written agreement, which he exhibited.[8]

But there is no implied warranty of title where the seller has not the chattel in his possession;[9] nor where the sale is by an agent, either public or private.[10]

[1] Patee *v.* Pelton, 48 Vt. 182.

[2] Curran *v.* Burdsall, 20 Fed. Rep. 835.

[3] Blewett *v.* Evans, 42 Miss. 804; Whitworth *v.* Carter, 43 Miss. 61; Mayfield *v.* Barnard, 43 Miss. 270; Algier *v.* Black, 32 Tex. 168; Ketchum *v.* Dew, 7 Cold. 532.

[4] Bell *v.* Cafferty, 21 Ind. 411; Merriam *v.* Wolcott, 3 Allen, 258; 80 Am. Dec. 69; Thompson *v.* McCullough, 31 Mo. 224; 77 Am. Dec. 644; Flynn *v.* Allen, 57 Pa. St. 482; McCay *v.* Barber, 37 Ga. 423; Aldrich *v.* Jackson, 5 R. I. 218; Curtis *v.* Brooks, 37 Barb. 476.

[5] Presbury *v.* Morris, 18 Mo. 165.

[6] Gilchrist *v.* Hilliard, 53 Vt. 592; 38 Am. Rep. 706; Kingsley *v.* Fitts, 55 Vt. 293; Marshall *v.* Morgan, 58 Vt. 60.

[7] People's Bank *v.* Kurtz, 99 Pa. St. 344; 44 Am. Rep. 112. But see Wood *v.* Sheldon, 42 N. J. L. 421; 36 Am. Rep. 523.

[8] Costigan *v.* Hawkins, 22 Wis. 74; 94 Am. Dec. 583.

[9] Scranton *v.* Clark, 39 N. Y. 221; 100 Am. Dec. 430; Huntingdon *v.* Hall, 36 Me. 501; 58 Am. Dec. 765; Scott *v.* Hix, 2 Sneed, 192; 62 Am. Dec. 458; Lackey *v.* Stouder, 2 Ind. 376; Boyd *v.* Bopst, 2 Dall. 91; Byrnside *v.* Burdett, 15 W. Va. 702; Long *v.* Hinckingbottom, 28 Miss. 772; 64 Am. Dec. 118; Storm *v.* Smith, 43 Miss. 497. Nor will his subsequent acquisition of a good title inure to the vendee's benefit: Scranton *v.* Clark, 39 N. Y. 221; 100 Am. Dec. 430.

[10] Forsythe *v.* Ellis, 4 J. J. Marsh. 298; 20 Am. Dec. 218. As a sheriff's

The implied warranty of title is broken if the vendor had no title at the time of sale;[1] or whenever the purchaser is actually dispossessed by a better title, whether there is a recovery at law or not.[2] In an action for the price of personal property, it is a valid defense that the purchaser discovered after the sale that the vendor had no title, and being threatened with suit by the true owner, paid him the price, the vendor being insolvent.[3]

§ 2380. **Right of Buyer to Examine Goods.**—The buyer may keep the goods a reasonable time after delivery, and do whatever is reasonably necessary for an efficient examination and comparison, under the circumstances of the case, and then refuse them, if not according to the contract.[4] It is not incumbent upon the buyer, refusing the goods, to return them; it is sufficient if he give clear notice that the goods are not accepted, and are at the risk of the seller.[5]

sale: Yates *v.* Bond, 2 McCord, 382; Davis *v.* Murray, 2 Mill Const. 143; 12 Am. Dec. 661; The Monte Allegre, 9 Wheat. 616; Herbemont *v.* Sharp, 2 McCord, 264; 2 Bay, 167; Davis *v.* Hunt, 2 Bail. 412; Bashore *v.* Whisler, 3 Watts, 490; Robinson *v.* Cooper, 1 Hill, 286; Stone *v.* Pointer, 5 Munf. 287; Thayer *v.* Sheriff, 2 Bay, 169; Worthy *v.* Johnson, 8 Ga. 236; 52 Am. Dec. 399. Or a sale of chattels announced as made by virtue of a mortgage: Harris *v.* Lynn, 25 Kan. 281; 37 Am. Rep. 253.

[1] Tipton *v.* Triplett, 1 Met. (Ky.) 570.

[2] Read *v.* Staton, 3 Hayw. (Tenn.) 159; 9 Am. Dec. 740; Salle *v.* Light, 4 Ala. 700; 39 Am. Dec. 317.

[3] Matheny *v.* Mason, 73 Mo. 677; 39 Am. Rep. 541.

[4] Heilbutt *v.* Hickson, L. R. 7 Com. P. 438; 41 L. J. Com. P. 228; Lucy *v.* Mouflet, 5 Hurl. & N. 233; 29 L. J. Ex. 110; Marshuetz *v.* McGreevy, 23 Hun, 408.

[5] Grimoldby *v.* Wells, L. R. 10 Com. P. 391; 44 L. J. Com. P. 203.

PART II.—THE PARTIES TO THE CONTRACT.

CHAPTER CXIII.

PARTIES TO CONTRACTS.

§ 2381. Two parties essential to a contract.
§ 2382. Stranger to contract enforcing it.
§ 2383. Joint promisors or debtors.
§ 2384. Joint promisees or creditors.
§ 2385. Several contracts.
§ 2386. Joint and several contracts.
§ 2387. Test whether contract joint, or joint and several.

§ 2381. Two Parties Essential to a Contract.—Two parties are essential to every contract,[1] though one of the parties may not be in existence at the time, or at least not ascertained; as in the case of an offer of a reward, which may be accepted by any one performing the services required.[2] An agreement does not bind a person who is not a party to it.[3] A man cannot be charged with the debt of another, or made responsible for the goods he may afterwards obtain, by his mere silence, or failure to object, when he is notified that such goods will be charged to him.[4] No action can be maintained upon an instrument in writing for the payment of money, unless the instrument shows on its face to whom it is payable.[5] But a variance or mistake in the names of parties to a contract, whether individuals or corporations, is not fatal to their contracts, if there is a sufficient description of the parties, whereby they are known.[6] There is no difference between assuming a purely artificial name by which to

[1] Carson *v.* Clark, 1 Scam. 113; 25 Am. Dec. 79.
[2] Leake on Contracts, 436.
[3] Bolles *v.* Carli, 12 Minn. 113.
[4] Grice *v.* Noble, 59 Mich. 515.
[5] Mayo *v.* Chenoweth, 1 Ill. 200.
[6] Medway Cotton Mfg. Co. *v.* Adams, 10 Mass. 360.

transact business, and assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear to show that the contract was not designed to be the personal contract of such natural person.[1] A state, when it enters into a contract with its citizens, can claim no exemption from the rules of law applicable to contracts between individuals.[2] Nor can the same person be a party on both sides, although other persons be joined with him on one side or the other; and an agreement in such form creates no legal right or liability.[3] The question as to who are the parties to a contract is for the jury;[4] and parties to a contract are presumed to intend to bind their personal representatives as well as themselves.[5]

ILLUSTRATIONS. — A constable distinctly told one whom he asked to board prisoners that he would not be liable for their board; that the county must be looked to. *Held*, that whether the county was liable or not, the constable could not be holden: *White* v. *Jones*, 67 Iowa, 241.

§ 2382. Stranger to Contract Enforcing It. — No right or liability on a contract can result to a person not a party thereto, or an assignee of a party thereto. A total stranger to a contract cannot be a party to an action upon it. This is the common-law rule, sustained by a number of decisions in the American courts;[6] though in some

[1] Pease *v.* Pease, 35 Conn. 131; 95 Am. Dec. 225.

[2] Patton *v.* Gilmer, 42 Ala. 548; 94 Am. Dec. 665.

[3] Moffatt *v.* Van Millingen, 2 Bos. & P. 124, note; De Tastet *v.* Shaw, 1 Barn. & Ald. 664. And see Faulkner *v.* Lowe, 2 Ex. 595, where a covenant by a person to pay himself was described as senseless, and void of any legal effect.

[4] Miller *v.* Ford, 4 Rich. 376; 55 Am. Dec. 687.

[5] Kernochan *v.* Murray, 111 N. Y. 306; 7 Am. St. Rep. 744.

[6] Tuttle *v.* Catlin, 1 D. Chip. 346; 12 Am. Dec. 691; Rossman *v.* Townsend, 17 Wis. 95; 84 Am. Dec. 733; Figure *v.* Mutual Soc., 46 Vt. 362; Haskett *v.* Flint, 5 Blackf. 69; 33 Am. Dec. 452; Seaman *v.* Whitney, 24 Wend. 260; 35 Am. Dec. 619; Ross *v.* Milne, 12 Leigh, 204; 37 Am. Dec. 646; Laidlow *v.* Hatch, 75 Ill. 11; Ellison *v.* Jackson Co., 12 Cal. 542. A promise by A to B, upon a consideration moving from B to A, to pay C a debt of B to C, will not authorize an action by C against A, there being no privity of contract: Page *v.* Becker, 31 Mo. 466. A physician cannot recover from a railroad company the value of services rendered to one injured by an accident on defendant's

jurisdictions it is now held that where a person makes a promise to another for the benefit of a third person, the latter may maintain an action upon it.[1] To a suit by a third person upon a contract made for his benefit, a failure of consideration, or a rescission of the contract by the parties thereto, before the acceptance by the plaintiff of the stipulation in his favor, is a defense.[2]

§ 2383. Joint Promisors or Debtors.—Where several persons make a joint contract, each is liable for the whole.[3] The words "we promise to pay" import a joint obligation,[4] and the following have been held to make a joint contract: An agreement to indemnify one from loss by becoming bail, commencing "We agree," etc., and signed by a number of names, with a certain sum of money marked opposite to each, and the entire amount being inadequate to meet the damages claimed;[5] an instrument, signed by several persons, proposing that if a

road, on a showing that defendant's president told the person treated to employ whatever physician he chose, and that the company would pay the physician, the offer not being made in plaintiff's presence: Canney *v.* R. R. Co., 63 Cal. 501. Thus where A and B separately have cattle sold by the same broker, and A is paid too much and B the same amount too little, B cannot recover his deficit of A: Hall *v.* Carpen, 27 Ill. 386; 81 Am. Dec. 234. And see Rohr *v.* Baker, 13 Or. 350; O'Rourke *v.* Peck, 29 Fed. Rep. 223; Davis *v.* Patrick, 122 U. S. 138.

[1] Lawrence *v.* Fox, 20 N. Y. 268; Burr *v.* Beers, 24 N. Y. 178; 80 Am. Dec. 327; Brewer *v.* Dyer, 7 Cush. 337; Smith *v.* Kemper, 4 Mart. (La.) 409; 6 Am. Dec. 708; Schemerhorn *v.* Vanderheyden, 1 Johns. 139; 3 Am. Dec. 305; Mason *v.* Hall, 30 Ala. 601; Treat *v.* Stanton, 14 Conn. 454; Morgan *v.* Overman Co., 37 Cal. 537; Arnold *v.* Lyman, 17 Mass. 400; 9 Am. Dec. 154; Joslin *v.* N. J. Car Co., 36 N. J. L. 141; Jones *v.* Thomas, 21 Gratt. 101; Kimball *v.* Noyes, 17 Wis. 698; Bellas *v.* Fagely, 19 Pa. St. 276; Marigny *v.* Remy, 3 Martin, N. S., 607; 15 Am. Dec. 172; Dearborn *v.* Parks, 5 Me. 81; 17 Am. Dec. 206; Kelly *v.* Evans, 3 Penr. & W. 387; 24 Am. Dec. 325; Hind *v.* Holdship, 2 Watts, 104; 26 Am. Dec. 107; Blymire *v.* Boystle, 6 Watts, 182; 31 Am. Dec. 458; Cox *v.* Skeen, 2 Ired. 220; 38 Am. Dec. 691; Barker *v.* Bucklin, 2 Denio, 45; 43 Am. Dec. 727; Edmonson *v.* Penny, 1 Pa. St. 334; 44 Am. Dec. 137; Brown *v.* O'Brien, 1 Rich. 268; 44 Am. Dec. 254; Robbins *v.* Ayeres, 10 Mo. 538; 47 Am. Dec. 125; Machias Hotel Co. *v.* Coyle, 35 Me. 405; 58 Am. Dec. 713; West *v.* Western Union Tel. Co., 39 Kan. 93; 7 Am. St. Rep. 530; Campbell *v.* Smith, 71 N. Y. 26; 27 Am. Rep. 5.

[2] Amonett *v.* Montague, 75 Mo. 43.

[3] Allin *v.* Shadburne, 1 Dana, 68; 25 Am. Dec. 121; Field *v.* Runk, 2 N. J. L. 525; Slocum *v.* Fairchild, 7 Hill, 292; Ripley *v.* Crooker, 47 Me. 370; 74 Am. Dec. 491; Clark *v.* Rawson, 2 Denio, 135.

[4] Mayor *v.* Ripley, 5 La. 121; 25 Am. Dec. 175.

[5] McCullis *v.* Thurston, 27 Vt. 596.

railroad company will extend its road to a certain point, "we will undertake" to buy a certain amount of stock;[1] where several persons execute an instrument, in parol or under seal, upon the same consideration, at the same time, and for the same purpose, and taking effect from a single delivery;[2] so where parties enter into a contract under seal in their individual characters, they are jointly personally responsible, although they, in fact, contract as a committee in anticipation of an incorporation.[3] But in an instrument reading, "We, the subscribers, promise to pay A B, teacher, the following rates of tuition," etc., the liability of the subscribers is several, and not joint.[4]

Upon the death of one of several joint contractors, the legal liability under the contract devolves on the surviving joint contractors or joint contractor; and the representative of the deceased cannot be sued at law, either alone or jointly with the survivors. Consequently, the whole legal liability ultimately devolves upon the last surviving contractor, and after his death, upon his representatives.[5] The rule in this respect is the same in equity as at law, unless there are special circumstances which show that the liability should be treated as a several liability.[6] A partnership contract is several as well as joint, and the estate of a deceased partner is liable.[7] Recovery against one obligor on a joint bond, without satisfaction, is no bar to a subsquent action against his co-obligor.[8]

ILLUSTRATIONS.—A committee of a political party order a public dinner of a caterer. The committee are jointly liable for the price: *Eichbaum* v. *Irons*, 6 Watts & S. 67; 40 Am. Dec. 540. Three persons hire of a livery a horse, carriage, and driver. They are jointly liable: *O'Brien* v. *Bound*, 2 Speer,

[1] New Haven etc. Co. v. Hayden, 119 Mass. 361.
[2] Stage v. Olds, 12 Ohio, 158.
[3] Lincoln v. Crandell, 21 Wend. 101; Rowland v. Phalen, 1 Bosw. 43; Eichbaum v. Irons, 6 Watts & S. 67; 40 Am. Dec. 546; Presbyterian Church v. Manson, 4 Rand. 197.
[4] Beck v. Pounds, 20 Ga. 36.
[5] Leake on Contracts, 450; Brown v. Benight, 3 Blackf. 39; 23 Am. Dec. 373.
[6] Sumner v. Powell, 2 Mer. 30.
[7] Dixon on Partnership, 510.
[8] Collins v. Lemasters, 1 Bail. 348; 21 Am. Dec. 469.

495; 42 Am. Dec. 384. A number of persons associated for the purpose of instituting a bank. At a meeting of the associates, at which all were not present, an agent was appointed to attend the legislature, and procure a charter, who accordingly undertook the service, and endeavored to procure the charter, but did not succeed. *Held*, that they were jointly liable to the agent for his services and expenses, as well those who were not present at the meeting as those who were: *Sproat* v. *Porter*, 9 Mass. 300. A written contract is made in form between two, and signed by the parties named, and at the same time a third person adds, "I agree to be security for the promisor in the above contract," with his signature. *Held*, that the latter is holden as a joint promisor: *Norris* v. *Spencer*, 18 Me. 324. Two persons were responsible on the sealed instrument to pay for the erection of a building, and both superintended the work, one acting in the other's absence, and always with a joint view to the same object. *Held*, that a parol promise by each, at different times, to waive the written contract, and pay the reasonable value, makes the promise joint: *Munroe* v. *Perkins*, 9 Pick. 298; 20 Am. Dec. 475.

§ 2384. Joint Promisees or Creditors. — Where the contract is made with several as joint promisees, they must all join in enforcing it.[1] Covenants are to be considered as either joint or several, according to the rights and interests of the parties; and although a covenant be joint and several in its terms, yet if the legal interest and cause of action be joint, the action must be brought by all; but if the interest and cause of action be several, the action must be brought by one only, though the covenant be joint in its terms.[2] An action on a written contract made with two persons jointly may be brought in the names of both, although one had parted with his interest therein to the other before it was signed.[3] All of several joint obligees must subscribe an assignment at law of a joint obligation to them, even though one of such obligees be vested with authority to assign the legal interests of his co-obligees.[4]

[1] Cannon v. Maull, 4 Harr. 223.
[2] Carthrae v. Brown, 3 Leigh, 98; 23 Am. Dec. 255.
[3] Brewer v. Stone, 11 Gray, 228.
[4] Sanders v. Blain, 6 J. J. Marsh. 446; 22 Am. Dec. 86.

ILLUSTRATIONS. — A written contract was "I, A B, bind myself," to have a certain encumbrance released, "I having this day sold forty acres of said land to C and D," to whom the bond was delivered. *Held*, that the names of the obligees were implied, if not expressed, and the action on the contract was brought properly by the parties jointly: *Linder* v. *Lake*, 6 Iowa, 164. C. covenanted with B. and J. that he would pay them "three hundred dollars, to wit, to each of them one moiety thereof, and also the sum of four hundred dollars," upon certain condition. *Held*, that this was a covenant to B. and J. severally, to pay each a moiety of each sum; and that J. being dead, B. could not maintain an action to recover the whole of both sums: *Carthrae* v. *Brown*, 3 Leigh, 98; 23 Am. Dec. 255.

§ 2385. **Several Contracts.** — Persons may bind themselves severally for the same matter, so that the creditor is entitled to claim the whole debt or performance against each debtor separately; or one person may bind himself to each of several persons for the same debt or matter, so that each of the persons is separately entitled as creditor to claim the whole debt or performance. The special characteristic of such contracts is the identity of the debt or matter in the several contracts; so that the payment or performance by one of the several debtors, or to one of the several creditors, discharges all the contracts.[1] An agreement entered into by a number of persons to "pay the sum annexed to their names," in order to make up an aggregate sum, to be paid to another person in consideration of services to be rendered, creates a several, and not a joint, obligation.[2] Although the charges for the hire of horses on several occasions were made against two persons jointly, yet, if there was in fact no joint liability, they may be held severally liable, each for what was furnished at his request.[3] An accepted proposal made to the workmen in a foundry collectively, by a partner therein, that if they will go to work his firm will pay them the amount due from a former proprietor, is a promise to

[1] Leake on Contracts, 454.
[2] Moss v. Wilson, 40 Cal. 159.
[3] Payne v. Jelleff, 67 Wis. 246.

each of them individually, upon which separate actions only will lie.[1]

ILLUSTRATIONS. — It is agreed with a storekeeper that if a certain person is elected to an office A will pay for certain cloth, and if he is not elected B will pay for it. *Held*, that the contract is a several one, and the person losing is liable for the price of the cloth: *Lurton* v. *Gilliam*, 1 Scam. 577; 33 Am. Dec. 430. An agreement is in the following form: "I hereby agree to pay J. B. L. $125, and to I. C. $110, by the 1st of April, etc., provided W. M. P. execute," etc. *Held*, that the rights of action of L. and C. were several and distinct: *Rorabacher* v. *Lee*, 16 Mich. 169. Defendants signed a contract reciting that whereas they owed the town of Manchester, etc., by certain notes made payable to the plaintiff, as treasurer of the town, and whereas the plaintiff had been called upon to pay to the town the amount of their notes, etc., they agreed as follows: "We agree to indemnify and save harmless the said Stevens from all costs and trouble which he may be put to touching the same, in proportion to the several sums which we owe as aforesaid." *Held*, in an action upon the contract, that the defendants were liable severally, and not jointly: *Stevens* v. *Hall*, 19 N. H. 560. Four persons who did not buy as partners agreed to pay fifteen hundred dollars for a printing-press and materials in installments, "each of the said first parties to be held personally responsible for one fourth of such amount." *Held*, that a several, and not a joint, obligation was created, and none of the promisors was bound to pay more than his share of one fourth: *Larkin* v. *Butterfield*, 29 Mich. 254.

§ 2386. Joint and Several Contracts. — So persons may enter into concurrent contracts respecting the same matter, binding themselves jointly as one party, and also severally as separate parties, at the same time; in which case, besides the one joint contract, there are also as many several contracts as there are separate persons, the debt or matter of the contract being one and the same in all the contracts thus made.[2] An agreement to pay money, signed by two, but in the body of it providing for the payment by one of them only, is a joint and several obligation.[3] So where the obligatory part of a bond

[1] Wills *v.* Cutler, 61 N. H. 405.
[2] Leake on Contracts, 454.
[3] Klapp *v.* Kleckner, 3 Watts & S. 519.

was in these words: "We are holden and bound unto M. C., in the sum of five hundred dollars, for the payment which we bind ourselves and each of us," this was held a joint and several bond, on which an action could be brought against one of the obligors separately.[1]

§ 2387. Test whether Contract Joint, or Joint and Several.— Whether the contract is joint or several, or joint and several, is one of intention. If the contract made by several persons purports simply to bind themselves, or to covenant, without more, the obligation or covenant is taken to be joint only, and not several; if the contract purports that they bind themselves or covenant severally, the liability is separate; if they purport to bind themselves jointly and severally, or to bind themselves and each of them, or to covenant for themselves and each of them, using both joint and several words, the liability is both joint and several.[2] A contract will be construed to be joint or several, according to the interests of the parties, if the words are capable of that construction, or even if they are not inconsistent with it; if the words are ambiguous or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several.[3]

[1] Carter *v.* Carter, 2 Day, 442; 2 Am. Dec. 113.

[2] Leake on Contracts, 456.

[3] Leake on Contracts, 457.

CHAPTER CXIV.

INSANITY AND INTOXICATION.

§ 2388. Contract with insane person voidable.
§ 2389. Rule where insanity is unknown to other party — Executed contracts.
§ 2390. Liable for necessaries.
§ 2391. Contracts with intoxicated persons.

§ 2388. Contract with Insane Person Voidable. — If a person is so insane as not to be able to understand the agreement into which he enters, he cannot bind himself by contract; and if a person enter into an agreement with an insane person, the agreement is voidable, and may be set aside.[1] One may prove, in avoidance of his contract, that he was *non compos mentis* when he entered into it.[2] So a husband may show the idiocy of his wife before coverture, in order to avoid her deed.[3] But the other party to the contract cannot set up the insanity, to avoid

[1] Lozell *v.* Pinnick, 1 Tyler, 247; 4 Am. Dec. 722; Grant *v.* Thompson, 4 Conn. 203; 10 Am. Dec. 119; Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Ingraham *v.* Baldwin, 9 N. Y. 45; Hovey *v.* Hobson, 53 Me. 453; 89 Am. Dec. 705; Hovey *v.* Chase, 52 Me. 304; 83 Am. Dec. 514; Allen *v.* Berryhill, 27 Iowa, 540; 1 Am. Rep. 309; Elstoa *v.* Jasper, 45 Tex. 409; Key *v.* Davis, 1 Md. 32; Chew *v.* Bank, 14 Md. 299; Crouse *v.* Holman, 19 Ind. 30; Somers *v.* Pumphrey, 24 Ind. 231; Nichol *v.* Thomas, 53 Ind. 42; Hallett *v.* Oakes, 1 Cush. 296; Arnold *v.* Richmond Iron Works, 1 Gray, 434; Breckenridge *v.* Ownsby, 1 J. J. Marsh. 236; 19 Am. Dec. 71; Fitzgerald *v.* Reed, 9 Smedes & M. 94; Burke *v.* Allen, 29 N. H. 106; 61 Am. Dec. 642; Carrier *v.* Sears, 4 Allen, 336; Wait *v.* Maxwell, 5 Pick. 217; 16 Am. Dec. 391; Sutton *v.* Reagan, 5 Blackf. 217; 33 Am. Dec. 466; Bensell *v.* Chancellor, 5 Whart. 371; 34 Am. Dec. 561; Allen *v.* Billings, 6 Met. 415; 39 Am. Dec. 744; Coleman *v.* Frazer, 3 Bush, 300. In a few cases it has been held that the contract is absolutely void, and not merely voidable: Desilver's Estate, 5 Rawle, 110; 28 Am. Dec. 645; Van Deusen *v.* Sweet, 51 N. Y. 378; Dexter *v.* Hall, 15 Wall. 9; Rogers *v.* Walker, 6 Pa. St. 371; 47 Am. Dec. 470.

[2] Mitchell *v.* Kingman, 5 Pick. 431; Webster *v.* Woodford, 3 Day, 90; Grant *v.* Thompson, 4 Conn. 203; 10 Am. Dec. 119; Lang *v.* Whidden, 2 N. H. 435; Thornton *v.* Appleton, 29 Me. 298; Tolson *v.* Garner, 15 Mo. 494; Rice *v.* Peet, 15 Johns. 503. The consideration need not be restored to grantee in deed of insane person before an action can be maintained for recovery of the land: Gibson *v.* Soper, 6 Gray, 279; 66 Am. Dec. 414. Insanity of grantor in deed cannot be established by his own testimony that that was his condition when he executed it: Stone *v.* King, 7 R. I. 358; 84 Am. Dec. 557.

[3] Millison *v.* Nicholson, Cam. & N. (N. C.) 499.

the contract.[1] A contract by an insane person is not rendered obligatory because it was negotiated and made by his agent; for a person mentally incapable of contracting cannot have an agent.[2]

In order to bind one's self by a contract, one must have sufficient mental capacity to know what he is doing. Hence, to avoid the contract, total incapacity must be shown;[3] and it is not enough to show mere weakness of mind.[4] Thus the mere fact that one's mind has begun to fail is not sufficient to avoid a contract made by him, there being mental capacity sufficient for business transactions.[5] But every person is to be deemed of unsound mind who has lost his memory and understanding by reason of old age, sickness, or accident, so as to render him incapable of transacting his business and of managing his property.[6] And mental unsoundness may be sufficient to invalidate a deed, though it be but a very modified degree of incapacity, if the transaction be accompanied with fraud, imposition, or over-exercise of authority.[7] So partial insanity will not avoid the contract, unless it exists as to the subject-matter.[8] The test is, whether the person possessed sufficient ability at the time he did the act to understand in a reasonable manner the nature and effect of his act.[9] Monomania upon a subject in no wise connected with the subject-matter of a contract will not

[1] Howe *v.* Howe, 99 Mass. 98.

[2] Marvin *v.* Inglis, 39 How. Pr. 329.

[3] Titcomb *v.* Vanlyle, 84 Ill. 371; Baldwin *v.* Danton, 40 Ill. 188; Hovey *v.* Chase, 52 Me. 305; 83 Am. Dec. 514; Stewart *v.* Lispenard, 26 Wend. 255; Wall *v.* Hill, 1 B. Mon. 290; 36 Am. Dec. 578.

[4] Jackson *v.* King, 4 Cow. 207; 15 Am. Dec. 354; Delafield *v.* Parish, 25 N. Y. 1; Dennett *v.* Dennett, 44 N. H. 531; 84 Am. Dec. 97; Owing's Case, 1 Bland, 370; 17 Am. Dec. 311; Smith *v.* Beatty, 2 Ired. Eq. 456; 40 Am. Dec. 435; Juzan *v.* Toulmin, 9 Ala. 662; 44 Am. Dec. 448; Ellis *v.* Matthews, 19 Tex. 390; 70 Am. Dec. 353.

[5] Baldrick *v.* Garvey, 66 Iowa, 14; Lindsey *v.* Lindsey, 50 Ill. 79; 99 Am. Dec. 489; Kimball *v.* Cuddy, 117 Ill. 213.

[6] Young *v.* Stevens, 48 N. H. 133; 97 Am. Dec. 592.

[7] Corbit *v.* Smith, 7 Iowa, 60; 71 Am. Dec. 431.

[8] Galpin *v.* Wilson, 40 Iowa, 90; Lewis *v.* Baird, 3 McLean, 56; Staples *v.* Wellington, 58 Me. 453; Searle *v.* Galbreath, 73 Ill. 269; Marks *v.* Hill, 15 Gratt. 422.

[9] Davren *v.* White, 42 N. J. Eq. 569.

invalidate it.[1] Belief in spiritualism does not, in itself, show insanity, unless it amounts to a monomania.[2] Where the person has been adjudged a lunatic, and placed under guardianship, contracts made by him thereafter are absolutely void.[3] But this rule does not apply where the guardianship has been abandoned, or no guardian has been appointed, or the guardian appointed has resigned.[4] Contracts of lunatics made after the time at which the inquisition finds unsoundness to begin are *prima facie* void; but the inquisition is not conclusive evidence of mental unsoundness.[5] A contract or liability assumed by a person while of sound mind may be enforced against him when he is of unsound mind.[6] So a contract made during a lucid interval is valid.[7]

The party may ratify the contract if he afterwards becomes sane;[8] or in a subsequent lucid interval;[9] or if he continues insane, his heirs, after his death, may ratify it.[10]

Insanity is no defense to an action of tort.[11] So a lunatic is civilly liable for an injury caused by the defective condition of his real estate.[12]

§ 2389. Rule where Insanity is Unknown to Other Party — Executed Contracts. — But where the insanity was not known to the other contracting party, the con-

[1] Boyce *v.* Smith, 9 Gratt. 704; 60 Am. Dec. 313.

[2] Connor *v.* Stanley, 72 Cal. 556; 1 Am. St. Rep. 84.

[3] Elston *v.* Jaspar, 45 Tex. 409; Fitz Hugh *v.* Wilcox, 12 Barb. 235; Wadsworth *v.* Sherman, 14 Barb. 169; Pearl *v.* McDowell, 3 J. J. Marsh. 658; 20 Am. Dec. 199; Leonard *v.* Leonard, 14 Pick. 280; L'Amoureux *v.* Crosby, 2 Paige, 422; 22 Am. Dec. 655. See Title Guardian and Ward, *ante*.

[4] Elston *v.* Jaspar, 45 Tex. 409; Mohr *v.* Tulip, 40 Wis. 66.

[5] Sims *v.* McLure, 8 Rich. Eq. 286; 70 Am. Dec. 196.

[6] King *v.* Robinson, 33 Me. 114; 54 Am. Dec. 614; Haggart *v.* Ranger, 15 Fed. Rep. 860.

[7] Hall *v.* Warren, 9 Ves. 605; Lee *v.* Lee, 4 McCord, 183; 17 Am. Dec. 722; Gangwere's Estate, 14 Pa. St. 417; 53 Am. Dec. 554; Jones *v.* Perkins, 5 B. Mon. 222.

[8] Howe *v.* Howe, 99 Mass. 98; Cole Cole, 5 Sneed, 63; 70 Am. Dec. 275; Hovey *v.* Chase, 52 Me. 304; 83 Am. Dec. 514.

[9] Brown *v.* Hodgdon, 31 Me. 67.

[10] Hovey *v.* Hobson, 53 Me. 451; 89 Am. Dec. 705.

[11] Morse *v.* Crawford, 17 Vt. 499; 54 Am. Dec. 349; Krone *v.* Sohoonmaker, 3 Barb. 647. *Aliter* in slander: Bryant *v.* Jackson, 6 Humph. 199.

[12] Morain *v.* Devlin, 132 Mass. 87; 42 Am. Rep. 423.

tract is valid, at least, if it has been in part executed, and the parties cannot be restored to their original positions.[1] That the obligor was insane when he signed an injunction bond is no defense to an action against him thereon, where his insanity was not known to plaintiff at the time he signed the bond, and where it appeared that he was able to transact his own business.[2] So an innocent purchaser from a lunatic may maintain his purchase, unless he can be put *in statu quo*.[3] If one contracts with a lunatic, without knowledge of his lunacy, and, in pursuance thereof renders him important services, whereby he is greatly benefited, he is entitled to just and reasonable compensation.[4] A chattel mortgage made by an insane person apparently sane, and not judicially pronounced insane, vests title, and after default, the right of possession in the innocent mortgagee; and the mortgagee having acquired possession, the chattels cannot be recovered from the mortgagee without disaffirmance.[5] Where a savings bank pays a deposit without knowledge of the insanity of the depositor, and without knowledge of facts which should charge it with knowledge, it is protected in making payment.[6] But it has been held that the doctrine of *bona fide* purchaser for value cannot be invoked against the insane indorser of a certificate of deposit.[7] And no action will lie on an accommodation indorsement of a

[1] Molton *v.* Camroux, 2 Ex. 501; Beavan *v.* McDonnell, 9 Ex. 309; Loomis *v.* Spencer, 2 Paige, 153; Sprague *v.* Duel, 11 Paige, 480; Eaton *v.* Eaton, 37 N. J. L. 108; 18 Am. Rep. 716; Scanlan *v.* Cobb, 85 Ill. 296; Wilder *v.* Weakley, 34 Ind. 184; Young *v.* Stevens, 48 N. H. 133; 97 Am. Dec. 593; Beals *v.* Lee, 10 Pa. St. 56; 49 Am. Dec. 573; Lancaster Bank *v.* Moore, 78 Pa. St. 414; 21 Am. Rep. 24; Behren *v.* McKenzie, 23 Iowa, 343; 92 Am. Dec. 428; Lincoln *v.* Buckmaster, 32 Vt. 658; Fay *v.* Burditt, 81 Ind. 433; 42 Am. Rep. 142; Carr *v.* Holliday, 5 Ired. Eq. 167; Langley *v.* Langley, 45 Ark. 392; Cribben *v.* Maxwell, 34 Kan. 8; 55 Am. Rep. 233; Sims *v.* McLure, 8 Rich. Eq. 286; 70 Am. Dec. 196; Alexander *v.* Haskins, 68 Iowa, 73. But see Seaver *v.* Phelps, 11 Pick. 304; 22 Am. Dec. 372.

[2] Behrens *v.* McKenzie, 23 Iowa, 333; 92 Am. Dec. 428.

[3] Rusk *v.* Fenton, 14 Bush, 490; 29 Am. Rep. 413.

[4] Ballard *v.* McKenna, 4 Rich. Eq. 358.

[5] Fay *v.* Burditt, 81 Ind. 433; 42 Am. Rep. 142.

[6] Riley *v.* Albany Sav. Bank, 36 Hun, 513.

[7] Anglo-California Bank *v.* Ames, 27 Fed. Rep. 727.

promissory note by a lunatic, even in favor of an innocent holder.[1]

ILLUSTRATIONS.—A, having a life estate in certain lands, and owning stock thereon, conveyed the same to defendant on condition that he should support her for life, which he did. After her death, her executor brought action to recover for use and occupation of the lands, and for value of the property, alleging that the conveyance was void, A being mentally imbecile at the time it was made. *Held*, that the plaintiff could not recover, in the absence of bad faith or fraud on the part of the defendant: *Young* v. *Stevens*, 48 N. H. 133; 2 Am. Rep. 202. Defendant, desiring to borrow money, gave S. his note, which S. procured to be discounted at plaintiff's bank, and the money deposited to defendant's order. Afterwards, a petition *de lunatico inquirendo* was presented against defendant, and he was found to be a lunatic, and to have been a lunatic from a time anterior to the making of the note. The plaintiff had no notice of defendant's lunacy. *Held*, that defendant's insanity was not a defense to an action on the note: *Lancaster County Bank* v. *Moore*, 78 Pa. St. 407; 21 Am. Rep. 24. A, by deed, directed his attorney in fact to pay annually out of the income of his estate a certain sum to B, during the joint lives of A and B, and A afterwards became insane. *Held*, that, in law, this deed was a grant of an annuity, and not revoked by his insanity: *Blount* v. *Hogg*, 4 Jones Eq. 46. A procured a deed from an insane person, who received no consideration, and did not comprehend the nature of the transaction. Then A mortgaged the land to B, who acted in good faith, relying on the record title. The insane person received no benefit from the money advanced by B. *Held*, that, as against B, the insane person was entitled to have the title quieted, and this, without a disaffirmance or an offer to make restitution: *Hull* v. *Louth*, 109 Ind. 315; 58 Am. Rep. 405.

§ 2390. Liable for Necessaries.—A lunatic or his estate is liable for necessaries supplied to him, although the party supplying them had notice of the incapacity.[2] So

[1] Wirebach *v.* First National Bank, 97 Pa. St. 543; 39 Am. Rep. 821.

[2] Baxter *v.* Portsmouth, 5 Barn. & C. 170; Hallett *v.* Oakes, 1 Cush. 296; Kendall *v.* May, 10 Allen, 59; Richardson *v.* Strong, 13 Ired. 106; 55 Am. Dec. 430; McCormick *v.* Littler, 85 Ill. 62; 28 Am. Rep. 610; Henry *v.* Fine, 23 Ark. 417; Surles *v.* Pipkin, 69 N. C. 513; Ex parte Northington, 37 Ala. 496; 79 Am. Dec. 67; Tally *v.* Tally, 2 Dev. & B. Eq. 385; 24 Am. Dec. 407; Darby *v.* Cabanne, 1 Mo. App. 127; Van Horn *v.* Hahn, 39 N. J. L. 207; Sawyer *v.* Lufkin, 56 Me. 308; La Rue *v.* Gilkyson, 4 Pa. St. 375; 45 Am. Dec. 700; Beals *v.* Lee, 10 Pa. St. 56; 49 Am. Dec. 573; Skidmore

also for the maintenance of the lunatic's wife and family,[1] or the costs of a commission of lunacy.[2]

§ 2391. Contracts with Intoxicated Persons. — A contract entered into with one so intoxicated as to be deprived of the exercise of his understanding is voidable, although the intoxication were voluntary, and not procured through the intervention of the other party.[3] Merely being under the influence of liquor is not enough; but it must be shown to exist to such extent as to seriously impair the reasoning faculties at the time of the contract.[4] The law will protect a party from the effect of his acts done in a state of insanity caused by drunkenness.[5] So one reduced to such extreme debility by intoxication as to be unable to rise, or sit up in bed unless supported, or to hold a pen and make a mark unless the pen and hand are held for him, cannot execute a conveyance of his property.[6] An habitual drunkard may make a valid

v. Romaine, 2 Bradf. 122; McCormick v. Littler, 85 Ill. 62; 28 Am. Rep. 610; Young v. Stevens, 48 N. H. 133; 97 Am. Dec. 592.

[1] Read v. Legard, 6 Ex. 636.

[2] Williams v. Wentworth, 5 Beav. 325.

[3] Burroughs v. Richman, 13 N. J. L. 233; 23 Am. Dec. 717; Foot v. Tewksbury, 2 Vt. 97; Taylor v. Patrick, 1 Bibb, 168; White v. Cox, 3 Hayw. (Tenn.) 82; Lee v. Ware, 1 313; Curtis v. Hall, 4 N. J. L. 361; Holland v. Barnes, 53 Ala. 83; 25 Am. Rep. 595; Menkins v. Lightner. 18 Ill. 282; Carpenter v. Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595; Gore v. Gibson, 13 Mees. & W. 623; Butler v. Mulvihill, 1 Bligh, 137; Wigglesworth v. Steers, 1 Hen. & M. 70; 3 Am. Dec. 602; Wade v. Colvert, 2 Mill Const. 27; 12 Am. Dec. 652; Bates v. Bell, 72 Ill. 108; Johns v. Fritchey, 39 Md. 258; Woodson v. Gordon, Peck, 196; 14 Am. Dec. 743; Barrett v. Buxton, 2 Aik. 167; 16 Am. Dec. 691; Crane v. Conklin, 1 N. J. Eq. 346; 22 Am. Dec. 519; Harbison v. Lemon, 3 Blackf. 51; 23 Am. Dec. 377; French v. French, 8 Ohio, 214; 31 Am. Dec. 441. In Cooke v. Clayworth, 18 Ves. 12, the court say: "A court of equity ought not to assist a person to get rid of an agreement or deed merely upon the ground of his having been intoxicated at the time; I say, merely upon that ground; as if there was, as Lord Hardwicke expresses it in Cory v. Cory, 1 Ves. Sr. 19, any unfair advantage made of his situation, or as Sir J. Jekyll says in Johnson v. Medlicott, 3 P. Wms. 130, note, any contrivance to draw him into drink, he might be a proper object of relief in a court of equity. As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition."

[4] Pickett v. Sutter, 5 Cal. 412; Cavender v. Waddingham, 5 Mo. App. 457; Reynolds v. Dechaums, 24 Tex. 174; 76 Am. Dec. 101; Johns v. Fritchey, 39 Md. 258; Wright v. Fisher, 65 Mich. 279; 8 Am. St. Rep. 886.

[5] Menkins v. Lightner, 18 Ill. 282.

[6] Wilson v. Bigger, 7 Watts & S. 111.

contract while sober.[1] But contracts by a person who has been found an habitual drunkard cannot be sustained by proof that the promisor was sober when they were made; the incapacity is continuous until the commission is superseded.[2]

But a person cannot avoid his own agreement merely upon the ground of the intoxication of the other party with whom he has contracted; and if the latter, after becoming sober, ratifies the agreement made whilst intoxicated, it becomes binding on both sides.[3] A person in a state of intoxication may render himself liable by an implied contract to pay for necessaries supplied, or necessary services rendered to him, whilst in that state.[4] The contracts of a person intoxicated at the time they were made are voidable, but not void; and to defend against a contract on the ground of drunkenness, it must have been rescinded by restoring whatever was received as the consideration thereof.[5] It is held in several cases that drunkenness of the maker of negotiable paper is no defense against a *bona fide* holder for value without notice.[6]

ILLUSTRATIONS.—A, when sober, bid at a judicial sale of land. When so drunk as to suspend the use of his reason and understanding, he signed the written contract and paid a portion of the price. *Held*, that he could avoid the contract and recover back the money paid: *Bush* v. *Breinig*, 113 Pa. St. 310; 57 Am. Rep. 469.

[1] Gardner *v.* Gardner, 22 Wend. 526; 34 Am. Dec. 340; Van Wyck *v.* Brosher, 81 N. Y. 262.

[2] Wadsworth *v.* Sharpsteen, 8 N. Y. 388; 59 Am. Dec. 499.

[3] Matthews *v.* Baxter, L. R. 8 Ex. 132; Carpenter *v.* Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595.

[4] Gore *v.* Gibson, 13 Mees. & W. 625.

[5] Joest *v.* Williams, 42 Ind. 565; 13 Am. Rep. 377.

[6] State Bank *v.* McCoy, 69 Pa. St. 204; 8 Am. Rep. 246; Miller *v.* Finley, 26 Mich. 249; 12 Am. Rep. 306; Caulkins *v.* Fry, 35 Conn. 170.

PART III.—THE MATTER OF THE CONTRACT.

CHAPTER CXV.

ILLEGAL CONTRACTS.

§ 2392. Contracts violating principles of law void generally.
§ 2393. Contracts violating injunctions of statutes void generally.
§ 2394. Contracts violating foreign laws.
§ 2395. Influencing or interfering with government or legislature or public officers.
§ 2396. Sale of public offices—Salaries of public officers.
§ 2397. Influencing public justice—Compounding offenses.
§ 2398. Agreements in fraud of the bankruptcy laws.
§ 2399. Agreements in fraud of creditors.
§ 2400. Maintenance and champerty.
§ 2401. Conflict in the American courts.
§ 2402. Contract between attorney and client for compensation out of recovery.
§ 2403. Contracts in total restraint of trade void—Restraint must be reasonable.
§ 2404. Contracts unlimited as to space, but limited as to time.
§ 2405. Contracts limited as to space, but unlimited as to time.
§ 2406. Other cases in which an unlimited or partial restraint is valid.
§ 2407. Restraint may be partially void and partially valid.
§ 2408. What is breach of contract.
§ 2409. Combinations of workmen.
§ 2410. Combinations of employers and traders.
§ 2411. Contracts entered into on Sunday void.
§ 2412. Contracts partly executed on Sunday.
§ 2413. Negotiable paper—Bona fide holder.
§ 2414. Ratification of contract made on Sunday.
§ 2415. Judicial acts performed on Sunday void.
§ 2416. Ministerial acts valid.
§ 2417. Traveling on Sunday.
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§ 2419. Works of "necessity or charity."
§ 2420. Wagers not illegal at common law—By statute.
§ 2421. Recovery from stake-holder.
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§ 2423. Securities given for gaming debts.
§ 2424. Gambling contracts—Option contracts.

§ 2425. Contracts in restraint of marriage void.
§ 2426. Restrictions on marriage in gifts and wills.
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§ 2428. Immoral and criminal contracts.
§ 2429. Agreement good on its face, but for illegal purpose.
§ 2430. Participation in illegal purpose necessary.
§ 2431. Effect of illegality on agreement.
§ 2432. Promises partly illegal.
§ 2433. Illegality occurring subsequent to making of contract.

§ 2392. Contracts Violating Principles of Law Void Generally.—Illegality in a contract will render it void. The law prohibits, as a rule, whatever is contrary to public policy or to morality; and a contract to do what the law thus prohibits, or to do something else in consideration thereof, is void, and not enforceable.[1] A contract is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society.[2] But where a contract belongs to that class, it will be declared void, although, in that particular instance, no injury to the public may have resulted.[3] What constitutes public policy, and what contravenes it, is a question of law for the court, and not one of fact for the jury.[4] On this principle these contracts have been held void: An agreement in consideration of a subscription to a railroad that the corporation would locate its depot on certain lands of the subscriber;[5] an agreement in consideration of a grant of a right of way that the railroad would erect and maintain its depot on

[1] Spalding *v.* Preston, 21 Vt. 9; 50 Am. Dec. 68; Ohio etc. Ins. Co. *v.* Merchants' etc. Ins. Co., 11 Humph. 1; 53 Am. Dec. 742; Blasdel *v.* Fowle, 120 Mass. 447; 21 Am. Rep. 533; Scudder *v.* Andrews, 2 McLean, 464; Milne *v.* Huber, 3 McLean, 212; Wooten *v.* Miller, 15 Miss. 380; Adams *v.* Rowan, 16 Miss. 624; Davis *v.* Holbrook, 1 La. Ann. 178; Leavitt *v.* Palmer, 3 N. Y. 19; 51 Am. Dec. 333; City Bank *v.* Perkins, 29 N. Y. 554; 86 Am. Dec. 332; Schmidt *v.* Barker, 17 La. Ann. 261; 87 Am. Dec. 527; Bowman *v.* Gonegal, 19 La. Ann. 328; 92 Am. Dec. 537; Norton *v.* Dawson, 19 La. Ann. 464; 92 Am. Dec. 548; Holcomb *v.* Weaver, 136 Mass. 265; Cumpston *v.* Lambert, 18 Ohio, 81; 51 Am. Dec. 442; Pickett *v.* School Dist., 25 Wis. 551; 3 Am. Rep. 105; Bledsoe *v.* Jackson, 4 Sneed, 429; Mercier *v.* Mercier, 50 Ga. 546; 15 Am. Rep. 694.

[2] Peterson *v.* Christensen, 26 Minn. 377.

[3] Fireman's Ch. Ass'n *v.* Berghaus, 13 La. Ann. 209.

[4] Smith *v.* Du Boise, 78 Ga. 413; 6 Am. St. Rep. 260.

[5] Fuller *v.* Dame, 18 Pick. 472.

the grantor's lands, and not have any other within a certain distance thereof;[1] or that a railroad would maintain its principal place of business at a certain place, and "not build a side-track to its main line in the town of E.";[2] a contract by the president and directors of a railroad company for the purchase of claims against the company;[3] a provision in a contract between a telegraph company and a railroad company that the former will transmit the family, private, and social messages of the executive officers of the latter free;[4] a contract for the sale and transfer of the property and franchises of a railroad company, before its road has been completed;[5] a contract to waive all damages for injuries resulting from negligence;[6] an agreement whereby a physician is to explain to a railroad company the injuries received by A at the hands of the company, and the physician's compensation is to vary according to the sum which the company shall pay A;[7] a contract of sale of stock of a corporation, which necessarily implies that the seller intended to derive and the buyer to give him a private advantage not shared by the other stockholders;[8] an agreement to divide a school district in consideration of the surrender of property rights by the new district;[9] an agreement between the father and grandfather of an infant legatee, on one side, and an heir at law, not a legatee, on the other, that the latter should resist and the former should not insist on probate, and if the will should

[1] St. Jo etc. R. R. Co. *v.* Ryan, 11 Kan. 602; 15 Am. Rep. 357; Marsh *v.* R. R. Co., 64 Ill. 414; 16 Am. Rep. 564; St. Louis etc. R. R. Co. *v.* Mathers, 71 Ill. 592; 22 Am. Rep. 122; Williamson *v.* R. R. Co., 53 Iowa, 126; 36 Am. Rep. 206.

[2] Pueblo etc. R. R. Co. *v.* Taylor, 6 Col. 1; 45 Am. Rep. 512. A contract to pay money in consideration that the company will build its road to a certain point is valid: First Nat. Bank *v.* Hendrie, 49 Iowa, 402; 31 Am. Rep. 153.

[3] McDonald *v.* Haughton, 70 N. C. 393.

[4] Western Union Telegraph Co. *v.* R. R. Co., 1 McCrary, 418.

[5] Clarke *v.* R. R. Co., 5 Neb. 314.

[6] Cook *v.* R. R. Co., 72 Ga. 48; Kansas Pacific R. R. Co. *v.* Peavey, 29 Kan. 169; 44 Am. Rep. 630; Lake Shore etc. R. R. Co. *v.* Spangler, 44 Ohio St. 471.

[7] Thomas *v.* Caulkett, 57 Mich. 392; 58 Am. Rep. 369.

[8] Guernsey *v.* Cook, 120 Mass. 501.

[9] State *v.* Kidd, 63 Wis. 337.

be set aside, the heir should pay the infant the amount of his legacy, the object being to defeat a residuary legatee;[1] a contract to abandon the prosecution of proceedings for the establishment of a public highway in consideration of money to be paid therefor;[2] a contract by which one trustee agrees, for a pecuniary compensation to himself, to permit his co-trustee to have control of the trust fund;[3] an agreement between tenants in common that the survivor shall take the other's estate;[4] a contract between two creditors interested in a public sale about to be made by an assignee in bankruptcy, that one will not bid against the other, and in consideration thereof, that the latter will pay to the former a certain sum of money;[5] an agreement for a consideration to renounce an executorship;[6] a contract by a physician to take the office of another, and practice therein in the name of the other;[7] a contract to buy of a director and president of a national bank shares of its stock, on condition that the purchaser shall be made cashier of the bank;[8] an agreement by an agent to induce his principals to discharge their present attorney and employ another, who agrees in consideration thereof to divide his fees with the agent.[9]

An agreement that one party thereto may, if necessary, use force in taking possession of certain property, in case the other party fails to comply with its conditions, is not an agreement to do an unlawful act.[10] A contract by a corporation organized to build a public bridge with the

[1] Gray *v.* McReynolds, 65 Iowa, 461; 54 Am. Rep. 16.

[2] Jacobs *v.* Tobiason, 65 Iowa, 245; 54 Am. Rep. 9.

[3] Foote *v.* Emerson, 10 Vt. 338; 33 Am. Dec. 205.

[4] Hershy *v.* Clark, 35 Ark. 17; 37 Am. Rep. 1.

[5] Dudley *v.* Odom, 5 S. C. 131; 22 Am. Rep. 6. As to agreements not to bid at auction, see Auctioneers, Division I.

[6] Ellicott *v.* Chamberlin, 38 N. J. Eq. 604; 48 Am. Rep. 327.

[7] Jerome *v.* Bigelow, 66 Ill 452; 16 Am. Rep. 597.

[8] Noel *v.* Drake, 28 Kan. 265; 42 Am. Rep. 162.

[9] Byrd *v.* Hughes, 84 Ill. 174; 25 Am. Rep. 442.

[10] Ambrose *v.* Root, 11 Ill. 497; 52 Am. Dec. 456.

proprietor of a newspaper, to give him stock of the company in consideration of his publishing articles favoring the enterprise, and showing the value of it as an investment, is valid.[1] An agreement by an employer to pay an employee a certain sum per month for his services, even if he should be discharged for incapacity or dereliction of duty, is not contrary to public policy.[2]

§ 2393. Contracts Violating Injunctions of Statutes Void Generally.— Where an act is prohibited by statute, a contract to do the act is illegal and unenforceable.[3] So a contract in violation of the constitution of the United States, whether made by the United States, a state, or an individual, is invalid.[4] Where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, or in express words prohibit it.[5] A statute prohibiting the mak-

[1] Liebke *v.* Knapp, 79 Mo. 22; 49 Am. Rep. 212.

[2] Edwards *v.* Crepin, 68 Cal. 37.

[3] Mitchell *v.* Smith, 1 Binn. 110; 2 Am. Dec. 417; Seidenbender *v.* Charles, 4 Serg. & R. 151; 8 Am. Dec. 683; Bank *v.* Owens, 2 Pet. 527; Morton *v.* Fletcher, 2 A. K. Marsh. 137; 12 Am. Dec. 366; Gray *v.* Roberts, 2 A. K. Marsh. 208; 12 Am. Dec. 383; Johnson *v.* Cooper, 2 Yerg. 524; 24 Am. Dec. 503; Linn *v.* Bank, 2 Ill. 87; 25 Am. Dec. 71; Persons *v.* Jones, 12 Ga. 371; 58 Am. Dec. 477; Adams *v.* Hackett, 27 N. H. 289; 59 Am. Dec. 376; Woodworth *v.* Bennett, 43 N. Y. 273; 3 Am. Rep. 706; Walker *v.* Johnson, 7 Hill, 387; Buxton *v.* Hamblin, 32 Me. 448; Bell *v.* Quinn, 2 Sand. 146; Capehart *v.* Rankin, 3 W. Va. 571; 100 Am. Dec. 779; Jones *v.* Blacklidge, 9 Kan. 562; 12 Am. Rep. 503; Foley *v.* Speir, 100 N. Y. 552; Levy *v.* Gowdy, 2 Allen, 320; Miller *v.* Post, 1 Allen, 434.

[4] Patton *v.* Gilmer, 42 Ala. 548; 94 Am. Dec. 665.

[5] Wilson *v.* Spencer, 1 Rand. 76; 10 Am. Dec. 491; Woods *v.* Armstrong, 54 Ala. 150; 25 Am. Rep. 671; Mitchell *v.* Smith, 1 Binn. 110; 2 Am. Dec. 417; Thorne *v.* Travelers Ins. Co., 80 Pa. St. 15; 21 Am. Rep. 89; Drury *v.* Defontaine, 1 Taunt. 136; Pennington *v.* Townsend, 7 Wend. 276; Griffith *v.* Wells, 3 Denio, 226; Bank *v.* Owens, 2 Pet. 527; Carlton *v.* Witcher, 6 N. H. 196; Brackett *v.* Hoyt, 29 N. H. 264; Roby *v.* West, 4 N. H. 285; 17 Am. Dec. 423; Madison *v.* Ins. Co., 2 Ind. 483; Hale *v.* Henderson, 4 Humph. 199; Territt *v.* Bartlett, 21 Vt. 104; Swords *v.* Owen, 43 How. Pr. 176; Hallett *v.* Norton, 14 Johns. 273; Ferdon *v.* Cunningham, 20 How. Pr. 154; Best *v.* Bander, 29 How. Pr. 489; Wheeler *v.* Russell, 17 Mass. 258; Russell *v.* Degrand, 15 Mass. 35; Ellsworth *v.* Mitchell, 31 Me. 247; Downing *v.* Ringer, 7 Mo. 585; Smith *v.* Albany, 7 Lans. 14; Hibernia Corp. *v.* Henderson, 8 Serg. & R. 219; 11 Am. Dec. 593; Sharp *v.* Teese, 9 N. J. L. 352; 17 Am. Dec. 479; O'Donnell *v.* Sweeney, 5 Ala. 467; 39 Am. Dec. 337; Columbia Bank *v.* Haldeman, 7 Watts & S. 233; 42 Am. Dec. 229; Harrison *v.* Berkley, 1 Strob. 525; 47 Am. Dec. 578; Milton *v.* Haden, 32 Ala. 30; 70 Am. Dec. 523. *Contra*, Solomon *v.* Dreschler, 4 Minn. 278; Lindsley *v.* Rutherford, 17 B. Mon. 245; Babcock *v.* Goodrich, 47

ing contracts, except in a certain manner, *ipso facto*, makes them void if made in any other way.[1] Courts will not, even with the consent of the parties, enforce a contract which is in violation of a statute, although not therein declared void.[2] Where a contract made in violation of a statute is void, the subsequent repeal of the statute does not make it valid.[3]

On the foregoing grounds the following have been held void: An agreement to withdraw the plea of usury;[4] a contract for the sale of fertilizers neither branded, tagged, nor inspected, as provided by statute;[5] a promise by a candidate for office to contribute money for purposes for a part of which candidates are expressly prohibited from contributing;[6] a contract of service by a minor in violation of the statute prohibiting the employment of a certain class of minors in manufacturing establishments;[7] a contract made since the war, for the sale and delivery of confederate bonds;[8] an executory contract waiving the benefit of an exemption law;[9] a contract to reprint any literary work, in violation of a right of copyright secured to a

Cal. 509; Coombs *v.* Emery, 14 Me. 404; Lester *v.* Howard Bank, 33 Md. 558; 3 Am. Rep. 211; Niemeyer *v.* Wright, 75 Va. 239; 40 Am. Rep. 720. In Hervey *v.* Moseley, 7 Gray, 479, 66 Am. Dec. 515, it is said: "While it is true that ordinary contracts, if prohibited by a penal statute, are held illegal and invalid, yet, in the case of marriage, this principle has been, for sound and obvious reasons, disregarded, and the marriage held valid, notwithstanding the penalty incurred by those who should unite a female in marriage under eighteen years of age without the consent of her parent or guardian."

[1] Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

[2] Fowler *v.* Scully, 72 Pa. St. 456; 13 Am. Rep. 699.

[3] Woods *v.* Armstrong, 54 Ala. 150; 25 Am. Rep. 671; Banchor *v.* Mansel, 47 Me. 58; Milne *v.* Huber, 3 McLean, 212; Gilliland *v.* Phillips, 1 S. C. 152. *Aliter* if the contract is not immoral, is held in Central Bank *v.* Stone Co., 26 Barb. 23; Washburn *v.* Franklin, 35 Barb. 600; Curtis *v.* Leavitt, 15 N. Y. 85.

[4] Clark *v.* Spencer, 14 Kan. 398; 19 Am. Rep. 96.

[5] Conley *v.* Sims, 71 Ga. 161.

[6] Foley *v.* Speir, 11 Daly, 254.

[7] Birkett *v.* Chatterton, 13 R. I. 299; 43 Am. Rep. 30.

[8] Branch *v.* Haas, 16 Fed. Rep. 53.

[9] Phelps *v.* Phelps, 72 Ill. 545; 22 Am. Rep. 149; Curtis *v.* O'Brien, 20 Iowa, 376; 89 Am. Dec. 543; Maxwell *v.* Read, 7 Wis. 583; Recht *v.* Kelly, 82 Ill. 147; 25 Am. Rep. 301, the court saying: "The exemption created by the statute is as much for the benefit of the family of the debtor as for himself, and for that reason he cannot, by an executory contract, waive the provisions made by law for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void."

third person;[1] a contract by an express company in violation of the mail law of the United States.[2]

ILLUSTRATIONS. — A statute declared that bricks should be made of a certain size, and prohibited, under a penalty, the making of bricks of a different size. *Held*, that a vendor of bricks of the latter size could not maintain an action for the price: *Law* v. *Hodgson*, 2 Camp. 147. A statute prohibits, under a penalty, the keeping of a nine-pin alley appurtenant to a tavern. A carpenter builds a nine-pin alley adjoining a tavern. He cannot recover the price: *Spurgeon* v. *McElwain*, 6 Ohio, 442; 27 Am. Dec. 266. A statute enacted that if any person should run or knowingly permit his grain to be thrashed by a thrashing-machine, the rods, knuckle-joints, and jacks of which should not be boxed, he should be deemed guilty of and punished as for a misdemeanor. *Held*, that one who rendered service in thrashing the grain of another with a machine not boxed in conformity with such a statute could not recover therefor: *Dillon* v. *Allen*, 46 Iowa, 299; 26 Am. Rep. 145.

§ 2394. Contracts Violating Foreign Laws. — An agreement which is illegal in the place where made fails to create any right that can be ground for an action in this country. Also, an agreement made in this country for a performance abroad, which is there illegal, will not give a cause of action here. Again, a contract, although valid in a foreign country where it is made, if it be illegal according to the law of this country, will not found a cause of action in our courts.[3] But courts do not notice the revenue laws of foreign countries; and contracts having for their object their violation will be enforced.[4]

§ 2395. Influencing or Interfering with Government or Legislature or Public Officers. — All agreements whose object is in any way to interfere with or unduly influence

[1] Nichols *v.* Ruggles, 3 Day, 145; 3 Am. Dec. 262.

[2] Hill *v.* Mitchell, 25 Ga. 704.

[3] Hope *v.* Hope, 8 De Gex, M. & G. 731; Grell *v.* Levy, 16 Com. B., N. S., 79; Parsons *v.* Trask, 7 Gray, 473; 66 Am. Dec. 502; Hall *v.* Costello, 48 N. H. 176; 2 Am. Rep. 207. The validity of a contract is to be decided by the law of the place where it is made; but no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws: Smith *v.* Godfrey, 28 N. H. 379; 61 Am. Dec. 617.

[4] Kohn *v.* Renaisance, 5 La. Ann. 25.

the action of the government, the legislature, or the other representatives of the state, are void.[1]

Therefore the following agreements have been held void: An agreement to endeavor to obtain from a cabinet officer a valuable contract for supplying arms to the government;[2] a contract for general services in procuring legislation;[3] an agreement to prevent legislative investigation into the affairs of a railroad company;[4] an agreement to use one's influence with a municipal council to procure a lease;[5] a contract to procure a return of duties by an officer in the custom-house for a share of the amount returned;[6] a promise to a voter to pay his traveling expenses, or to remunerate him for his loss of time;[7] a wager between two voters upon the result of an election;[8] an agreement to pay money in consideration of abandoning a petition against the return of a member for bribery;[9]

[1] Providence Tool Co. *v.* Norris, 2 Wall. 45; Howell *v.* Fountain, 3 Ga. 176; 46 Am. Dec. 415; Marsh *v.* Russell, 2 Lans. 340; Coppell *v.* Hall, 7 Wall. 542; Pratt *v.* Foot, 6 Conn. 332; McGuire *v.* Smock, 42 Ind. 1; 13 Am. Rep. 353; Buck *v.* Bank, 27 Mich. 293; 15 Am. Rep. 189; Nichols *v.* Mudgett, 32 Vt. 546; Elkhart Co. Lodge *v.* Crary, 98 Ind. 238; 49 Am. Rep. 746; Oscanyar *v.* Ames Co., 103 U. S. 24.

[2] Providence Tool Co. *v.* Norris, 2 Wall. 45. But see Lyon *v.* Mitchell, 36 N. Y. 235; 93 Am. Dec. 503.

[3] Weed *v.* Black, 2 McAr. 268; 29 Am. Rep. 618; Trist *v.* Child, 21 Wall. 441; Clippinger *v.* Hepbaugh, 5 Watts & S. 315; 40 Am. Dec. 519; Frost *v.* Belmont, 6 Allen, 152; Gil *v.* Williams, 12 La. Ann. 219; 68 Am. Dec. 767; Powers *v.* Skinner, 34 Vt. 274; 80 Am. Dec. 677; Bryan *v.* Reynolds, 5 Wis. 200; 68 Am. Dec. 55; Coquillard *v.* Bearss, 21 Ind. 479; 83 Am. Dec. 362. *Contra*, Hunt *v.* Test, 8 Ala. 713; 42 Am. Dec. 659. A contract for contingent compensation for professional services of a legitimate character in prosecuting a claim against the United States pending in one of the executive departments is not illegal: Stanton *v.* Embrey, 93 U. S. 548; nor is a contract to make a public argument before the legislature or its committee for or against an act: Bryan *v.* Reynolds, 5 Wis. 200; 68 Am. Dec. 55; nor a contract whereby one agrees for hire to work for passage of bills by the legislature, provided he does not conceal his interest in the matter, but lets it be known and understood by the members whose judgment he undertakes to influence: Miles *v.* Thorne, 38 Cal. 335; 99 Am. Dec. 384. But a contract is void as against public policy, and will not be enforced where the consideration is that one of the parties thereto would give "all the aid in his power, spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law" of a bill introduced into the legislature: Mills *v.* Mills, 40 N. Y. 543; 100 Am. Dec. 535.

[4] Usher *v.* McBratney, 3 Dill. 385.

[5] Wall *v.* Charlick, 8 N. Y. Leg. Obs. 230; Pease *v.* Walsh, 49 How. Pr. 269.

[6] Satterlee *v.* Jones, 3 Duer, 102.

[7] Cooper *v.* Slade, 6 El. & B. 447; Simpson *v.* Yeend, L. R. 4 Q. B. 626.

[8] Allen *v.* Hearn, 1 Term Rep. 56.

[9] Coppock *v.* Bower, 4 Mees. & W. 361.

a promise to pay for services rendered by another as a canvasser at a primary election to secure the promisor's nomination for an office;[1] an agreement to indemnify an officer for the voluntary escape of a prisoner in his charge;[2] an agreement to influence the governor of a state to appoint a certain person to an office;[3] an agreement not to compete with a person in making bids for the carrying of the United States mail, or other government contract, or to share in the result;[4] a promise to indemnify an officer for releasing a person from arrest;[5] an agreement to give a person his interest in a coming election for the office of sheriff;[6] a contract to endeavor to procure a pardon from the governor for a convict for a compensation;[7] a note given to procure a party to sign a petition for executive clemency;[8] an agreement guaranteeing to pay a sum of money to certain persons provided they will petition the common council of a city for street improvements;[9] a contract whereby, in consideration of A's procuring B's appointment as special counsel in certain causes against the United States, and aiding him in managing the defense of them, B agrees that he will pay A one half of the fee which he may receive from the government;[10] an agreement between a proprietor of a distillery and an officer of the internal revenue service charged

[1] Keating *v.* Hyde, 23 Mo. App. 555.

[2] Ayer *v.* Hutchins, 4 Mass. 370; 3 Am. Dec. 232.

[3] Faurie *v.* Morin, 4 Mart. (La.) 39; 6 Am. Dec. 701.

[4] Gulick *v.* Ward, 9 N. J. L. 87; 18 Am. Dec. 389; King *v.* Winants, 71 N. C. 469; 17 Am. Rep. 11; Swan *v.* Chorpenning, 20 Cal. 182; Atcheson *v.* Mallon, 43 N. Y. 147; 3 Am. Rep. 678; Gibbs *v.* Smith, 115 Mass. 592; Marsh *v.* Russell, 66 N. Y. 288. But an agreement that one shall bid for several for a mail contract is not illegal *per se:* Bellows *v.* Russell, 20 N. H. 427; 51 Am. Dec. 238. See Breslin *v.* Brown, 24 Ohio St. 565; 15 Am. Rep. 627.

[5] Webber *v.* Blunt, 19 Wend. 188; 32 Am. Dec. 445.

[6] Swayze *v.* Hall, 8 N. J. L. 54; 14 Am. Dec. 399; Nicholls *v.* Mudgett, 32 Vt. 546.

[7] Hatzfield *v.* Gulden, 7 Watts, 152; 32 Am. Dec. 750. See Wildey *v.* Collier, 7 Md. 273; 61 Am. Dec. 346. *Contra*, Chadwick *v.* Knox, 31 N. H. 226; 64 Am. Dec. 329. And see Thompson *v.* Wharton, 7 Bush, 563; 3 Am. Rep. 306.

[8] Buck *v.* Bank, 27 Mich. 302; Haines *v.* Lewis, 54 Iowa, 301; 37 Am. Rep. 202.

[9] McGuire *v.* Smock, 1 Wil. 92; 42 Ind. 1; 13 Am. Rep. 353.

[10] Meguire *v.* Corwine, 101 U. S. 108.

with watching the distillery, that the officer will pay the proprietor a monthly sum so long as the latter carries on the distillery;[1] a contract made by a mayor while in office, with the city council, to lease a city park for five years, and for an annual sum paid him, to keep the park in repair;[2] a contract made by a postmaster, before his commission was issued, to remove his post-office to a certain building, and continue it there so long as he should hold office, even though it was not shown that the public has been injured thereby;[3] a contract to procure for a drafted man a substitute, "or otherwise clear him from said draft";[4] an agreement to grant certain privileges, in consideration of the withdrawal of the opposition to the passage of an act through the legislature;[5] promises to officers to induce them to perform the duty required of them by law;[6] a contract by which an administrator agrees to sell certain real property belonging to the estate which he represents, for a certain sum, and to make the title to the purchaser named therein, through the medium of the orphans' court;[7] an agreement whereby A is to enter into and perform a contract with the state for the construction of a swamp-land state road, and to give B, who, at the public letting of the work under the statute, had been the lowest bidder, as a bonus for being allowed to take his place in the contract, a portion of the swamp-lands to be secured from the state for the performance of the work;[8] a promise to a collector of taxes to pay him a tax, in consideration that he will forbear to collect the same in the manner required by law;[9] a promise to pay money to a mail-contractor upon consideration that he will repudiate his contract for carrying the mail;[10] a con-

[1] Caton *v.* Stewart, 76 N. C. 357.
[2] Macon *v.* Huff, 60 Ga. 221.
[3] Spence *v.* Harvey, 22 Cal. 336; 83 Am. Dec. 69.
[4] O'Hara *v.* Carpenter, 23 Mich. 410; 9 Am. Rep. 89.
[5] Pingry *v.* Washburn, 1 Aiken, 264; 15 Am. Dec. 676.
[6] Mitchell *v.* Vance, 5 T. B. Mon. 528; 17 Am. Dec. 96.
[7] Myers *v.* Hodges, 2 Watts, 381; 27 Am. Dec. 319.
[8] Hannah *v.* Fife, 27 Mich. 172.
[9] Packard *v.* Tisdale, 50 Me. 376.
[10] Weld *v.* Lancaster, 56 Me. 453.

tract with a public enemy;[1] an agreement by members of a township board of education, acting in their individual capacity, to purchase from another person apparatus for the schools of the township, and to ratify said contract of purchase at the next meeting of the board;[2] a contract whereby the parties agree to pay a delegate in Congress for services rendered by him in securing the payment of a claim, where legislation is by Congress required therefor;[3] an agreement to pay to the county commissioners, who were bound by law to build a court-house, a certain sum of money, provided they would build it on a particular lot;[4] an agreement by private parties to employ a deputy collector at a greater compensation than fixed by statute;[5] a promise to secure the removal of a post-office, and the appointment of one as postmaster;[6] an agreement of a trustee of a corporation, for a pecuniary recompense, to resign his trust.[7]

§ 2396. Sale of Public Offices — Salaries of Public Officers. — The sale of public offices is illegal, and a contract made for such an object is accordingly void.[8] So the salary or emoluments of a public office cannot be sold or assigned by the holder,[9] and any such contract or agreement is void;[10] as, for example, an agreement before an election to share the salary and fees of an office, in

[1] Woods *v.* Wilder, 43 N. Y. 164; 3 Am. Rep. 684; Chancely *v.* Bailey, 37 Ga. 532; 95 Am. Dec. 350; Wood *v.* Stone, 2 Cold. 369; 88 Am. Dec. 601.

[2] McCortle *v.* Bates, 29 Ohio St. 419; 23 Am. Rep. 758.

[3] Weed *v.* Black, 2 McAr. 268; 29 Am. Rep. 618.

[4] County Commissioners *v.* Jones, 1 Ill. 237.

[5] Fawcett *v.* Eberly, 58 Iowa, 544.

[6] Filson *v.* Himes, 5 Pa. St. 452; 47 Am. Dec. 422.

[7] Forbes *v.* McDonald, 54 Cal. 98.

[8] Outon *v.* Rodes, 3 A. K. Marsh. 432; 13 Am. Dec. 193; Groton *v.* Waldoborough, 11 Me. 306; 26 Am. Dec. 531; Waldron *v.* Evans, 1 Dak. 11; Engle *v.* Chipman, 51 Mich. 524. *Contra*, Salling *v.* McKinney, 1 Leigh, 42; 19 Am. Dec. 722; Eddy *v.* Capron, 4 R. I. 394; 67 Am. Dec. 541; Grant *v.* McLester, 8 Ga. 553; Lucas *v.* Allen, 80 Ky. 681; O'Rear *v.* Higer, 10 Leigh, 622; Cunningham *v.* Cunningham, 18 B. Mon. 19; 68 Am. Dec. 718; Robinson *v.* Robinson, 65 Ala. 610; 39 Am. Rep. 17.

[9] Palmer *v.* Bate, 2 Ball & B. 673; Barwicke *v.* Reade, 1 H. Black. 627.

[10] A contract by a clerk of a court to assign all the fees of his office to pay a debt is void as against public policy: Field *v.* Chipley, 79 Ky. 260; 42 Am. Rep. 215.

consideration of the plaintiff's using his influence to elect the defendant to such office;[1] or an agreement by an applicant for an office to divide the receipts, in consideration that a rival applicant will withdraw or has withdrawn,[2] or shall aid the other in obtaining the office;[3] a contract under which a United States marshal assumes to authorize a deputy marshal to appoint under-deputies, and to receive three fourths of all the fees earned by himself and them.[4]

§ 2397. Influencing Public Justice — Compounding Offenses. — Upon the ground of public policy, any agreement having a tendency to pervert or influence the course of public justice is illegal and void;[5] as an agreement that one shall, in consideration of a large sum of money, not only procure witnesses, but procure them to swear to a particular fact;[6] or that one will hold himself at all times ready to testify for the promisor in a certain case;[7] or an agreement that a defendant in a proceeding for a divorce shall withdraw his or her papers, and make no defense in the case;[8] or a contract by a wife to pay her solicitors one half of alimony to be recovered by her in a suit for divorce as compensation for their services in such

[1] Gaston *v.* Drake, 14 Nev. 175; 33 Am. Rep. 548.

[2] Hunter *v.* Nolf, 71 Pa. St. 282; Martin *v.* Wade, 37 Cal. 168; Glover *v.* Taylor, 38 La. Ann. 634.

[3] Gray *v.* Hook, 4 N. Y. 449.

[4] Schloss *v.* Hewlett, 81 Ala. 266.

[5] Collins *v.* Blantern, 2 Wils. 341; 1 Smith's Lead. Cas. 490; Bierbaur *v.* Wirth, 10 Biss. 60. It is illegal to aid a felon to escape from prosecution of punishment unless the persons stand in the relation of husband and wife, parent and child, or the like, and a contract growing out of such an act is void: Dodson *v.* Swan, 2 W. Va. 511; 98 Am. Dec. 787.

[6] Patterson *v.* Donner, 48 Cal. 369, 379. An agreement by a stranger to an action to furnish evidence therein, for a compensation contingent upon the result, is not necessarily illegal: Wellington *v.* Kelly, 84 N. Y. 543.

[7] Pollak *v.* Gregory, 9 Bosw. 116. Contract to give information in respect to evidence for trial is not void as against public policy; but a contract to suppress evidence is: Cobb *v.* Cowdery, 40 Vt. 25; 94 Am. Dec. 370. An agreement to compensate a deputy sheriff for procuring evidence which would lead to the conviction of a person implicated in a certain crime is not contrary to public policy, if the crime was committed and the trial had in a county other than that in which the deputy sheriff was an officer: Harris *v.* More, 70 Cal. 502.

[8] Stoutenburg *v.* Lybrand, 13 Ohio St. 228.

suit;[1] or an agreement between a corporation and an employee that a deposit given by him to secure the faithful discharge of his duties shall be retained in whole or in part, if the president shall deem proper, and that his certificate that the deposit is forfeited shall be conclusive evidence of the fact in the courts, and shall bar the employee of all right to recover the deposit;[2] or an agreement whereby one agrees for a certain sum of money to furnish sureties so that the other party to the contract can be appointed an administrator.[3]

The compromise or compounding of felonies, misdemeanors, or any public offenses is illegal, and agreements involving such compromises, either in whole or in part, are void;[4] as, for example, a bond, a deed, or other agreement, the consideration of which is not to prosecute for an offense which has been committed;[5] an agreement by an attorney to procure, for a contingent fee, the quashing of a criminal conviction;[6] a promise to pay a person for endeavoring to induce the prosecutors of a criminal case to discontinue it;[7] or for endeavoring to prevent the finding of an indictment, or if it is found, endeavoring to get the authorities to dismiss it;[8] or a contract to "use every legal and proper endeavor to have the criminal

[1] Jordan *v.* Westerman, 62 Mich. 170; 4 Am. St. Rep. 836.

[2] White *v.* R. R. Co., 135 Mass. 216. As to the validity of agreement to oust the jurisdiction of courts, see Title Arbitration, *post*.

[3] Aycock *v.* Braun, 66 Tex. 201.

[4] Hinesburgh *v.* Sumner, 9 Vt. 23; 31 Am. Dec. 600; Dixon *v.* Olmstead, 9 Vt. 310; 31 Am. Dec. 629; Woodruff *v.* Hinman, 11 Vt. 592; 34 Am. Dec. 712; Guilford Co. *v.* March, 89 N. C. 268; Peed *v.* McKee, 42 Iowa, 689; 20 Am. Rep. 631; Lindsay *v.* Smith, 78 N. C. 328; 24 Am. Rep. 463; Bell *v.* Wood, 1 Bay, 249; Mattocks *v.* Owen, 5 Vt. 42; Plumer *v.* Smith, 5 N. H. 553; 22 Am. Dec. 478; Cameron *v.* McFarland, 2 Car. Law Repos. 415; 6 Am. Dec. 566; Corley *v.* Williams, 1 Bail. 588; Den *v.* Monroe, 5 N. J. L. 470; Bailey *v.* Buck, 11 Vt. 252; Catlin *v.* Henton, 9 Wis. 746; Bobb *v.* Hitchcock, 40 Ala. 468; 20 Am. Rep. 289; McMahon *v.* Smith, 47 Conn. 221; 36 Am. Rep. 67.

[5] Cameron *v.* McFarland, 2 Car. Law Repos. 415; 6 Am. Dec. 566; Plumer *v.* Smith, 5 N. H. 553; 22 Am. Dec. 478; Crowden *v.* Reece, 80 Ind. 1; Haltkaus *v.* Kruitz, 17 Ill. App. 434; Pearce *v.* Wilson, 111 Pa. St. 14; 56 Am. Rep. 243. So of a judgment confessed for this consideration: Bredin's Appeal, 92 Pa. St. 241; 37 Am. Rep. 677.

[6] Ormerod *v.* Dearman, 100 Pa. St. 561; 45 Am. Rep. 391.

[7] Rhodes *v.* Neal, 64 Ga. 704; 37 Am. Rep. 93.

[8] Barron *v.* Tucker, 53 Vt. 338; 38 Am. Rep. 684.

prosecutions dismissed" against the promisee;[1] or a contract between attorneys and liquor dealers that they will defend for a stated monthly compensation all cases brought against them for violations of the prohibitory liquor law;[2] or a note, part of the consideration for which was an agreement to use influence to secure the acquittal of one prosecuted for a felony;[3] or an agreement by which one party receives a sum of money to become the bail of another, accused of felony, in order that a defendant may be released from custody so as to escape trial.[4]

One whose money has been stolen may compromise with the thief, provided nothing is done tending to suppress a criminal prosecution.[5] So a promise not to prosecute is not illegal, unless it was made for the sake of gain, and not merely from motives of kindness and compassion.[6] And it must be shown that a crime was committed, and that there was an agreement not to prosecute. Threats to prosecute, unless a certain security was given, will not justify the inference that if the security was given the agreement was that no prosecution would follow.[7] A private injury for which the sufferer may maintain an action may be compromised or settled by him in his discretion.[8] Where the consideration of an agreement for the sale of land is the compounding of a felony, neither party can obtain relief in a court of equity. The parties will be left as found.[9]

§ 2398. Agreements in Fraud of the Bankruptcy Laws.—Agreements operating in fraud of the bankruptcy laws are void; as an agreement by a creditor, in consideration of money, to withdraw his opposition to the

[1] Averbeck *v.* Hall, 14 Bush, 505.
[2] Bowman *v.* Phelps, 41 Kas. 364.
[3] Ricketts *v.* Harvey, 106 Ind. 564.
[4] Dunkin *v.* Hodge, 46 Ala. 523.
[5] Souhegan Bank *v.* Wallace, 61 N. H. 24.
[6] Ward *v.* Allen, 2 Met. 53; 35 Am. Dec. 387.
[7] Swope *v.* Ins. Co., 93 Pa. St. 251; Ford *v.* Cratty, 52 Ill. 313; Plant *v.* Gunn, 2 Woods, 372.
[8] Leake on Contracts, 729; Kier *v.* Leeman, 9 Q. B. 395.
[9] Allison *v.* Hess, 28 Iowa, 388.

discharge of a bankrupt.[1] So with agreements interfering with the equal distribution of the bankrupt's estate; as a security or charge upon the property of the debtor stipulated to take effect only in the event of his bankruptcy;[2] or a sale at a fictitious price, to enable the seller, in case of the bankruptcy of the buyer, to recover the real value by a dividend.[3]

§ 2399. Agreements in Fraud of Creditors.— In the case of composition agreements between debtor and creditor, any agreement made with one creditor for a preference, whether by paying or promising him a larger composition, or by giving him better security for his composition, so that he does not in effect discharge the debtor upon equal terms with the others, is illegal and void as a fraud upon the other creditors.[4] An action at law cannot be maintained against the debtor on a note or bond given for a secret preference, and he may set up the fraud as against the creditor or any other person who is not a *bona fide* holder for value before maturity.[5] Equity will decree the surrender of securities given by the debtor for secret preferences,[6] and the cancellation of notes or bonds given by him to induce a creditor to sign a composition agreement.[7] The creditor who pro-

[1] Hall *v.* Dyson, 17 Q. B. 785; 21 L. J. Q. B. 224; Sharp *v.* Teese, 9 N. J. L. 352; 17 Am. Dec. 479; Rice *v.* Maxwell, 13 Smedes & M. 289; 53 Am. Dec. 85.

[2] Ex parte Mackay, L. R. 8 Ch. 643; 42 L. J. Ch. 68.

[3] In re Gomersall, L. R. 1 Ch. D. 137; 45 L. J. Q. B. 1. S., an attorney at law, put into the hands of W., another attorney, a demand against T. under the agreement that T. was to be forced into bankruptcy, and if S. was appointed assignee, he and W. should share the attorney's fees and assignee's commissions. Held, not invalid: Redick *v.* Woolworth, 17 Neb. 260; 52 Am. Rep. 410.

[4] Mallalieu *v.* Hodgson, 16 Q. B. 711; Cobleigh *v.* Pierce, 32 Vt. 788; Bean *v.* Amsink, 10 Blatchf. 361; Partridge *v.* Messer, 14 Gray, 180; Bean *v.* Brookmire, 2 Dill. 108; Ramsdell *v.* Edgarton, 8 Met. 227; 41 Am. Dec. 503; Yeomans *v.* Chatterton, 9 Johns. 295; 6 Am. Dec. 277; Sharp *v.* Teese, 9 N. J. L. 352; 17 Am. Dec. 479; Dexter *v.* Snow, 12 Cush. 594; 59 Am. Dec. 206; Solinger *v.* Earle, 82 N. Y. 393; In re Clements, 52 Conn. 464. See *ante*, Title Trusts.

[5] Lawrence *v.* Clark, 36 N. Y. 128; Carroll *v.* Shields, 4 E. D. Smith, 466; Pinner *v.* Higgins, 12 Abb. Pr. 334; Way *v.* Langley, 15 Ohio St. 392.

[6] Pleyer *v.* Browne, 28 Beav. 391; O'Shea *v.* Collier White Lead and Oil Co., 42 Mo. 397.

[7] Middleton *v.* Lord Onslow, 1 P. Wms. 768; Spurrett *v.* Spiller, 1 Atk.

cures such fraudulent preference cannot recover even the amount of the composition, as the whole agreement between him and his debtor is an entire agreement, and is vitiated by the fraud.[1] The composition obtained by the fraudulent preference of one creditor over the others is also void as between the debtor and all the other creditors defrauded; and they are remitted to their original rights and remedies against the debtor.[2] But the debtor can recover from the creditor a sum of money paid to him by way of fraudulent preference.[3]

§ 2400. Maintenance and Champerty.—Maintenance is an officious intermeddling in a suit, that in no way belongs to one, by assisting either party, with money, or otherwise, to prosecute or defend. It is said to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression. "Maintenance, as thus described," says Mr. Anson,[4] "hardly appears in the reports of recent times. The mere maintaining or assisting another person in a suit would not now avoid a contract entered into for such a purpose, unless there was something vexatious in the maintenance."[5] Even at common law a stranger was per-

105; Constantein *v.* Blache, 1 Cox, 287; Fawcett *v.* Gee, 3 Anst. 910; Estabrook *v.* Scott, 3 Ves. 456; Jackman *v.* Mitchell, 13 Ves. 581; Cecil *v.* Plaistow, 1 Anst. 202.

[1] Howden *v.* Haigh, 11 Ad. & E. 1033.

[2] Dauglish *v.* Tennent, L. R. 2 Q. B. 49.

[3] Smith *v.* Bromley, 2 Doug. 696; Bean *v.* Amsink, 10 Blatchf. 361.

[4] Anson on Contracts, 178; citing Abinger, C. J., in Findon *v.* Parker, 11 Mees. & W. 682.

[5] In Thallhimer *v.* Brinckerhoff, 3 Cow. 623, 15 Am. Dec. 308, the court say: "Our statute concerning champerty and maintenance is a compilation of the several English statutes relating to the same subjects, and it declares certain contracts void. This statute, throughout, makes or supposes a distinction, which before prevailed in the rules of the common law, between maintenance which is innocent and that which is unlawful. To maintain the suit of another is unlawful, unless the person maintaining has some interest in the subject of the suit, or unless he is connected with the suitor in some social relation. These are the exceptions to a general rule, and they are exceptions which rest upon the strongest ground of reason as well as the support of authority. Where the person promoting the suit of another has any interest whatever in the thing demanded distinct from that which he may acquire by an agreement with the suitor, he is, in effect, also a suitor, according to the nature and extent of his interest.

mitted to assist in the prosecution of a suit commenced by another, where he had, or believed he had, a pecuniary interest in the result of the suit, or was related to either of the parties;[1] or the litigant were a poor person unable to carry on his own suit or defend his property;[2] or where he has purchased the interest of a co-defendant in a suit.[3] The offense of maintenance seems now to be confined to the intermeddling of a stranger in a suit, for the purpose

To deny to such a person the benefit which he might receive from a suit conducted mainly or partly for the benefit of another would be to close the temple of justice against all persons not parties to the suit, and yet having interests in the subject of litigation which may be affected by the determination of the cause. It is, accordingly, a principle that any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest to participate in the suit of another, or also has, or claims, some right to the same subject: Bac. Abr., tit. Maintenance, B, and the several authorities there cited. Where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the voice of nature and the language of the law equally declare that such assistance is not unlawful maintenance. The relation of landlord and tenant, that of master and servant, acts of charity to the poor, and the exercise of the legal profession, are all cases in which it is not unlawful to give aid in the conduct of suits before the courts of justice. Upon all such cases these laws were never intended to operate. They were intended to prevent the interference of strangers having no pretense of right in the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject otherwise than as purchasers of the profits of litigation. It has been urged that champerty and maintenance are distinct offenses, and that champerty is illegal in many cases in which maintenance in other modes would be lawful. If principles are considered, it seems to be of little moment whether he who maintains the suit of another receives his reward from the subject of the suit or from any other property of the suitor. Champerty is one species of maintenance; but the authorities do not declare contracts for a part of the thing in demand universally unlawful. The distinction made by the books between interference which is illegal and that which is lawful consists in the rule and the exceptions already stated; and where maintenance is lawful, as in the case of interest in the subject, or relation to the suitor, a contract to divide the subject of the suit, which is maintenance in a particular form, is also legal."

[1] Thallhimer *v.* Brinckerhoff, 3 Cow. 623; 15 Am. Dec. 308; Call *v.* Calef, 13 Met. 362; Thompson *v.* Marshall, 36 Ala. 504; 76 Am. Dec. 328; Perine *v.* Dunn, 3 Johns. Ch. 508; Tilman *v.* Searcy, 7 Humph. 347; Wright *v.* Meek, 3 G. Greene, 472; Blackerby *v.* Holton, 5 Dana, 520; Dorwin *v.* Smith, 35 Vt. 69; Barnes *v.* Strong, 1 Jones, Eq. 100; McCall *v.* Capehart, 20 Ala. 521. As every member of the community has an interest in the punishment of crime, any one may lawfully contribute to a criminal prosecution: Com. *v.* Dupuy, Bright. (Pa.) 44.

[2] Thallhimer *v.* Brinckerhoff, 3 Cow. 623; 15 Am. Dec. 308; Perine *v.* Dunn, 3 Johns. Ch. 508; State *v.* Chitty, 1 Bail. 401; Findon *v.* Parker, 11 Mees. & W. 675.

[3] Thompson *v.* Marshall, 36 Ala. 504; 76 Am. Dec. 328.

of stirring up strife and continuing litigation.[1] Purchasing a pretended title, and prosecuting the suit in the name of another, but for the party's own benefit, is not an offense within the New York statute.[2]

Champerty is a species of maintenance. It is a "bargain with a plaintiff or defendant to divide the land or other thing sued for between them if they prevail at law, the champerter agreeing to carry on the suit at his own expense."[3] At common law, and under the statutes of England, agreements involving transactions of this kind are illegal and void.[4] But a party will not be denied relief in a suit because of a champertous contract, until he asks aid of the court to enforce it.[5]

§ 2401. Conflict in the American Courts.—In many, perhaps most, of the states, the English law of champerty and maintenance exists, either by statute or by judicial decision.[6] In other states this doctrine of the common law is held to be obsolete,[7] and inapplicable to the present day.[8]

[1] Dorwin *v.* Smith, 35 Vt. 69.

[2] Wickham *v.* Conklin, 8 Johns. 220.

[3] Bouvier's Law Dict. A champerty statute does not apply to devises, judicial sales, or assignments under the insolvent act: Varick *v.* Jackson, 2 Wend. 166; 19 Am. Dec. 571.

[4] 4 Bla. Com. 135.

[5] Pike *v.* Martindale, 91 Mo. 268.

[6] Weakly *v.* Hall, 13 Ohio, 167; 42 Am. Dec. 194; Gilbert *v.* Holmes, 64 Ill. 548; Barker *v.* Barker, 14 Wis. 131; Miller *v.* Larson, 19 Wis. 463; Stearns *v.* Felker, 28 Wis. 594; Ogden *v.* Des Arte, 4 Duer, 275; Hovey *v.* Hobson, 51 Me. 62; Martin *v.* Amos, 13 Ired. 198; Quigley *v.* Thompson, 53 Ind. 317; Statsenburg *v.* Marks, 79 Ind. 193; Holloway *v.* Lowe, 7 Port. 488; Thompson *v.* Marshall, 36 Ala. 504; 76 Am. Dec. 328; Lytle *v.* State, 17 Ark. 608; Webb *v.* Armstrong, 5 Humph. 379; Slade *v.* Rhodes, 2 Dev. & B. 24; Moses *v.* Bagley, 55 Ga. 283; Davis *v.* Sharron, 15 B. Mon. 64; Christie *v.* Sawyer, 44 N. H. 298; Whitney *v.* Kirkland, 7 N. J. Eq. 333; Martin *v.* Clark, 8 R. I. 389; 5 Am. Rep. 586; Backus *v.* Byron, 4 Mich. 535; Thurston *v.* Percival, 1 Pick. 415; Small *v.* Mott, 22 Wend. 403 (now regulated in New York by statute: Sedgwick *v.* Stanton, 14 N. Y. 289); Boardman *v.* Thompson, 25 Iowa, 487; Rust *v.* Larue, 4 Litt. 112; 14 Am. Dec. 172; Brown *v.* Beauchamp, 5 T. B. Mon. 81; 17 Am. Dec. 81; Coleman *v.* Billings, 89 Ill. 183; Barnes *v.* Strong, 1 Jones Eq. 100; Wheeler *v.* Pounds, 24 Ala. 472; Vansever *v.* Stickney, 75 Ala. 225.

[7] Danforth *v.* Streeter, 28 Vt. 490; Sherley *v.* Riggs, 11 Humph. 53; Bentinck *v.* Franklin, 38 Tex. 458; Cain *v.* Munroe, 23 Ga. 82; Mathewson *v.* Fitch, 22 Cal. 86; Ballard *v.* Carr, 48 Cal. 74; Richardson *v.* Rowland, 40 Conn. 565; Schaferman *v.* O'Brien, 28 Md. 565; 92 Am. Dec. 708; Hickox *v.* Elliot, 22 Fed. Rep. 13.

[8] Duke *v.* Harper, 66 Mo. 51; 27 Am. Rep. 314. And see Roberts *v.* Cook, 20 How. 467; Wright *v.* Meek, 3 G. Greene, 472.

§ 2402. Contract between Attorney and Client for Compensation out of Recovery.—In some of the states in which it is held that the law of champerty is in force, it is ruled that it is an essential element of maintenance and champerty that the person shall contribute to the expense of a litigation; and that therefore an agreement with an attorney that he is to receive as compensation for his services a portion of the subject-matter of the litigation is not champertous, unless he also agrees to pay or advance the costs and expenses of the suit.[1] On the other hand, other courts hold that such a contract need not contain an agreement as to costs to render it illegal.[2] Of course, in those states which repudiate the doctrine of champerty, an attorney may agree to recover land or other property, paying the expenses therefor for a specified portion of the amount recovered.[3] The supreme court of the United States holds that an attorney may lawfully contract with his client for a percentage of the amount he collects, whether the claim is collected by suit, or before

[1] Duke *v.* Harper, 66 Mo. 51; 27 Am. Rep. 314; 5 Rep. 624; 2 Mo. App. 1; Crow *v.* Harmon, 25 Mo. 417; Allard *v.* Lamirande, 29 Wis. 502; Arden *v.* Patterson, 5 Johns. Ch. 44; Moses *v.* Bagley, 54 Ga. 288; Martin *v.* Clark, 8 R. I. 389; 5 Am. Rep. 586; Bayard *v.* McLane, 3 Harr. (Del.) 139; Thompson *v.* Reynolds, 73 Ill. 11; Stearns *v.* Felker, 28 Wis. 594; Moody *v.* Harper, 38 Miss. 599; Meeks *v.* Dewberry, 57 Ga. 263; Boardman *v.* Thompson, 25 Iowa, 487; Martin *v.* Amos, 3 Ired. 201; Coleman *v.* Billings, 89 Ill. 183; Taylor *v.* Hinton, 66 Ga. 743; Million *v.* Ohnsorg, 10 Mo. App. 432; Atchison etc. R. R. Co. *v.* Johnson, 29 Kan. 218; Blaisdell *v.* Ahern, 144 Mass. 393; 59 Am. Rep. 99.

[2] Lathrop *v.* Amherst Bank, 9 Met. 489; Rust *v.* Larue, 4 Litt. 412; 14 Am. Dec. 172; Brown *v.* Beauchamp, 5 T. B. Mon. 413; 17 Am. Dec. 81; Davis *v.* Sharron, 15 B. Mon. 64; Thurston *v.* Percival, 1 Pick. 415; Byrd *v.* Odem, 9 Ala. 755; Scobey *v.* Rose, 13 Ind. 117; Quigley *v.* Thompson, 53 Ind. 317; Slade *v.* Rhodes, 2 Dev. & B. 24; Key *v.* Vattier, 1 Ohio, 152; Backus *v.* Byron, 4 Mich. 535. The court may dismiss an action at any stage on discovering that it is being prosecuted by the plaintiff's attorney on a champertous contract: Greenman *v.* Cohee, 61 Ind. 201.

[3] Bentinck *v.* Franklin, 38 Tex. 458; Mathewson *v.* Fitch, 22 Cal. 86; Ballard *v.* Carr, 48 Cal. 74; Phillips *v.* South Park Comm'rs, 119 Ill. 629. A contract between an attorney and client that the former is to have half the amount of a judgment for collecting it is not within the law against champerty if made after final judgment: Floyd *v.* Goodwin, 8 Yerg. 484; 29 Am. Dec. 130. A statute prohibiting advances by attorneys on notes left with them for collection does not apply to advances made to assist a needy client in supporting his family long after the suit was commenced, and after one trial has been had: Bristol *v.* Dann, 12 Wend. 142; 27 Am. Dec. 122.

a department of the government.[1] After the litigation is ended, or after judgment recovered, an attorney may lawfully purchase or take in payment of his fees a part of the property received or a part of the judgment.[2] Even where the contract is declared void for champerty, the attorney may recover the value of his services upon a *quantum meruit*.[3] It is no defense to an action that plaintiff has made a champertous contract for its prosecution.[4]

§ 2403. Contracts in Total Restraint of Trade Void — Restraint must be Reasonable. — An agreement in total and general restraint of trade in and throughout the limits of a particular country or state is void.[5] The grounds on which a contract in restraint of trade is held void are two. One is, the injury to the public by being deprived of the

[1] Stanton *v.* Embrey, 93 U. S. 548; Wright *v.* Tebbitts, 91 U. S. 252; Wylie *v.* Coxe, 15 How. 415; Trist *v.* Child, 21 Wall. 450; 1 McAr. 1 In New Jersey it is held that an attorney, as distinguished from an advocate, may lawfully contract for a certain percentage of the sum to be recovered as remuneration for his services: Schamp *v.* Schenck, 40 N. J. L. 195; 29 Am. Rep. 219.

[2] Walker *v.* Cuthbert, 10 Ala. 213; Ross *v.* R. R. Co., 55 Iowa, 691; McMicken *v.* Perin, 18 How. 507.

[3] Rust *v.* Larue, 4 Litt. 412; 14 Am. Dec. 172; Coldwell *v.* Shepherd, 6 T. B. Mon. 389; Stearns *v.* Felker, 28 Wis. 594; Merritt *v.* Lampert, 10 Paige, 352; 2 Denio, 607; Berrien *v.* McLane, 1 Hoff. Ch. 421.

[4] Cartwright *v.* Burnett, 3 McCrary, 60; Small *v.* R. R. Co., 55 Iowa, 582; Bent *v.* Priest, 10 Mo. App. 543; 86 Mo. 475.

[5] Alger *v.* Thacher, 19 Pick. 51; 31 Am. Dec. 119; Keeler *v.* Taylor, 53 Pa. St. 468; 91 Am. Dec. 221; Chappell *v.* Brockway, 21 Wend. 157; Lange *v.* Werk, 2 Ohio St. 519; Moore *v.* Bonnett, 40 Cal. 251; Lawrence *v.* Kidder, 10 Barb. 641; Wright *v.* Ryder, 36 Cal. 342; 95 Am. Dec. 187; Long *v.* Towl, 42 Mo. 545; 97 Am. Dec. 355; Berlin Works *v.* Parry, 71 Wis. 495; 5 Am. St. Rep. 236. In Alger *v.* Thacher, 19 Pick. 51, 31 Am. Dec. 119, the court say: "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: 1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression; 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves; 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill; 4. They prevent competition, and enhance prices; 5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family.[1] And a valid agreement of this kind must be established by clear and satisfactory proof in order to justify a court in restraining its breach by injunction. There must be no doubt or uncertainty in regard to its terms, or the consideration upon which it is founded.[2]

On the foregoing principle the following agreements have been held void: An agreement that a person will not carry on a certain business at any place where the other party might carry it on;[3] that he will never carry on or be concerned in the business of an iron founder;[4] that he will cease the trade of cabinet-maker;[5] that he will never be interested in any part of the United States in the business of manufacturing daguerreotype materials, or candles;[6] that he will never carry on the business of manufacturing boots and shoes within the state;[7] a contract between the lessor and lessee of a coal mine that the lessee should not give nor accept any order for goods and merchandise on any other store than the lessor's;[8] a contract, without any limitation as to space, that for and during the period of five years the covenantor would not, directly or indirectly, continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form a part;[9] a contract entered into between the president and trustees of a village and a private citizen, under which the latter was to erect a market-house for the village, the authorities undertaking, as a compensation to him, to confine the marketing of the citizens during

[1] Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 68.
[2] Hall's Appeal, 60 Pa. St. 458; 100 Am. Dec. 584.
[3] Thomas *v.* Miles, 3 Ohio St. 274.
[4] Alger *v.* Thacher, 19 Pick. 51; 31 Am. Dec. 119.
[5] Maier *v.* Homan, 4 Daly, 168.
[6] Dean *v.* Emerson, 102 Mass. 480; Lange *v.* Work, 2 Ohio St. 519.
[7] Taylor *v.* Blanchard, 13 Allen, 370; 90 Am. Dec. 203.
[8] Crawford *v.* Wick, 18 Ohio St. 190; 98 Am. Dec. 103.
[9] Bishop *v.* Palmer, 146 Mass. 469; 4 Am. St. Rep. 339.

market hours to the building and its vicinity, to appoint a proper officer for the enforcement of all ordinances relative to the market and the vending of market articles, and to control and rent the stalls for the benefit of the person erecting the building;[1] a contract by a patentee not to "manufacture, sell, or cause to be sold any sand-papering machines of any description."[2] So where a conveyance in fee contains a provision that the grantee shall not sell or dispose of the land in any way whatever, such provision is void.[3]

The question as to the validity of an agreement in restraint of trade depends upon whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is imposed. Whatever restraint is larger than the necessary protection of the party is oppressive on the other party, without any countervailing benefit, and being injurious to the interests of the public, is void on grounds of public policy.[4] On the

[1] Gale *v.* Kalamazoo, 23 Mich. 344; 9 Am. Rep. 80.

[2] Berlin Machine Works *v.* Perry, 71 Wis. 495; 5 Am. St. Rep. 236.

[3] Munroe *v.* Hall, 97 N. C. 206.

[4] Ward *v.* Byrne, 5 Mees. & W. 548; Hubbard *v.* Miller, 27 Mich. 15; 15 Am. Rep. 153; Mitchel *v.* Reynolds, 1 P. Wms. 281; 1 Smith's Lead. Cas. 705; Millan *v.* May, 11 Mees. & W. 652; Wentz *v.* Voght, 3 La. Ann. 16; Mullen *v.* Vettel, 25 How. Pr. 360; Goodman *v.* Henderson, 58 Ga. 567; Richardson *v.* Peacock, 33 N. J. Eq. 577; 28 N. J. Eq. 15; Pike *v.* Thomas, 4 Bibb, 486; 7 Am. Dec. 741; Beard *v.* Dennis, 6 Ind. 200; 63 Am. Dec. 380. In Wright *v.* Ryder, 36 Cal. 357, 95 Am. Dec. 186, the court say: "The general principles which govern contracts in restraint of trade are well settled, both in England and the United States. They proceed on the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecution of trades, callings, or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest. At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth, and to prohibit contracts which tended to abridge them. Hence the rule first established was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular circumscribed locality, either for a definite or unlimited period. But as population and trade increased, and there was consequently a greater competition in all useful pursuits, the necessity for the stringent rule which before prevailed had in a greater measure ceased, and the rule itself was greatly relaxed and modified. Instead of denouncing as void all contracts in restraint of trade, the rule, as relaxed, tolerated such as were restricted in their operations within reasonable limits. Hence it has been repeatedly decided, both in England and America, that whilst a contract by

other hand, a contract in restraint of trade is valid if it imposes no restriction upon one party not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it.[1]

The following agreements have been held void, because wider and more onerous than necessary for the protection of the other party, viz.: An agreement that a person will not practice dentistry in any part of a district two hundred miles in diameter;[2] that a person will not carry on the perfume business within six hundred miles of London;[3] that a person will not become a coal merchant for nine months;[4] a covenant not to engage for eight years in the manufacture of a certain yeast-powder, nor in any branch of the yeast-powder business;[5] a covenant made by a corporation of one state with a citizen of another not to run a steamboat, or allow its machinery to be used on any other boat, in any of the waters of certain states.[6]

But the following have been held valid, because no larger than necessary to protect the covenantee, viz.: An agreement on the sale of a magazine not to publish a similar magazine;[7] an agreement on the sale of the busi-

an artisan not to follow his calling at any time or place was an unreasonable restraint upon trade, contrary to public policy, and therefore void, nevertheless if he contracted for a valuable consideration not to pursue his occupation within certain reasonable, restricted limits, the contract was valid, and would be enforced."

[1] Hodge *v.* Sloan, 107 N. Y. 244; 1 Am. St. Rep. 816.

[2] Homer *v.* Graves, 7 Bing. 735, Tindal, C. J., saying: "We do not see how a better test can be applied to the question whether the restraint is reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. . . . . No precise rule can be laid down as to the limit of the restraint. The nature of the business must be considered. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law; and upon the bare inspection of this deed it must strike the mind of every man that a circle around York, traced for the distance of one hundred miles, incloses a much larger space than can be necessary for the plaintiff's protection."

[3] Price *v.* Green, 16 Mees. & W. 346.

[4] Ward *v.* Byrne, 5 Mees. & W. 548.

[5] Callahan *v.* Donnolly, 45 Cal. 152; 13 Am. Rep. 172.

[6] Oregon Steam Nav. Co. *v.* Hale, 1 Wash. 283; 34 Am. Rep. 803.

[7] Amsby *v.* Bentley, 14 Week. Rep. 630.

ness of an attorney, whose clientage extends throughout England, that he will not practice in England for twenty years;[1] an agreement not to engage in the business of a gas-fitter within twenty miles of a certain place;[2] nor to carry on the business of a soap manufacturer within forty miles of Lockport, New York, for ten years;[3] not to establish a newspaper in a certain city or within eight miles thereof for eight years;[4] not to do business as a banker in a certain place for ten years;[5] a covenant not to carry on the tobacco business on a certain route, embracing the cities of Albany and Schenectady, New York, and surrounding towns;[6] a covenant by A not to run any carts over the butcher route sold by him to B;[7] a covenant by A, in getting employment to travel for a house over a route, that if he quits traveling for the house, and travels over the same route for another house, he will pay the former fifty pounds;[8] a covenant by A, the owner of an exclusive ferry franchise between two points, on the sale of it to B, never to establish a rival ferry on his own lands while B should maintain the one sold;[9] a covenant not to be concerned in the stage business on the Washington and Baltimore road;[10] a covenant by A, on the sale of his bakery to B, never to solicit any trade from the customers who had traded on the sold premises;[11] a covenant by a dyer and scourer, who sells his establishment to B, at no time thereafter, directly or indirectly, to compete with B for the goodwill and custom sold;[12] a condition in a bond that M. shall cease to have any concern in the business of boating on

[1] Whittaker *v.* Howe, 3 Beav. 383.
[2] Clarkson *v.* Edge, 33 Beav. 227.
[3] Ross *v.* Sadgbeer, 21 Wend. 166.
[4] Noah *v.* Webb, 1 Edw. Ch. 604.
[5] Hoagland *v.* Segur, 38 N. J. L. 230. And see Whitfield *v.* Levy, 35 N. J. L. 145.
[6] Ewing *v.* Johnson, 34 How. Pr. 202.
[7] Perkins *v.* Clay, 54 N. H. 518.
[8] Mumford *v.* Gething, 6 Jur., N. S., 428; 29 L. J. C. P. 105; 8 Week. Rep. 187; 1 L. T., N. S., 64; 7 Com. B., N. S., 305.
[9] Westfall *v.* Mapes, 3 Grant Cas. 198.
[10] Davis *v.* Barney, 2 Gill & J. 382.
[11] Rannie *v.* Irving, 8 Scott N. R. 674. See Boutelle *v.* Smith, 116 Mass. 111.
[12] Guerand *v.* Dandelet, 32 Md. 561; 3 Am. Rep. 164. See Warren *v.* Jones, 51 Me. 146.

the Connecticut River, and shall give the obligees all the freighting of his goods at customary price, etc., and shall not, directly or indirectly, aid, countenance, or promote any other boatman;[1] a covenant by the purchaser of a steamboat that it should never be run on the upper Hudson;[2] an agreement by a physician transferring his practice and good-will to another physician for a price, and guaranteeing that "no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless the purchaser should commit some act which shall forfeit to him the confidence of the community," and that if any such competitor do so establish himself, the former will repay the sum paid.[3]

A doctrine formerly prevailed that the restraint must not only be justifiable upon the above grounds, but must also be supported by an adequate consideration; that is to say, a consideration equivalent in value to the restraint imposed. But the doctrine has been overruled, and it is now held as to such contracts, as with all others, that, provided there be a legally valid consideration, the value or adequacy of it is a matter to be left to the agreement of the parties, and cannot be inquired into or made matter of objection in law.[4]

§ 2404. Contracts Unlimited as to Space, but Limited as to Time.—A contract unlimited as to space, though limited in time, is held void; it is unreasonable, being more than the party requires for his protection. Thus the following agreements have been held void: That a person will not run a boat on any of the waters of the

[1] Palmer *v.* Stebbins, 3 Pick. 188; 15 Am. Dec. 204.
[2] Dunlop *v.* Gregory, 10 N. Y. 241; 61 Am. Dec. 746.
[3] Gilman *v.* Dwight, 13 Gray, 356; 74 Am. Dec. 634.
[4] Leake on Contracts, 737; Hitchcock *v.* Coker, 6 Ad. & E. 438; Guerand *v.* Dandelet, 32 Md. 561; 3 Am. Rep. 164; Lawrence *v.* Kidder, 10 Barb. 649; Duffy *v.* Shockey, 11 Ind. 70; 71 Am. Dec. 348; Pierce *v.* Fuller, 8 Mass. 223; 5 Am. Dec. 102.

state of California for the term of ten years from date;[1] that he will not carry on the trade of a coal merchant for twenty years;[2] or an innkeeper for ten years;[3] or the manufacturing of dies for thirty years;[4] a condition in a sale of a dry-goods business not to engage in that business for five years, with no limitation as to place.[5] But in a recent case in New York, where the defendant sold his match-manufacturing business, with the good-will, to a corporation then engaged in the same business, and covenanted with the purchaser and its assigns not to engage within ninety-nine years in the like business, except for the purchaser, in any of the United States or territories except Nevada and Montana, the covenant was held valid.[6]

§ 2405. Contracts Limited as to Space, but Unlimited as to Time.— But it is no objection to a contract in restraint of trade, reasonably limited in point of space, that it is unlimited in point of time, and may therefore continue during the whole life of the party restrained.[7] These agreements have therefore been held valid: The contract of a miller not to carry on the same business within thirty miles of Marion, Indiana;[8] of an apothecary not to set up business within twenty miles of Aylesbury, England;[9] of a butcher not to engage in the same business within five miles of the business sold;[10] of a physician not to practice within twenty miles of the residence of the covenantee;[11] of a milliner not to carry on the same busi-

[1] Wright *v.* Ryder, 36 Cal. 342; 95 Am. Dec. 186; Cal. Steam Nav. Co. *v.* Wright, 6 Cal. 259; 65 Am. Dec. 511.

[2] Ward *v.* Byrne, 5 Mees. & W. 548.

[3] Mossop *v.* Mason, 18 Grant (U. C.) 453.

[4] Saratoga Bank *v.* King, 44 N. Y. 87.

[5] Wiley *v.* Baumgardner, 97 Ind. 66; 49 Am. Rep. 427.

[6] Diamond Match Co. *v.* Roeber, 106 N. Y. 473; 60 Am. Rep. 465.

[7] Angier *v.* Webber, 14 Allen, 211; 92 Am. Dec. 748; Hitchcock *v.* Coker, 6 Ad. & E. 438; Pike *v.* Thomas, 4 Bibb, 486; 7 Am. Dec. 741; Bowser *v.* Bliss, 7 Blackf. 344; 43 Am. Dec. 93; Cook *v.* Johnson, 47 Conn. 178; 36 Am. Rep. 64; Duffy *v.* Shockey, 11 Ind. 70; 71 Am. Dec. 348; Worthy *v.* Jones, 11 Gray, 168; 71 Am. Dec. 696.

[8] Bowser *v.* Bliss, 7 Blackf. 344; 43 Am. Dec. 93.

[9] Hayward *v.* Young, 2 Chit. 407.

[10] Elves *v.* Crofts, 10 Com. B. 241.

[11] Butler *v.* Burleson, 16 Vt. 176.

ness, in the future, at any place which would interfere with the business sold;[1] of an attorney not to solicit business in London, or one hundred and fifty miles around;[2] of a saddler not to carry on business within ten miles of Croydon, England;[3] or of a tanner, within twenty miles of Waterville, New York;[4] not to sell liquors within one mile of Martinsville, Indiana;[5] not to practice medicine within six miles of Chili, Illinois,[6] or medicine within ten miles of Litchfield, Connecticut,[7] or law within twenty-one miles of Torquay, England,[8] or medicine within ten miles of Jenkintown, Pennsylvania,[9] or within fifteen miles of Fairfield, Indiana,[10] or within twelve miles of Chandlerville, Pennsylvania;[11] not to trade as merchant within ten miles of Marion, Pennsylvania;[12] or to act as surgeon or apothecary within seven miles of Macclesfield, England;[13] never to practice dentistry in the village of L.,[14] or medicine in a certain town;[15] never to practice law in Adell, Iowa;[16] not to carry on the grocery business in Springplace, Georgia;[17] or to carry on the well-driving business in Grand Haven, Michigan;[18] to discontinue a tavern in a town within half a mile of land sold;[19] not to trade in agricultural implements in Winterset, Iowa, and vicinity;[20] not to erect a tan-yard in Morganfield, Kentucky;[21] not to

[1] Morgan *v.* Perhamus, 36 Ohio St. 517; 38 Am. Rep. 607.
[2] Bunn *v.* Gay, 4 East, 190.
[3] Jones *v.* Heavens, L. R. 4 Ch. Div. 636.
[4] Nobles *v.* Bates, 7 Cow. 307.
[5] Harrison *v.* Lockhart, 25 Ind. 112.
[6] Linn *v.* Sigsbee, 67 Ill. 75.
[7] Cook *v.* Johnson, 47 Conn. 175; 36 Am. Rep. 64.
[8] Dendy *v.* Henderson, 11 Ex. 194; 24 L. J. Ex. 326.
[9] Bett's Appeal, 10 Week. Not. Cas. 431.
[10] Miller *v.* Elliott, 1 Ind. 484; 50 Am. Dec. 475.
[11] McClurg's Appeal, 58 Pa. St. 51.
[12] Gompers *v.* Rochester, 56 Pa. St. 194.
[13] Sainter *v.* Ferguson, 7 Com. B. 716; 13 Jur. 828.
[14] Cook *v.* Johnson, 47 Conn. 175; 36 Am. Rep. 64.
[15] Doty *v.* Martin, 32 Mich. 462; Dwight *v.* Hamilton, 113 Mass. 175; Linn *v.* Sigsbee, 67 Ill. 75; Gilman *v.* Dwight, 13 Gray, 356; Mott *v.* Mott, 11 Barb. 127; Haldeman *v.* Simonton, 55 Iowa, 144; Miller *v.* Elliott, 1 Ind. 484; 50 Am. Dec. 475; Niver *v.* Rossman, 18 Barb. 50.
[16] Smalley *v.* Greene, 52 Iowa, 241; 35 Am. Rep. 267.
[17] Jenkins *v.* Temples, 39 Ga. 655; 99 Am. Dec. 482.
[18] Hubbard *v.* Miller, 27 Mich. 15; 15 Am. Rep. 153.
[19] Heichew *v.* Hamilton, 3 G. Greene, 596.
[20] Hedge *v.* Lowe, 47 Iowa, 137.
[21] Grundy *v.* Edwards, 7 J. J. Marsh. 368; 23 Am. Dec. 409.

trade as shoe-dealer in Addison, New York;[1] not to deal in fancy-goods in Cincinnati, Ohio,[2] or in agricultural implements in Richmond, Indiana,[3] or in cabinet-ware in Buffalo, New York,[4] or in hardware in Hillsboro, Illinois;[5] not to engage in the grocery business within certain limits in Boston, Massachusetts;[6] not to practice as physician in Hastings, Michigan, or vicinity;[7] not to carry on a business thereafter, "in the vicinity of Marlborough";[8] not to work at the blacksmith trade within four miles of Postville, Iowa.[9]

In measuring the distance, the rule is to measure in a straight line as upon a map, and not according to the usual or practicable routes.[10]

§ 2406. Other Cases in Which an Unlimited or Partial Restraint is Valid.—On the sale of a patent-right, the restraint may be unlimited during the life of the patent.[11] Thus the following have been held valid: A covenant by the vendor on the sale of a patent that he will at no time "aid, assist, or encourage in any manner any competition" against the patent;[12] a covenant by the vendor of a patent that he will not engage in business in opposition to the vendee.[13] So on the sale of a secret process of manufacture of an article in general demand, which it is agreed shall be communicated for the exclusive benefit of the buyer, it becomes a reasonable and necessary stipulation that the seller shall not communicate the secret to any one, or carry on the manufacture in the future.[14]

[1] Curtiss *v.* Gokey, 68 N. Y. 300.
[2] Thomas *v.* Miles's Adm'r, 3 Ohio St. 274.
[3] Beard *v.* Dennis, 6 Ind. 200; 63 Am. Dec. 380.
[4] Weller *v.* Hersee, 10 Hun, 431.
[5] Stewart *v.* Challacombe, 11 Ill. App. 379.
[6] Pierce *v.* Woodward, 6 Pick. 206.
[7] Timmerman *v.* Dever, 52 Mich. 34; 50 Am. Rep. 240.
[8] Webster *v.* Buss, 61 N. H. 40; 60 Am. Rep. 317.
[9] Stafford *v.* Shortreed, 62 Iowa, 524.
[10] Mouflet *v.* Cole, L. R. 8 Ex. 32; Duignan *v.* Walker, 28 L. J. Ch. 867.
[11] Jones *v.* Lees, 1 Hurl. & N. 189; Stearns *v.* Barrett, 1 Pick. 443; 11 Am. Dec. 223.
[12] Morse etc. Mac. Co. *v.* Morse, 103 Mass. 73.
[13] Mackinnon Pen Co. *v.* Fountain Ink Co., 16 Jones & S. 442.
[14] Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Bryson *v.* Whitehead, 1 Sim. & St. 74; Jarvis *v.* Peck, 10 Paige,

Where a contract is made for the employment of a person in a certain trade or business, it may be accompanied with an absolute and unlimited restraint against his carrying on the same trade or business for another person, or in any other way, during the employment or for a reasonable time after the term of service has elapsed.[1] So where A and B were rival manufacturers of washing-machines, a contract under which A discontinued business, and became B's partner for five years, a scale of selling prices being agreed on, was not void as in restraint of trade.[2] And it seems that an agreement that one person will trade only with another person for a definite or indefinite period is valid.[3] Where a person agreed not to carry on the liquor business, the contract was held valid, on the ground that this business was not a trade to be encouraged.[4]

ILLUSTRATIONS.—A physician agrees, on selling his drug-store, to send all his prescriptions to be filled by one druggist. The agreement is valid: *Ward* v. *Hogan*, 11 Abb. N. C. 478.

118; Vickery *v.* Welch, 19 Pick. 523; Peabody *v.* Norfolk, 98 Mass. 452; 96 Am. Dec. 664; Alcock *v.* Giberton, 5 Duer, 76; Brewer *v.* Lamar, 69 Ga. 656; 47 Am. Rep. 766.

[1] Pilkington *v.* Scott, 15 Mees. & W. 657. Where the employment is for life, the restraint may be for life: Wallis *v.* Day, 2 Mees. & W. 273; Morris *v.* Colman, 18 Ves. 438; Stiff *v.* Cassel, 2 Jur., N. S., 348. In an English case, where a person, in consideration of obtaining employment from another, agreed that he would not for twelve months after leaving his employment sell similar goods within eight miles of the London post-office (Middleton *v.* Brown, 47 L. J. Ch. 411), the master of the rolls said: "I think that it is of the utmost importance to state that it is far more beneficial to men in the position of the defendant, in my opinion, that the order should be made, than that it should be refused. Men of this class obtain employment in certain terms, which prevent them on leaving that employment from making use of the knowledge which they have acquired during the employment to set up in business against their master, and destroy his business. Now, if we said that no such agreement as this would be binding on the man who entered into it, the result might be that no such business would be carried on, and that the men would get no employment at all, and therefore if we are to consider the consequences of what we are doing, I think the balance of convenience or inconvenience would show that we ought strictly to enforce such contracts."

[2] Dolph *v.* Troy Laundry Machinery Co., 28 Fed. Rep. 553.

[3] Lightner *v.* Menzel, 35 Cal. 452; Van Marten *v.* Babcock, 23 Barb. 633; Schwalin *v.* Holmes, 49 Cal. 655; Long *v.* Towle, 42 Mo. 545; Palmer *v.* Stebbins, 3 Pick. 188; 15 Am. Dec. 204; Brown *v.* Rounsavell, 78 Ill. 589; Levy *v.* Brown, 41 Wis. 172; Jones *v.* Edney, 3 Camp. 285.

[4] Harrison *v.* Lockhart, 25 Ind. 112.

A contracts to sell to no person but B any lime for six months. The covenant is valid: *Schwalin* v. *Holmes*, 49 Cal. 665. A agrees to sell to B all ore purchased by him after a certain date. The agreement is valid: *Long* v. *Towl*, 42 Mo. 545; 97 Am. Dec. 355. A binds himself not to write plays for any other than the H. theater. The contract is valid: *Morris* v. *Colman*, 18 Ves. 438. A contracts that he will write for a periodical, and will write for no other publication sold at less than a certain price, for one year. The agreement is valid: *Stiff* v. *Cassell*, 2 Jur., N. S., 348. A, a publican, in making settlement with his creditors, agrees to buy all beer of them. The agreement is valid: *Thornton* v. *Sherratt*, 8 Taunt. 529. A contracts to furnish B with sewing-machines at a discount, and upon credit, provided that B will deal exclusively with him. The contract of B is valid: *Brown* v. *Ronsavell*, 78 Ill. 589. A abandons the express business from L. to W., and covenants not to exercise the trade of carrier during his life. B gave him life employment as his assistant. The covenant is valid: *Wallis* v. *Day*, 2 Mees. & W. 273; 1 Jur. 73. A, the inventor of a patent, agrees with B that the latter shall become part owner of the patent, and A agrees to conduct exclusively the business of manufacturing the patented machines for part of the profits. The agreement is valid: *Kinsman* v. *Parkhurst*, 18 How. 289. B, in selling "Brewer's Lung Restorer," a patent medicine, covenanted "never to use or permit his name to be used on any preparation which could be used for the same purposes" as the medicine in question was used and sold for, or to impart the recipe thereof to any one. The covenant is valid: *Brewer* v. *Lamar*, 59 Ga. 756; 47 Am. Rep. 766. In the sale of a process for porcelain teeth, A covenanted not to carry on or be interested in the conduct of the business of manufacturing porcelain teeth or impart the secret to any one. The agreement is valid: *Alcock* v. *Giberton*, 5 Duer, 76. B sold out his business to A, agreeing not to engage in business in opposition to A so long as A should continue to do business. *Held*, valid: *Mackinnon Pen Co.* v. *Fountain Ink Co.*, 48 N. Y. Sup. Ct. 442. A dentist agreed to purchase artificial teeth of a manufacturer on condition that the latter would not sell such teeth to any person in the town where the dentist resided. *Held*, that the condition was valid: *Clark* v. *Crosby*, 37 Vt. 188. A sold two village lots adjoining the premises owned and occupied by himself to B, and in part consideration of such sale took from B a contract not to sell any spirituous liquors on the lots in less than a half-barrel. *Held*, that the contract was not void: *Laubenheimer* v. *Mann*, 17 Wis. 542. A leased a portion of a certain warehouse in the city of M. to B, for a specified term,

for the storage of wheat, and covenanted that during the term he would not purchase, store, or handle any wheat in the market of M., except under the direction of B. *Held*, that this covenant was not void: *Kellogg* v. *Larkin*, 3 Chand. 133.

§ 2407. Restraint may be Partially Void and Partially Valid. — If the terms of the restraint can be construed divisibly as to the limits, it may be valid as to the limits which are reasonable, although other limits imposed are excessive and unreasonable.[1] Thus where the restraint was to operate in London, or in any place in England or Scotland, where the employer might have been practising during the employment, the restraint was held good as to London, but void as to the rest, because possibly extending everywhere.[2] So a covenant not to exercise a certain trade within the cities of London or Westminster, or within six hundred miles of the same, was construed divisibly, and held good as to London and Westminster, but void as to the six hundred miles beyond, which was not divisible.[3] So a contract not to engage in a particular trade for a specified time, "in the city of St. Louis, or at any other place," is divisible, and as to the restriction imposed in St. Louis is not void as in restraint of trade.[4] Upon the same principle, a covenant by the articled clerk to a solicitor not to act for any person who had already been or who thereafter should become a client of the solicitor was held to be unreasonably large, but valid as to persons who were clients before and during the clerk's articles.[5] So where A agreed with B not to manufacture ochre in Lehigh County or elsewhere, it was held that he might be enjoined from manufacturing ochre

[1] Leake on Contracts, 740; Dean *v.* Emerson, 102 Mass. 480; Hubbard *v.* Miller, 27 Mich. 15; 15 Am. Rep. 153. See *contra*, More *v.* Bonnet, 40 Cal. 251; 6 Am. Rep. 621. But the rule that contracts in partial restraint of trade are valid does not apply to a contract by a corporation to abandon a part of its duty to the public: Chicago Gas Light Co. *v.* Gas Light Co., 121 Ill. 530; 2 Am. St. Rep. 124.

[2] Mallan *v.* May, 11 Mees. & W. 653; Chesman *v.* Nainby, 2 Ld. Raym. 1456.

[3] Price *v.* Green, 16 Mees. & W. 346.

[4] Peltz *v.* Eichele, 62 Mo. 171.

[5] Nicholls *v.* Stretton, 10 Q. B. 346.

in Lehigh County.[1] But an action will not lie on a promise made for one entire consideration, a part of which is unlawful as being in restraint of trade, if there has been no apportionment made or means of apportionment furnished by the parties themselves.[2]

§ 2408. What is Breach of Contract. — A contract by S. & C., in selling out a bakery "that they will not, or either of them, hereafter engage in the business of bakers in the town of F., and will not, directly or indirectly, engage in any business or do any act that shall interfere with the business thus purchased, for the sale of bread on the bread routes heretofore connected with said business" for five years, is broken if S. drove a bread-cart in F. on his former routes, and supplied his former customers with bread, though acting as the hired servant of a baker in another town.[3] A contract by a hotel-keeper to buy no ice except of B is violated by purchasing for his hotel a small quantity from another than B.[4] A contract not to manufacture nor put up a patented article during the existence of the patent prohibits the party from putting up the article covered by the patent, and also from putting up articles resembling those described in the patent, and liable to compete therewith in market.[5] A covenant not to again carry on a retail butcher business on the covenantor's own account, or to operate any butcher business, except a wholesale business, is broken by taking charge of a retail butcher business for another.[6] An agreement not to "have a marble shop" within a certain territory is broken by soliciting and filling orders within that territory, the workshop being outside.[7] An agreement of a stage proprietor not to be concerned, "direct

[1] Smith's Appeal, 113 Pa. St. 579.
[2] Bishop v. Palmer, 146 Mass. 469; 4 Am. St. Rep. 339.
[3] Boutelle v. Smith, 116 Mass. 111.
[4] Twomey v. People's Ice Co., 66 Cal. 233.
[5] Billings v. Ames, 32 Mo. 265.
[6] Finger v. Hahn, 42 N. J. Eq. 606.
[7] Duffy v. Shockey, 11 Ind. 70; 71 Am. Dec. 348.

or indirect," in any opposition line, is violated by his lending money to proprietors of a rival line, for the purpose of enabling them to sustain it.[1] A stipulation that A will not run, or suffer to be run or employed, any steamer in which he is now or may be interested, on certain waters, is broken if a steamer owned by the covenantor at the time of the covenant is run on those waters by purchasers from him.[2] An agreement not at any time to send or ship to New York any poultry coming from certain districts is broken by engaging in New York in the sale of poultry on commission, ordering all his supplies to be shipped from those districts, sometimes in advance of his sales, sometimes to fill contracts of sale previously made.[3] On a covenant not to engage in or carry on the same business, within certain limits, it is not necessary to show that the covenantor had solicited custom within the prescribed limits, if he, having established himself in the same business outside of the district, systematically, and for profit, to an extent to constitute the carrying on of a business, did send to the houses of customers within the district, and receive orders, and deliver goods, although it was done at the request of the customers, and without his solicitation; but if, occasionally, to oblige an old customer, he sold to him goods, this is not a breach.[4]

An agreement not to sell milk within a certain town is not broken by selling milk outside the town to a party not an inhabitant of the town, with knowledge that such purchaser himself intends to sell within the town.[5] A contract by an expressman to withdraw from that business on his own account on a certain railroad, and not to do any express business over any other road running between certain points, is not broken by his working as

[1] Davis *v.* Barney, 2 Gill & J. 382.
[2] California Steam Navigation Co. *v.* Wright, 8 Cal. 585.
[3] Richardson *v.* Peacock, 33 N. J. Eq. 597.
[4] Sander *v.* Hoffman, 64 N. Y. 248.
[5] Smith *v.* Martin, 80 Ind. 260; 41 Am. Rep. 806.

messenger for another expressman on another road between the same points.[1] One who agrees not to practice as a physician in a certain city "and vicinity" is prevented from practicing within ten miles of the city limits.[2] An obligation of a physician that he would not locate himself and practice in his profession within certain limits, and if he should so locate himself or practice, that he would pay a stipulated sum for every month that he should so practice, is forfeited if he practice within those limits, though he resides without them.[3] A contract not to practice dentistry on one's own account, or by any agent, within certain limits, is not violated by working for another.[4] Where, by a written contract, defendant, a physician, sold his medical practice to plaintiff and agreed not to "resettle" in the same town, it was held that he was bound thereby not to again take up his residence in such town for the practice of his profession, but that he might practice in that locality while residing elsewhere.[5] Where a physician sold out his business, reserving the right to practice in "special cases," and he afterwards attended a few chronic cases on which he had been employed, and also some relatives, in the neighborhood, this was held no breach of his agreement not to practice except as aforesaid.[6] An agreement by A with B that he will not for himself open, or cause to be opened, a billiard or eating saloon in W., is not violated when A opens and manages such a saloon as the agent and servant of C.[7]

§ 2409. Combinations of Workmen. — Combinations of workmen for the purpose of restricting and controlling the freedom of labor, as by supporting strikes, are illegal

[1] Eastern Ex. Co. *v.* Meserve, 60 N. H. 198.
[2] Timmerman *v.* Dever, 52 Mich. 34; 50 Am. Rep. 240.
[3] Smith *v.* Smith, 4 Wend. 468.
[4] Bowers *v.* Whittle, 63 N. H. 147; 56 Am. Rep. 499.
[5] Haldeman *v.* Simonton, 55 Iowa, 144.
[6] Powers *v.* Strout, 67 Iowa, 341.
[7] Tabor *v.* Blake, 61 N. H. 83.

at common law.[1] "Such combinations cannot create any mutual obligation having the legal effect of binding each other not to work, or not to employ, unless upon terms allowed by the combination."[2] But public policy does not forbid combinations of workmen who are bound by no contract for the purpose of obtaining reasonable prices for their labor.[3]

§ 2410. Combinations of Employers and Traders.— A combination of employers for purposes operating in restraint of trade, or the free employment of labor, is illegal upon the ground of public policy.[4] Thus the following have been held void: An agreement by several commercial firms by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of the majority of them;[5] a covenant between citizens of Washington Territory and an Oregon corporation not to run a steamboat, or allow its machinery to be employed on any other boat, in any of the waters of Oregon or California, and many of the waters of Washington Territory;[6] an agreement between two large coal-mining companies that one would take all the coal the other should mine, and the other should not sell to any third parties;[7] a grant of the "exclusive" right of way and privilege to construct and maintain tubing for the transportation of oil through a tract of two

[1] Leake on Contracts, 741.

[2] Farrer *v.* Close, L. R. 4 Q. B. 612.

[3] Sayre *v.* Benevolent Ass'n, 1 Duvall, 143; 85 Am. Dec. 613. See Master and Servant, Title Agency.

[4] Hooker *v.* Vandewater, 4 Denio, 349; 47 Am. Dec. 258; Morris Run Coal Co. *v.* Barclay, 68 Pa. St. 173; 8 Am. Rep. 159; Hartford etc. R. R. Co. *v.* New York etc. R. R. Co., 3 Rob. (N. Y.) 416; Clancy *v.* Onondaga etc. Co., 62 Barb. 375; Kurtz *v.* Citizens' Oil Co., 72 Pa. St. 392; Arnott *v.* Coal Co., 68 N. Y. 558; 23 Am. Rep. 190; Santa Clara etc. Co. *v.* Hayes, 76 Cal. 387. A loan for the purpose of making a "corner" in wheat cannot be recovered: Raymond *v.* Leavitt, 46 Mich. 447; 41 Am. Rep. 170; Sampson *v.* Shaw, 101 Mass. 145; 3 Am. Rep. 327. It is lawful for parties to associate to buy property at public sale: Smith *v.* Ullman, 58 Md. 183; 42 Am. Rep. 329.

[5] India Ass'n *v.* Kock, 14 La. Ann. 168.

[6] Oregon Steam Nav. Co. *v.* Hale, 1 Wash. Ter. 283.

[7] Arnott *v.* Coal Co., 68 N. Y. 558; 23 Am. Rep. 190.

thousand acres of land;[1] an agreement between the grain-dealers of a town which purported to be a contract of partnership for the purpose of dealing in grain, but the real object of which was to form a secret combination to control the grain trade and suppress competition;[2] a contract by which one railroad company agrees with another not to do business between certain points, and not to connect with, or take business from, or give business to, any other railroad which may be afterwards constructed, and not accept freight and passengers from a certain other company, except at higher than the usual rates;[3] a bond entered into by the mill-owners of a district conditioned to carry on their works, in regard to wages and the engaging of workmen and times of work, according to the resolutions of a majority of their number, during a period of twelve months;[4] an agreement by the proprietors of transportation lines, whereby they agree to stock all the earnings of their boats, to appoint an agent to act under the advice of a committee and do such acts as the committee advises, to give such committee the power of making rates of transportation which shall govern the association, to make returns in writing to the agent each month of all freight and passengers transported for the preceding month, computed at such rates as the committee had established for that month, and of the tolls on the same, to make divisions and settlements on certain specified days;[5] an agreement of a voluntary association of salt manufacturers that no member should sell any salt during the continuance of the association, except by retail at the factory, and at prices fixed by a committee;[6] an agreement between several stockholders

[1] West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; 46 Am. Rep. 527.

[2] Craft v. McConoughy, 79 Ill. 346; 22 Am. Rep. 171.

[3] Denver etc. R. R. Co. v. R. R. R. Co., 15 Fed. Rep. 650.

[4] Hilton v. Eckersley, 6 El. & B. 66.

[5] Stanton v. Allen, 5 Denio, 434; 49 Am. Dec. 282.

[6] Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

of a corporation not to sell their stock nor to give powers to vote;[1] a contract between common carriers that shippers shall be denied the advantage of improvements or new facilities adapted to the needs of transportation;[2] a covenant by a canal company not to allow to others a drawback from established rates on the transportation of merchandise over its canal, which it agreed to allow to the covenantee;[3] an agreement among the respective proprietors of five several lines of boats, engaged in transporting persons and freight, on the Erie and Oswego canals, to run for the remainder of the season at certain agreed rates for freight and passage, which the parties might change when they should deem expedient, and to divide the net earnings in certain proportions;[4] a secret partnership agreement to stifle or diminish competitive bidding on public works;[5] an agreement by members of an association, the terms of which are, that no one should carry the freight for less than the rate fixed by the association, without regard to the question whether the rate was reasonable or not;[6] a contract entered into between two gas companies, that one of them shall discontinue for a hundred years the manufacture and sale of illuminating gas in a city in which it had been granted by the legislature the right to manufacture and sell such gas.[7]

But the following have been held not illegal, viz.: A contract between a railroad company and a telegraph company that the former will not allow any other telegraph company to construct a line along its road;[8] a contract

[1] Fisher *v.* Bush, 35 Hun, 641.
[2] Wiggins Ferry Co. *v.* R. R. Co., 5 Mo. App. 347.
[3] Stewart *v.* R. R. Co., 38 N. J. L. 505.
[4] Hooker *v.* Vandewater, 4 Denio, 349; 47 Am. Dec. 258.
[5] Hunter *v.* Pfeiffer, 108 Ind. 197.
[6] Sayre *v.* Benevolent Ass'n, 1 Duvall, 143; 85 Am. Dec. 613.
[7] Chicago Gas Light Co. *v.* Gas Light Co., 121 Ill. 530; 2 Am. St. Rep. 124.
[8] Western Union Tel. Co. *v.* Tel. Co., 7 Biss. 367; Western Union Tel. Co. *v.* R. R. Co., 86 Ill. 246; 29 Am. Rep. 28. But see, *contra*, Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160; 38 Am. Rep. 781; Western Union Tel. Co. *v.* R. R. Co., 3 McCrary, 130; Western Union Tel. Co. *v.* Tel. Co., 23 Fed. Rep. 12; Baltimore etc. Tel. Co. *v.* Western Union Tel. Co., 24 Fed. Rep. 319.

between a manufacturer and a storekeeper that the former shall furnish the trade of his workmen to the latter, and that the latter shall pay eight per cent on all sales;[1] an agreement between proprietors of parks that neither shall pay any bonus to parties enjoying his park;[2] a contract whereby the mill-owners of Milwaukee agree to pay to the warehousemen a certain amount per bushel on wheat coming into the Milwaukee market, so far as they are able to control the same, and the warehousemen agree to give the mill-owners the full, absolute, and uninterrupted control of the Milwaukee wheat market for a certain time, as far as they are able, by virtue of their capacity as warehousemen, or vessel and dock owners, and not to deal in wheat during that time, except as agents of the mill-owners;[3] an agreement whereby three manufacturers of a certain kind of curtain-fixtures, under letters patent, owned by them severally, form themselves into a corporation which is to have the sole right for three years to sell all the fixtures made, neither manufacturer to dispose of his stock without the assent of a majority of the three.[4]

ILLUSTRATIONS. — A railroad company, needing a ferry to complete transportation at its terminus, agreed with a ferry company to give it all its ferrying business at that point, and not to employ any other ferry. The ferry company agreed to furnish the requisite facilities, and transact the business promptly and with dispatch. *Held*, not void: *Wiggins Ferry Co.* v. *R. R. Co.*, 73 Mo. 389; 39 Am. Rep. 519. T. agreed that he would not pay for ore he might thereafter purchase, taken from L.'s land, a greater price than L. was paying for such ore, and that he would not pay a greater price for ore taken from other lands than L. was paying for ore taken from his own land, and agreed to sell L. all ore thereafter purchased by him, for which he was to receive a certain sum per thousand pounds. *Held*, that the contract was not void: *Long* v. *Towl*, 42 Mo. 546; 97 Am. Dec. 355.

[1] George *v.* East Tennessee Coal Co., 15 Lea, 455; 54 Am. Rep. 425.

[2] Koehler *v.* Feuerbacher, 2 Mo. App. 11.

[3] Kellogg *v.* Larkin, 3 Pinn. 123; 3 Chand. 133; 56 Am. Dec. 164.

[4] Central Shade Roller Co. *v.* Cushman, 143 Mass. 353.

§ 2411. Contracts Entered into on Sunday Void.— At common law there was no distinction made between contracts entered into on Sunday and on any other day in the week.[1] But by a statute passed in England in the reign of Charles II. it was enacted that "no tradesman, artificer, or other person whatsoever, should do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day, or any part thereof (works of necessity and charity only excepted), and that every person of the age of fourteen years offending in the premises should forfeit five shillings."[2] Contracts made in violation of this statute were held by the English courts to be void.[3] Similar statutes (but differing in phraseology)[4] are in force in nearly every state in the Union; and the same construction has been adopted as in England in regard to contracts entered into that day, i. e., they are void, because made in violation of a statute;[5] the

[1] Tucker *v.* West, 29 Ark. 386; Kepner *v.* Keefer, 6 Watts, 231; 31 Am. Dec. 460; Adams *v.* Gay, 19 Vt. 365; Bloom *v.* Richards, 2 Ohio St. 387; Amis *v.* Kyle, 2 Yerg. 31; 24 Am. Dec. 463. The federal courts will not adjudge a contract made on Sunday to be against the public policy of a state, unless it be so declared in the constitution, laws, or judicial decisions thereof: Swann *v.* Swann, 21 Fed. Rep. 299. So a contract made in Connecticut after sunset on Sunday, being valid in that state, may be enforced in Rhode Island, although the law of the latter state prohibits business in one's ordinary calling during the whole day of Sunday: Brown *v.* Browning, 15 R. I. 422; 2 Am. St. Rep. 908.

[2] 29 Car. II.

[3] Fennell *v.* Riddler, 5 Barn. & C. 406.

[4] Giving a promissory note is "business of a secular calling" within a statute: Varney *v.* French, 19 N. H. 233. It is an "act of common labor": Reynolds *v.* Stevenson, 4 Ind. 619. But see Glover *v.* Cheatham, 19 Mo. App. 656.

[5] Tucker *v.* West, 29 Ark. 386; Allen *v.* Gardiner, 7 R. I. 22; Hazard *v.* Day, 14 Allen, 487; 92 Am. Dec. 790; Adams *v.* Hamell, 2 Doug. (Mich.) 73; 43 Am. Dec. 455. In Cranson *v.* Goss, 107 Mass. 439, 9 Am. Rep. 45, it is said: "The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. . . . . It is upon this principle that a bond, promissory note, or other executory contract made and delivered upon the Lord's day is incapable of being enforced, or, as is sometimes said, absolutely void as between the parties: Pattee *v.* Greely, 13 Met. 284; Merriam *v.* Stearns, 10 Cush. 257; Day *v.* McAllister, 15 Gray, 433; Fowle *v.* Larrabee, 26 Me. 464; Pope *v.* Linn, 50 Me. 83; Allen *v.* Deming, 14 N. H. 133; 40 Am. Dec. 179; Finn *v.* Donahue, 35 Conn. 216. And it follows that, as between them, it is incapable of being confirmed or ratified; for, in suing upon the original contract after its ratification by the defendant, it

general rule being that where contracts are made invalid when entered into on Sunday, no action will lie by a party thereto, either to enforce it or to escape from its consequences, or for any deceit practiced in procuring the contract.[1]

Therefore a person cannot recover for money loaned to another on Sunday;[2] nor a livery-stable keeper for the

would still be necessary for the plaintiff, in proving his case, to show his own illegal act in making the contract at first: Day *v.* McAllister, and Pope *v.* Linn, above cited; Ladd *v.* Rogers, 11 Allen, 209; Bradley *v.* Rea, 14 Allen, 20. Upon the same principle, if the contract has been executed by the illegal act of both parties on the Lord's day, the law will not assist either to avoid the effect of his own unlawful act. Thus if the amount of a pre-existing debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor, while retaining the amount so paid, to treat the payment as a nullity, and enforce payment over again: White *v.* Buss, 3 Cush. 448, 450; Mills *v.* Western Bank, 10 Cush. 22; Johnson *v.* Willis, 7 Gray, 164. If a chattel has been delivered by the owner to another person on the Lord's day by way of bailment or pledge, the latter may retain it for the special purpose for which he received it; or, if it has been delivered to him on the Lord's day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all: Scarfe *v.* Morgan, 4 Mees. & W. 270; King *v.* Green, 6 Allen, 139; Myers *v.* Meinrath, 101 Mass. 366; Horton *v.* Buffington, 105 Mass. 399; Smith *v.* Bean, 15 N. H. 577; Greene *v.* Godfrey, 44 Me. 25. If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied: Simpson *v.* Nicholls, 3 Mees. & W. 240; 5 Mees. & W. 702, note; 3 Mees. & W., Am. ed., 244, note; Ladd *v.* Rogers, 11 Allen, 209." Making a contract is not "common labor": Horacek *v.* Keebler, 5 Neb. 355; or "labor" that disturbs the peace and good order of society: Richmond *v.* Moore, 107 Ill. 429; 47 Am. Rep. 445. Executing a mortgage is not the exercise of an act the "ordinary calling" of the citizen: Hellams *v.* Abercrombie, 15 S. C. 110; 40 Am. Rep. 684. Procuring signatures of tax-payers to a petition to a board of supervisors to issue railroad-aid bonds is "business": De Forth *v.* R. R. Co., 52 Wis. 320; 38 Am. Rep. 737. So is lending money to be repaid on demand: Troewert *v.* Decker, 51 Wis. 46; 37 Am. Rep. 808.

[1] Robeson *v.* French, 12 Met. 24; 45 Am. Dec. 236; Pattee *v.* Greeley, 13 Met. 289; Gregg *v.* Wyman, 4 Cush. 325; Myers *v.* Meinrath, 101 Mass. 369; Woodman *v.* Hubbard, 25 N. H. 67; 57 Am. Dec. 310; Hazard *v.* Day, 14 Allen, 487; 92 Am. Dec. 790. No action lies for fraudulent representations inducing to a contract made on Sunday, although the representations were criminal: Gunderson *v.* Richardson, 56 Iowa, 56; 41 Am. Rep. 81. But one who on Sunday procures goods by false representations cannot on that ground escape liability from arrest in a civil action, although the law prohibits the sale of that class of goods on Sunday: O'Shea *v.* Kohn, 33 Hun, 114. The seller of a horse on Sunday can recover it if he was fraudulently made drunk by the buyer: Block *v.* McMurry, 56 Miss. 217; 31 Am. Rep. 357.

[2] Meader *v.* White, 66 Me. 90; 22 Am. Rep. 551.

hire of a horse let on Sunday.[1] So these are void: A warranty made on a sale or exchange of horses on Sunday;[2] a contract of insurance made on that day;[3] a promissory note made and delivered on that day;[4] or a deed;[5] or an offer to rescind a contract;[6] or an exchange of property;[7] or a demand made for the delivery of an article of merchandise;[8] or a demand of any kind;[9] or a contract for the publication of an advertisement in a newspaper to be published, sold, and distributed on Sunday;[10] or a contract to make a balloon ascension upon Sunday, from a garden open to the public on payment of admission fees;[11] or a contract to run a steamboat upon Sundays, partly in Michigan and partly in Canadian waters.[12]

A contract which could not be lawfully made on Sunday cannot, if lawfully made, be rescinded on that day.[13] A promise to repay money borrowed on the Lord's day, whether in writing, verbal, or implied, cannot be enforced.[14] A bailee's breach of his Sunday contract for the exercise of care in the Sunday use of the thing bailed is not actionable.[15] A partial payment upon a note to the payee, who is a merchant, will not take the case out of the statute of limitations when made on Sunday.[16] Although a contract of sale on Sunday is void, yet the seller cannot recover the chattels sold, nor damages for their

[1] Welden *v.* Chappel, 8 R. I. 230; Stewart *v.* Davis, 31 Ark. 518; 25 Am. Rep. 576.

[2] Finley *v.* Quirk, 9 Minn. 194; 86 Am. Dec. 93; Murphy *v.* Simpson, 14 B. Mon. 337; Bradley *v.* Rea, 14 Allen, 20; Lyon *v.* Strong, 6 Vt. 219.

[3] Heller *v.* Crawford, 37 Ind. 279.

[4] O'Donnell *v.* Sweeney, 5 Ala. 467; 39 Am. Dec. 337; Allen *v.* Deming, 14 N. H. 133; 40 Am. Dec. 179; Morgan *v.* Bailey, 59 Ga. 683.

[5] Love *v.* Wells, 25 Ind. 503; 87 Am. Dec. 375.

[6] Merritt *v.* Robinson, 35 Ark. 483.

[7] Myers *v.* Meinrath, 101 Mass. 366; 3 Am. Rep. 368.

[8] Brackett *v.* Edgerton, 14 Minn. 174; 100 Am. Dec. 211.

[9] Delameter *v.* Miller, 1 Cow. 75; 13 Am. Dec. 512.

[10] Smith *v.* Wilcox, 24 N. Y. 353; 19 Barb. 581; 25 Barb. 341.

[11] Brunnett *v.* Blark, 1 Buff. (N. Y.) Sup. Ct. 500.

[12] Gauthier *v.* Cole, 17 Fed. Rep. 716.

[13] Benedict *v.* Batchelder, 24 Mich. 425; 9 Am. Rep. 130.

[14] Meader *v.* White, 66 Me. 90; 22 Am. Rep. 551.

[15] Chenette *v.* Teehan, 63 N. H. 149.

[16] Dennis *v.* Sharman, 31 Ga. 607.

value.[1] Replevin lies for a horse sold and delivered on Sunday, although the contract was ratified on a week-day.[2]

The following have been held not within the statute, and therefore not void, viz.: A contract between a farmer and a laborer for a year's hire, made on Sunday;[3] a promise by an attorney, acting for his client, to be responsible for part of the debt owing by him;[4] an agreement with a farmer to have a mare covered by a stallion on Sunday;[5] executing a will or performing a marriage;[6] a tender of

[1] Block v. McMurry, 56 Miss. 217; 31 Am. Rep. 357.

[2] Winfield v. Dodge, 45 Mich. 355; 40 Am. Rep. 476.

[3] R. v. Whitnash, 7 Barn. & C. 596.

[4] Peate v. Dickens, 1 Cromp. M. & R. 422. This and the next case went on the construction of the words "ordinary calling" in the English statute.

[5] Scarfe v. Morgan, 4 Mees. & W. 270.

[6] Bennett v. Brooks, 9 Allen, 118, the court saying: "A just interpretation of the statutes for the due observance of the Lord's day does not require us to hold that the execution of a will on that day is an act within the implied prohibition of the law. It is a mistake to suppose that the legislature intended to forbid or restrain every act of a secular or temporal nature not coming within the exception in the statute, so that on the day set apart for religious services and observances nothing else could be done, unless it might be properly designated as a charitable or necessary act. The purpose of the statute is only to prevent the carrying on of the usual and ordinary callings and occupations of men by which they gain a livelihood or acquire property, and the doing of acts such as usually belong to or are connected with worldly affairs and the common transactions of business. . . . . Many acts of a secular or temporal nature may be done without interfering essentially with the due observance of the Lord's day or causing injury to individuals (in the words of the preamble already cited) 'as members of a Christian society,' or creating 'disturbance to well-disposed persons,' or occasioning 'great damage to the community.' These results might follow from the general and indiscriminate pursuit on the sabbath of any of the usual avocations and employments connected with the daily business and labor by which civilized society is supported and held together. But no such evils would be caused by the doing of acts which, although in a strict sense they might be deemed to be in the nature of work, labor, or business, and to have relation only to worldly affairs, are nevertheless of an exceptional character, and not incident to or connected with the ordinary transactions which constitute common business of every-day life. An example will illustrate the meaning which we intend to convey. A contract of marriage under our law is a purely civil contract. Nothing is added to its legal force or obligation by entering into it with religious rights or ceremonies. Yet no one would contend that it would be unlawful for a civil magistrate to complete the execution of such a contract by joining parties in matrimony on the sabbath, or that a contract of marriage entered into before a magistrate and solemnized by a magistrate would be invalid because the act was done on the Lord's day. The reason is obvious. Such an act does not come within the category of transactions which are connected with or appertain to ordinary worldly business. It is neither 'labor, business, or work,' in the sense in which these words are used by the legislature. The same

chattels made on Sunday, the day of performance following on that day.[1] An executed contract of sale, although made on Sunday, is not void, either between the parties thereto or third persons.[2] The purchaser of property delivered to him without payment, under a contract made on Sunday, may maintain replevin for it if the seller retakes it without his consent, without paying or offering to pay.[3] Sunday begins at twelve o'clock at night and ends in twenty-four hours thereafter,[4] except in Connecticut, where it is from sunset on Saturday to sunset on Sunday.[5]

§ 2412. **Contracts Partly Executed on Sunday.**— Contracts not finally executed on Sunday are not void because some of the terms may have been agreed to on that day;[6] as an agreement made on Sunday, but executed and carried into effect on a week-day.[7] Therefore the following have been held good: A note signed on Sunday, but not delivered until a week-day;[8] a replevin bond signed on Sunday, but not delivered until a week-day;[9] a bond for costs signed on Sunday, but filed on another day;[10] a sale

reason applies with still greater force to the execution of a will on the sabbath. It is not within the prohibition implied from the penalty imposed by the statute." In Gangwere's Estate, 14 Pa. St. 417, 53 Am. Dec. 554, the court was equally divided on the question whether a marriage contract executed on Sunday was legal or not.

[1] Amis *v.* Kyle, 2 Yerg. 31; 24 Am. Dec. 463.

[2] Moore *v.* Kendall, 2 Pinn. 99; 1 Chand. 33; 52 Am. Dec. 145.

[3] Kinney *v.* McDermot, 55 Iowa, 674; 39 Am. Rep. 191.

[4] Kilgour *v.* Miles, 6 Gill & J. 268; Huidekoper *v.* Cotton, 3 Watts, 56.

[5] Finn *v.* Donahue, 35 Conn. 216.

[6] Merrill *v.* Downs, 41 N. H. 72; Bradley *v.* Rea, 103 Mass. 188; 4 Am. Rep. 524; Stackpole *v.* Symonds, 23 N. H. 227; Mosely *v.* Van Hooser, 6 Lea, 286; 40 Am. Rep. 37; Uhler *v.* Applegate, 26 Pa. St. 140 (whether the contract was made on Sunday or on a week-day is a question for the jury: Id.); Beitenman's Appeal, 55 Pa. St. 183; Dickinson *v.* Richmond, 97 Mass. 45; Butler *v.* Lee, 11 Ala. 885; 46 Am. Dec. 231. But see Allen *v.* Deming, 14 N. H. 133; 40 Am. Dec. 179; Foreman *v.* Ahl, 55 Pa. St. 325; Bradley *v.* Rea, 14 Allen, 20.

[7] Taylor *v.* Young, 61 Wis. 314.

[8] King *v.* Fleming, 72 Ill. 21; 22 Am. Rep. 131; Dohoney *v.* Dohoney, 7 Bush, 217; Hilton *v.* Houghton, 35 Me. 143; Hill *v.* Dunham, 7 Gray, 543; Adams *v.* Gay, 19 Vt. 358; Stacy *v.* Kemp, 97 Mass. 166; Lovejoy *v.* Whipple, 18 Vt. 379; 46 Am. Dec. 157; Burns *v.* Moore, 76 Ala. 339; 52 Am. Rep. 332; Bill *v.* Mabin, 69 Iowa, 408.

[9] Prather *v.* Harlan, 6 Bush, 185.

[10] Hall *v.* Parker, 37 Mich. 590; 26 Am. Rep. 540. And see Com. *v.* Kendig, 2 Pa. St. 448.

of goods agreed upon on Sunday, and the goods selected and set apart, the delivery being made on Monday;[1] a contract for an exchange of horses made on Saturday including the discharge of a debt due from one of the parties to the other, the purchaser of the horse taking possession on Sunday;[2] a request for service made on the Lord's day, but not accepted on that day;[3] a letter, accepting a prior proposal, written on Saturday, left by the writer on Sunday, with request to carry it to the post-office on Monday;[4] a request to perform services by a letter written and delivered on Sunday, there being no acceptance on that day of the terms of such letter;[5] a contract for the sale of land made on a week-day, and a note for the purchase-money executed on Sunday;[6] a contract made on Sunday by an agent without authority and without the knowledge of his principal, but ratified by the principal on a week-day;[7] a contract for labor entered into on the sabbath, the contract being afterwards performed by the laborer;[8] an account stated for liquor sold on Sunday, provided the account was not stated on Sunday;[9] a bill of sale of personal property, drawn and executed on Monday, an account of stock having been taken on Sunday;[10] a contract made on Sunday for the sale of land, where the vendor demands the purchase-money on a week-day.[11]

§ 2413. Negotiable Paper — Bona Fide Holder. — While negotiable paper drawn, delivered, and accepted on Sunday is void between the parties, yet if it is falsely dated as of another day, and comes to the hands of an innocent holder, who takes it for value without notice,

[1] Rosenblatt *v.* Townsley, 73 Mo. 536.
[2] Peake *v.* Conlan, 43 Iowa, 297.
[3] Dickinson *v.* Richmond, 97 Mass. 45.
[4] Bryant *v.* Booze, 55 Ga. 438.
[5] Tuckerman *v.* Hinkley, 9 Allen, 452.
[6] Tucker *v.* West, 29 Ark. 386.
[7] Gibbs etc. Mfg. Co. *v.* Brucker, 111 U. S. 597.
[8] Meriwether *v.* Smith, 44 Ga. 541.
[9] Melchoir *v.* McCarty, 31 Wis. 252; 11 Am. Rep. 605.
[10] Luebbering *v.* Oberkoetter, 1 Mo. App. 393.
[11] McKinney *v.* Demby, 44 Ark. 74.

and in the due course of trade, the acceptor is estopped in a suit against him by such holder.[1]

§ 2414. Ratification of Contract Made on Sunday.— As to whether a contract made on Sunday, and therefore void, can be ratified by a subsequent agreement, there is a conflict in the decisions; those of some states holding that a ratification may be made;[2] others that it may not.[3] If one, having taken property on Sunday in payment of an antecedent debt, afterwards sends a receipt for both the property and the debt, it is a ratification of the transaction.[4] So evidence of an admission made on Sunday of a part payment of a promissory note on a week-day is admissible.[5] The execution of a note by an accommodation surety on Sunday is void, although the note is dated on a week-day, and is delivered by the principal to an innocent payee on a week-day; and a request by the surety to forbear suit, and his notifying the payee of property of the principal to which he might resort, do not amount to a ratification.[6]

§ 2415. Judicial Acts Performed on Sunday Void.— Judicial acts performed on Sunday are void.[7] Thus the following acts done on Sunday have been held void, viz.: Advertising a tax-sale in a Sunday paper;[8] instructing the jury;[9] issuing or serving a writ in a civil case;[10] or a

[1] Ball *v.* Powers, 62 Ga. 757; Heise *v.* Bumpuss, 40 Ark. 575; Cranson *v.* Goss, 107 Mass. 439; 9 Am. Rep. 45; Johns *v.* Bailey, 45 Iowa, 241; Knox *v.* Clifford, 38 Wis. 651; 20 Am. Rep. 28; Beman *v.* Wessels, 53 Mich. 594.

[2] Adams *v.* Gay, 19 Vt. 358; Campbell *v.* Young, 9 Bush, 245; Melchoir *v.* McCarty, 31 Wis. 256; 11 Am. Rep. 605; Tucker *v.* West, 29 Ark. 386; Sayles *v.* Wellman, 10 R. I. 468; Gwinn *v.* Simes, 61 Mo. 335; Harrison *v.* Colton, 31 Iowa, 16; Blood *v.* Bates, 31 Vt. 147; Winchell *v.* Carey, 115 Mass. 151; 15 Am. Rep. 151; Clough *v.* Davis, 9 N. H. 500; Van Hoven *v.* Irish, 3 McCrary, 443; Sumner *v.* Jones, 24 Vt. 317; Flinn *v.* St. John, 51 Vt. 334.

[3] Plaistead *v.* Palmer, 63 Me. 576; Day *v.* McAllister, 15 Gray, 433; Kountz *v.* Price, 40 Miss. 341.

[4] Wilson *v.* Milligan, 75 Mo. 41.

[5] Beardsley *v.* Hall, 36 Conn. 270; 4 Am. Rep. 74.

[6] Parker *v.* Pitts, 73 Ind. 597; 38 Am. Rep. 155.

[7] Coleman *v.* Henderson, Litt. Sel. Cas. 171; 12 Am. Dec. 290; Story *v.* Elliott, 8 Cow. 28; 18 Am. Dec. 423.

[8] Sawyer *v.* Cargile, 72 Ga. 290.

[9] State *v.* Green, 37 Mo. 466; Pulling *v.* People, 8 Barb. 384.

[10] Story *v.* Elliott, 8 Cow. 27; 18 Am. Dec. 423; Shaw *v.* Dodge, 5 N. H.

warrant of arrest in a civil case;[1] levying an execution;[2] making an award;[3] pronouncing or entering a judgment;[4] or a criminal judgment by a justice of the peace;[5] returning an execution;[6] serving a notice.[7]

§ 2416. **Ministerial Acts Valid.** — But ministerial acts are valid;[8] as, for example, rendering a verdict;[9] making a foreclosure sale;[10] or taking the privy examination of a married woman to her deed.[11] Publication of preliminary and other ordinances of a street improvement, required to be published in a paper of general circulation, is valid, though made in a paper published only on Sunday.[12]

§ 2417. **Traveling on Sunday.** — In most of the New England states, a person traveling on Sunday, and injured by a defective highway, cannot recover damages of the municipal corporation.[13] This doctrine, however, has

462; Butler *v.* Kelsey, 15 Johns. 177; Sterns's Appeal, 64 Pa. St. 447; Van Vechten *v.* Paddock, 12 Johns. 178; 7 Am. Dec. 303; Haynes *v.* Sledge, 2 Port. 530; 27 Am. Dec. 665. So on Thanksgiving Day when that day is made a holiday by statute: Gladwin *v.* Lewis, 6 Conn. 49; 16 Am. Dec. 33.

[1] Moore *v.* Hagan, 2 Duvall, 437.

[2] Bland *v.* Whitfield, 1 Jones, 122; Pierce *v.* Hill, 9 Port. 151.

[3] Story *v.* Elliott, 8 Cow. 27; 18 Am. Dec. 423.

[4] Arthur *v.* Mosby, 2 Bibb, 589; Houghtaling *v.* Osborn, 15 Johns. 118; Blood *v.* Bates, 31 Vt. 147; Allen *v.* Godfrey, 44 N. Y. 433.

[5] Ex parte White, 15 Nev. 146; 37 Am. Rep. 466.

[6] Peck *v.* Cavell, 16 Mich. 9.

[7] Chesapeake etc. Co. *v.* Bradley, 4 Cranch C. C. 193; Field *v.* Park, 20 Johns. 140.

[8] Continuing a cause over from Saturday to Monday is not keeping a court open on the sabbath: Vanderwerker *v.* People, 5 Wend. 530.

[9] Baxter *v.* People, 8 Ill. 368; Huidekoper *v.* Cotton, 3 Watts, 56; Rosser *v.* McColly, 9 Ind. 589; Webber *v.* Merrill, 34 N. H. 202; Reid *v.* State, 53 Ala. 402; 25 Am. Rep. 627; Van Riper *v.* Van Riper, 4 N. J. L. 156; 7 Am. Dec. 576. In Huidekoper *v.* Cotton, 3 Watts, 56, the court say: "The objection goes to a great length; if it is unlawful or sinful to deliver the verdict verbally after Sunday has commenced, it must be equally unlawful to write and seal it up to be delivered on Monday; nay, to deliberate upon and discuss it after Sunday had commenced. Now, whether it would be less sinful, in fact and in its consequences, to keep a jury from Saturday night until Monday morning locked up without food, or to permit them to give a verdict, go home, and attend religious worship, we leave to casuists to discuss."

[10] Sayles *v.* Smith, 12 Wend. 57; 27 Am. Dec. 117.

[11] Lucas *v.* Larkin, 85 Tenn. 355.

[12] Hastings *v.* Columbus, 42 Ohio St. 585.

[13] Hamilton *v.* Boston, 14 Allen, 475; Jones *v.* Andover, 10 Allen, 19; Bosworth *v.* Swansey, 10 Met. 363; 43 Am. Dec. 441; Conolly *v.* Boston, 117 Mass. 64; 19 Am. Rep. 396; Johnson *v.* Irasburgh, 47 Vt. 28; 19 Am. Rep. 111; Hinckley *v.* Penobscot, 42 Me. 89; Cratty *v.* Bangor, 57 Me. 423; 2 Am. Rep. 56; Feital *v.* R. R. Co., 109

been combated and discountenanced in other states.[1] In Massachusetts it is held that if a man, while traveling on Sunday, in violation of the statute, fastens his horse at the side of the road, and the horse is injured by the negligent act of another in driving against it, he cannot sustain an action of tort for the injury.[2] So where one person, in assisting another to clean out a wheel-pit on Sunday, was injured, it was held he could not recover.[3] So in Massachusetts, it has been held that damages cannot be recovered of a railroad company for an injury sustained at a railroad crossing through negligence of the company's servants while the plaintiff was traveling on Sunday.[4] But in New York and other states a carrier cannot set up as a defense to an injury to a passenger that the latter was traveling on Sunday.[5] It is held in Pennsylvania that the fact that a person was on Sunday unlawfully engaged in a worldly employment does not prevent him from recovering damages against one who obstructs a navigable stream;[6] and a traveler on Sunday may recover for injuries then received by a ferocious dog.[7] So in

Mass. 398; 12 Am. Rep. 720; Davis *v.* Somerville, 128 Mass. 594; 35 Am. Rep. 399; Davidson *v.* Portland, 69 Me. 116; 31 Am. Rep. 253.

[1] Dutton *v.* Weare, 17 N. H. 34; 43 Am. Dec. 590; Schmid *v.* Humphrey, 48 Iowa, 652; 30 Am. Rep. 414; Sutton *v.* Wauwatosa, 29 Wis. 21; 9 Am. Rep. 534; Platz *v.* Cohoes, 89 N. Y. 219; 42 Am. Rep. 286. To walk out on Sunday a short distance, as for exercise, is not traveling: Hamilton *v.* Boston, 14 Allen, 25; O'Connell *v.* Lewiston, 65 Me. 34; 20 Am. Rep. 673; Davidson *v.* Portland, 69 Me. 116; 31 Am. Rep. 253. Nor to make a social call: Barker *v.* Worcester, 139 Mass. 74.

[2] Lyons *v.* Desotelle, 124 Mass. 387.

[3] McGrath *v.* Merwin, 112 Mass. 467; 17 Am. Rep. 119. A conductor of a street-railway car, performing his ordinary duties on Sunday, is both "laboring" and "traveling," and can maintain no action for an injury by collision with a car of another company while so employed: Day *v.* R. R. Co., 135 Mass. 113; 46 Am. Rep. 447. See Platz *v.* Cohoes, 89 N. Y. 219; 42 Am. Rep. 286.

[4] Smith *v.* R. R. Co., 120 Mass. 490; 21 Am. Rep. 538; or on a horse-railroad: Stanton *v.* R. R. Co., 14 Allen, 485; or on a vessel: Wallace *v.* Nav. Co., 134 Mass. 95; 45 Am. Rep. 301; or while traveling on a railroad train: Bucher *v.* R. R. Co., 131 Mass. 156; 41 Am. Rep. 216.

[5] Carroll *v.* R. R. Co., 58 N. Y. 126; 17 Am. Rep. 221; Mohney *v.* Cook, 26 Pa. St. 342; 67 Am. Dec. 419; Opsahl *v.* Judd, 30 Minn. 126. An action will not lie against a carrier for breach of its general duty in failing to carry passengers on Sunday: Walsh *v.* R. R. Co., 42 Wis. 23; 24 Am. Rep. 376.

[6] Mohney *v.* Cook, 26 Pa. St. 342; 67 Am. Dec. 419.

[7] White *v.* Lang, 128 Mass. 598; 35 Am. Rep. 402; Schmid *v.* Humphrey, 48 Iowa, 652; 30 Am. Rep. 414.

Indiana, that the injury for which a brakeman sues the company employing him was received on Sunday does not preclude a recovery, although it is unlawful to labor on Sunday.[1] In New Jersey, under a statute prohibiting Sunday traveling, save for necessity or charity, with the proviso that railroad companies may run one train a day each way "for the accommodation of citizens of this state," a passenger on such train, though not traveling for necessity or charity, may recover for the negligence of the company.[2]

§ 2418. **Hiring Horses on Sunday.**—It is held in Rhode Island that the owner of a horse who lets it on Sunday to be driven for pleasure to a particular place cannot recover damages in case the hirer negligently injures it, or drives it to a different place, and it is injured.[3] The same doctrine was at one time held in Massachusetts,[4] but it is now abandoned,[5] and has likewise been denied in other states.[6]

§ 2419. **Works of Necessity or Charity.**— The statutes generally except acts or works of necessity or charity. "By the word 'necessity,'" it is said, "we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of any particular case."[7] The following

[1] Louisville etc. R. R. Co. *v.* Frawley, 110 Ind. 18.

[2] Smith *v.* R. R. Co., 46 N. J. L. 7.

[3] Wheldon *v.* Chappel, 8 R. I. 230; Smith *v.* Rollins, 11 R. I. 464; 23 Am. Rep. 509. And see Parker *v.* Latner, 60 Me. 528; 11 Am. Rep. 210; Berrill *v.* Gibbs, 1 Pa. L. J. 313.

[4] Gregg *v.* Wyman, 4 Cush. 322.

[5] Hall *v.* Corcoran, 107 Mass. 251; 9 Am. Rep. 30.

[6] Woodman *v.* Hubbard, 25 N. H. 67; 7 Am. Dec. 310; Morton *v.* Gloster, 56 Me. 520; Frost *v.* Plumb, 40 Conn. 111; 16 Am. Rep. 18; Nodine *v.* Doherty, 46 Barb. 59; Stewart *v.* Davis, 31 Ark. 518; 25 Am. Rep. 576.

[7] Flagg *v.* Millbury, 4 Cush. 243; Wilkinson *v.* State, 59 Ind. 416; 26 Am. Rep. 84. In Com. *v.* Sampson, 97 Mass. 407, it is said: "To save life, or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in the case of fire, flood, or tempest, or other unusual peril, — would unquestionably be acts which fall within the exception. But it is no sufficient excuse for work on the Lord's day that it is more convenient or profitable if then done than it would be to defer or omit it: Jones *v.* Andover, 10 Allen, 18. And we think that the ruling at the trial in this case was, on the whole, right, and that taking the sea-weed was not a

have been held "works of necessity or charity": To go to procure medicine for a sick child;[1] or to bring a maid-servant home, in order that she may prepare needful food for the family;[2] or to go a distance of eight miles to visit one's children, who are properly away from home;[3] or to go to visit a sick friend in need of assistance;[4] or to do pilotage;[5] or contracting for the relief of a sick pauper;[6] or to preserve property exposed to imminent danger;[7] or baking provisions for customers;[8] or selling cigars to the guests of a hotel by the hotel-keeper;[9] or running a railroad train for passengers, mails, and express matter;[10] or carrying cattle;[11] or making a subscription to the building of a church;[12] or repairing the tracks of a railroad;[13] or a contract made on Sunday to secure decent burial for one's wife, and to secure the presence of relatives at her funeral;[14] or the labor expended by a man on Sunday in shipping car-trucks which he had sold and agreed to ship, when any longer delay was very dangerous from the risk of the navigation closing for the season, and the captain of the vessel (the only one procurable) refused to receive them

work of necessity within the meaning of the law. If a vessel had been wrecked upon the beach, it would have been lawful to work on Sunday for the preservation of property which might be lost by delay. But if the fish in the bay or the birds on the shore happened to be uncommonly abundant on the Lord's day, it is equally clear that it would furnish no excuse for fishing or shooting on that day. How it would be if a whale happened to be stranded on the shore, we need not determine."

[1] Gorman *v.* Lowell, 117 Mass. 65.

[2] Crosman *v.* Lynn, 121 Mass. 301; citing Rex *v.* Cox, 2 Burr. 785; Rex *v.* Younger, 5 Term Rep. 449.

[3] McClary *v.* Lowell, 44 Vt. 116; 8 Am. Rep. 366.

[4] Doyle *v.* R. R. Co., 118 Mass. 195; 19 Am. Rep. 431.

[5] Perkins *v.* O'Mahoney, 131 Mass. 546.

[6] Aldrich *v.* Blackstone, 128 Mass. 148.

[7] Whitcomb *v.* Gilman, 35 Vt. 297; Parmelee *v.* Wilks, 22 Barb. 539.

[8] R. *v.* Cox, 2 Burr. 787.

[9] Carver *v.* State, 69 Ind. 61; 35 Am. Rep. 205. *Aliter* where the defendant is a keeper of a cigar-store, and sells to customers as on week-days: Mueller *v.* State, 76 Ind. 310; 40 Am. Rep. 245.

[10] Com. *v.* R. R. Co., 80 Ky. 291; 44 Am. Rep. 475; or street-cars: Augusta etc. R. R. Co. *v.* Renz, 55 Ga. 126.

[11] Philadelphia etc. R. R. Co. *v.* Lehman, 56 Md. 209; 40 Am. Rep. 415.

[12] Allen *v.* Duffie, 43 Mich. 1; 38 Am. Rep. 159; Dale *v.* Knepp, 98 Pa. St. 389; 42 Am. Rep. 624. *Contra*, Catlett *v.* Trustees, 62 Ind. 365; 30 Am. Rep. 197.

[13] Yonoski *v.* State, 79 Ind. 393; 41 Am. Rep. 614.

[14] Gulf, Colorado etc. R. R. Co. *v.* Levy, 59 Tex. 542.

at any later day;[1] or a sale of partnership goods for the purpose of paying off a debt;[2] or if the exigency is such as to render it necessary that a creditor, in order to save his debt or procure indemnity against liability, should contract with the debtor on Sunday, such contract is not void.[3] But to prevent an inconvenient delay in traveling does not make the execution of a note a "work of necessity."[4]

Some judicial acts have been considered works of "necessity"; as, for example, the entering into a recognizance in a criminal case;[5] issuing an injunction to prevent a railroad from tearing up a street on the Lord's day;[6] the taking of bail in a criminal case.[7]

But one who works by night instead of by day, and who travels on the Lord's day for the purpose of seeing his master, and inducing him to change his hours of labor from night to day time, in order that he may sleep better, is not traveling from necessity or charity.[8] Neither is going a short distance on Sunday evening, in company with several other persons, by invitation, to the house of a friend, for the purpose of spending the evening in pleasure;[9] nor one who is going to a house which he has hired, and to which he intends to move the next day, to see if it is cleaned;[10] nor one who cleans out a wheel-pit on Sunday, in order that the mill may work on Monday;[11] nor traveling on Sunday for the purpose of supplying the market with fresh meat on Monday morning, although circumstances prevent its being carried upon any other

[1] McGatrick *v.* Wason, 4 Ohio St. 566.
[2] Schneider *v.* Sansom, 62 Tex. 201; 50 Am. Rep. 521.
[3] Hooper *v.* Edwards, 18 Ala. 280; 25 Ala. 528.
[4] Burns *v.* Moore, 76 Ala. 339; 52 Am. Rep. 332.
[5] Watts *v.* Com., 5 Bush, 309; Johnston *v.* People, 31 Ill. 469. See Rice *v.* Com., 3 Bush, 15.
[6] Langabier *v.* R. R. Co., 64 Ill. 243; 16 Am. Rep. 550.
[7] Weldon *v.* Colquitt, 62 Ga. 449; 35 Am. Rep. 128.
[8] Connolly *v.* Boston, 117 Mass. 64; 19 Am. Rep. 396.
[9] Cratty *v.* Bangor, 57 Me. 423.
[10] Smith *v.* R. R. Co., 120 Mass. 490; 21 Am. Rep. 538.
[11] McGrath *v.* Merwin, 112 Mass. 467; 17 Am. Rep. 119.

day;[1] nor the delivery of a quantity of flour on board a steamboat on Sunday, in order to avoid the liability of delay in getting it to market, occasioned by danger of the closing of navigation.[2] The necessity must be actual; an honest belief only that the act is necessary is not sufficient.[3]

§ 2420. **Wagers not Illegal at Common Law—By Statute.** — A wager is "a contract by A to pay money to B on the happening of a given event, in consideration of B paying money to him on the event not happening"; and the contract may be substantially a wager, if the ultimate effect be wholly dependent upon the happening of the event, although it be disguised in the form of a sale of goods or a remuneration for services dependent upon the event.[4] At common law, wagers were not unlawful *per se*, the question of their legality depending in each instance upon the legality of the matter of the wager.[5] Thus wagers of the following kind have been considered legal and enforceable: That a certain person was the owner of a certain piece of property;[6] that the world is not round;[7] that a railroad would or would not be finished to a certain place by a certain time;[8] as to the weight of a dressed hog;[9] as to the result of a presidential election

[1] Jones *v.* Andover, 10 Allen, 18.

[2] Pate *v.* Wright, 30 Ind. 476; 95 Am. Dec. 705.

[3] Johnson *v.* Irasburgh, 47 Vt. 28; 19 Am. Rep. 111.

[4] Leake on Contracts, 748; citing Hampden *v.* Walsh, L. R. 1 Q. B. D. 192; Higginson *v.* Simpson, L. R. 2 C. P. D. 76.

[5] Hampden *v.* Walsh, L. R. 1 Q. B. Div. 192; Johnston *v.* Russell, 37 Cal. 670; Winchester *v.* Nutter, 52 N. H. 507; 13 Am. Rep. 93; Wheeler *v.* Spencer, 15 Conn. 28; Haskett *v.* Wootan, 1 Nott & McC. 180; Johnson *v.* Fall, 6 Cal. 359; 65 Am. Dec. 518; Bailes *v.* Williams, 15 Tex. 318; Smith *v.* Smith, 21 Ill. 244; 74 Am. Dec. 100; Dewes *v.* Miller, 5 Harr. (Del.) 347; Trenton etc. Ins. Co. *v.* Johnson, 24 N. J. L. 583; Kirkland *v.* Randon, 8 Tex. 10; 58 Am. Dec. 94; Wheeler *v.* Friend, 22 Tex. 683; Stoddard *v.* Martin, 1 R. I. 1; 19 Am. Dec. 643; Dunham *v.* Strother, 1 Tex. 89; 46 Am. Dec. 97; Campbell *v.* Richardson, 10 Johns. 406.

[6] Good *v.* Elliot, 3 Term Rep. 693.

[7] Hampden *v.* Walsh, L. R. 1 Q. B. D. 192.

[8] Johnson *v.* Fall, 6 Cal. 359; 65 Am. Dec. 518; Beadles *v.* Bless, 27 Ill. 320; 81 Am. Dec. 231.

[9] Mulford *v.* Bowen, 9 N. J. L. 315.

in another state, made after the vote has been cast.[1] But if the matter of a wager was against public policy, or was indecent, or was injurious to third parties, then the wager was held void;[2] as, for example, that a certain person would or would not be elected to a certain office;[3] that a certain person would not marry;[4] that a certain bird will win a cock-fight;[5] that a person will not be convicted of a crime;[6] as to the duration of the life of a person;[7] as to the age of a young woman, or whether she squints, or has a mole on her breast;[8] whether a certain person is a man or a woman;[9] whether a girl will have a child by a certain day;[10] as to which horse will win a race;[11] as to whether an execution can be collected against a certain firm;[12] as to how many members the next state legislature would be composed of.[13] But in some of the states, even in the absence of any statute, all wager contracts, without exception, are held to be void.[14] And in most of the

[1] Smith *v.* Smith, 21 Ill. 244; 74 Am. Dec. 100. But see Gregory *v.* King, 58 Ill. 170; 11 Am. Rep. 56, where this decision is virtually overruled.

[2] Rust *v.* Gott, 9 Cow. 169; 18 Am. Dec. 497.

[3] Because it gave the parties an interest in corrupting the vote or falsifying the count: Bunn *v.* Riker, 4 Johns. 426; 4 Am. Dec. 292; Vischer *v.* Yates, 11 Johns. 21; Rust *v.* Gott, 9 Cow. 169; 18 Am. Dec. 497; Hill *v.* Kidd, 43 Cal. 615; Stoddard *v.* Martin, 1 R. I. 1; 19 Am. Dec. 643; Johnston *v.* Russell, 37 Cal. 670; Gregory *v.* King, 58 Ill. 169; 11 Am. Rep. 56; Wroth *v.* Johnson, 4 Har. & McH. 284; Murdock *v.* Kilbourne, 6 Wis. 468; Worthington *v.* Black, 13 Ind. 344; Wheeler *v.* Spencer, 15 Conn. 28; Conner *v.* Ragland, 15 B. Mon. 634; Hickerson *v.* Benson, 8 Mo. 8; 40 Am. Dec. 115; Tarleton *v.* Baker, 18 Vt. 9; 44 Am. Dec. 358; Jeffrey *v.* Ficklin, 3 Ark. 227; 36 Am. Dec. 456.

[4] Because contracts in restraint of marriage are void: Hartley *v.* Rice, 10 East, 22.

[5] Because cock-fighting is illegal: Brogden *v.* Marriott, 3 Bing. N. C. 88; or a sparring-match: Elgerton *v.* Finzeman, 1 Car. & P. 613.

[6] Because it raises an interest in a party to interfere with the course of justice: Evans *v.* Jones, 5 Mees. & W. 77.

[7] Gilbert *v.* Sykes, 16 East, 150; Phillips *v.* Ives, 1 Rawle, 42.

[8] See Good *v.* Elliott, 3 Term Rep. 698; Phillips *v.* Ives, 1 Rawle, 42.

[9] Da Costa *v.* Jones, 2 Cowp. 729.

[10] Ditchburn *v.* Goldsmith, 4 Camp. 152.

[11] Gridley *v.* Dorn, 57 Cal. 78; 40 Am. Rep. 110.

[12] Boughner *v.* Meyer, 5 Col. 71; 40 Am. Rep. 139.

[13] Smith *v.* Brown, 3 Tex. 360; 49 Am. Dec. 748.

[14] Winchester *v.* Nutter, 52 N. H. 507; 13 Am. Rep. 93; Rice *v.* Gist, 1 Strob. 82; Harding *v.* Walker, 1 Hemp. 53; Thomas *v.* Cronise, 16 Ohio, 54; Lewis *v.* Littlefield, 15 Me. 233; West *v.* Holmes, 26 Vt. 530; Wilkinson *v.* Tousley, 16 Minn. 299; 10 Am. Rep. 139; Edgell *v.* McLaughlin, 6 Whart. 176; Hoit *v.* Hodge, 6 N. H. 104; 25 Am. Dec. 451; Monroe *v.* Smelly, 25 Tex. 586; 78 Am. Dec. 541; Lucas *v.* Harper, 24 Ohio St. 328.

states, the common-law rule as to wagers has been altered by statute.[1]

§ 2421. **Recovery from Stake-holder.** — If money is placed in the hands of a stake-holder to abide the event, either party, while it is in his hands, may notify the stake-holder not to pay it over to the winner; and if he does so, may recover the amount from him.[2] And this is so, according to the weight of authority, whether at the time of the notice the event upon which the money was staked has or has not happened.[3] But in a few cases it has been ruled that no recovery can be had where the stake-holder is not notified before the happening of the event, though the money has not yet been paid over to the winner.[4] A payment by a stake-holder of the stake after the result of the election was generally known, but before a certificate was issued to the party elected, is no defense to an action by the loser, who, after the payment, but before the issue

[1] 1 Stimson's American Statute Law; Fuller *v.* Hutchings, 10 Cal. 523; 70 Am. Dec. 747. A purse offered to the horse that will trot in the best time less than a given time is not a wager: Misner *v.* Knapp, 13 Or. 135; 57 Am. Rep. 6. Horse-trotting or horse-racing is a "game" within a statute: Ellis *v.* Beale, 18 Me. 337; 36 Am. Dec. 726; Tatman *v.* Strader, 23 Ill. 493; Shropshire *v.* Glascock, 4 Mo. 536; 31 Am. Dec. 189; Boynton *v.* Curle, 4 Mo. 599; and so is a foot-race: Swaggard *v.* Hancock, 25 Mo. App. 596. But a gubernatorial election is not a "game": Woodcock *v.* McQueen, 11 Ind. 14. Money won at billiards is money won at play: Lardo *v.* Fougeres, 3 Cranch C. C. 655.

[2] Reynolds *v.* McKinney, 4 Kan. 94; 89 Am. Dec. 602; Hardy *v.* Hunt, 11 Cal. 343; 70 Am. Dec. 787. But where the stake-holder pays over the money to the winner without any previous notice or demand by the loser, he is not liable: Perkins *v.* Eaton, 5 N. H. 152; McCullam *v.* Gourley, 8 Johns. 147; Gregory *v.* King, 58 Ill. 169; 11 Am. Rep. 56; Bates *v.* Lancaster, 10 Humph. 134; 51 Am. Dec. 696.

[3] Wheeler *v.* Spencer, 15 Conn. 27; Hale *v.* Sherwood, 40 Conn. 332; 16 Am. Rep. 37; Conner *v.* Ragland, 15 B. Mon. 634; Stacy *v.* Foss, 19 Me. 335; 36 Am. Dec. 755; Shannon *v.* Baumer, 10 Iowa, 210; Bledsoe *v.* Thompson, 6 Rich. 44; 57 Am. Dec. 777; Perkins *v.* Eaton, 3 N. H. 152; Moore *v.* Trippe, 20 N. J. L. 263; Ivery *v.* Phifer, 11 Ala. 535; Alford *v.* Burke, 21 Ga. 46; 68 Am. Dec. 449; Hampden *v.* Walsh, L. R. 1 Q. B. D. 192; Garrison *v.* McGregor, 51 Ill. 473; Silgal *v.* Funk, 3 Pittsb. Rep. 28; Cleveland *v.* Wolff, 7 Kan. 184; Fisher *v.* Hildreth, 117 Mass. 558; Huncke *v.* Francis, 27 N. J. L. 55; Perkins *v.* Hyde, 6 Yerg. 288; Burroughs *v.* Hunt, 13 Ind. 178; Wilkinson *v.* Touseley, 16 Minn. 299; 10 Am. Rep. 139; Gilmore *v.* Woodcock, 69 Me. 118; 31 Am. Rep. 255; West *v.* Holmes, 26 Vt. 534; Shackleford *v.* Ward, 3 Ala. 37; 36 Am. Dec. 435; Jeffrey *v.* Ficklin, 3 Ark. 227; 36 Am. Dec. 456; McAllister *v.* Hoffman, 16 Serg. & R. 147; 16 Am. Dec. 556.

[4] Yates *v.* Foot, 12 Johns. 1; Johnston *v.* Russell, 37 Cal. 670; Hill *v.* Kidd, 43 Cal. 615.

of the certificate, notified the stake-holder not to pay.[1] The notice must come from the owner of the money. It is not sufficient that it comes from the agent of the owner who made the bet and deposited the money.[2] The statutes of some states, to prevent betting and gaming, give the party to a wager an unconditional right to recover his stake from the stake-holder. The fact that the stake-holder, after the determination of the wager, paid the stakes to the winner by direction or consent of the loser is no defense to an action afterwards brought by the latter under the statute.[3] A court of chancery has jurisdiction to compel a stake-holder to return money deposited with him on a wager; but it must be alleged in the bill that the money is still in his hands, and that he refuses to return it after a demand.[4] In Louisiana a stake-holder paying over a bet without the consent of a majority of the judges of a race is liable to the winner if the latter cannot collect the amount from the loser.[5] A joint action cannot be maintained against the stake-holder by several contributors to the stake.[6] Where the deposit was made in the bills of a bank which had failed before the suit was brought, and no demand had been made of the stake-holder, and there was no evidence that he had parted with the bills, it was held that he was only liable for the value of them at the time of bringing the action.[7] Where the property is not placed in the stake-holder's hands, he cannot take it from the loser and deliver it to the winner, unless authorized by the loser otherwise than by the bet.[8] Where a man won a chattel on a bet, and left it with the stake-holder to take care of until he should call for it, in his action of trover

[1] Lewis *v.* Bruton, 74 Ala. 317; 49 Am. Rep. 816.
[2] Reichly *v.* Maclay, 2 Watts & S. 59.
[3] Storey *v.* Brennan, 15 N. Y. 524; 69 Am. Dec. 629.
[4] Petillon *v.* Hipple, 90 Ill. 420; 32 Am. Rep. 31.
[5] Dauterive *v.* Broussard, 5 Rob. (La.) 516; 39 Am. Dec. 550.
[6] Mytinger *v.* Springer, 3 Watts & S. 405; 38 Am. Dec. 774.
[7] Fowler *v.* Van Surdan, 1 Denio, 557.
[8] Franklin *v.* Stoddart, 34 Minn. 247.

based on the stake-holder's refusal to give it up, the fact that the bet was illegal was held immaterial.[1]

§ 2422. **Recovery from Other Party.** — Money or other property lost at play, or on a bet or wager, cannot, after it has been paid over to the winner, be recovered from him.[2] But if one party rescinds the bet before the event happens, he may recover the money or property bet, generally, of course, from the stake-holder, but if the other party has it, then from him.[3]

§ 2423. **Securities Given for Gaming Debts.** — A note, bond, or other security given in consideration of money lost at gambling is void,[4] even, it is held in some cases, in the hands of a *bona fide* holder for value.[5] But as this conclusion generally arises from the language of the statutes against gaming, in some states a *bona fide* holder for value of a negotiable security is protected.[6] A bill of sale of goods lost at gaming is void.[7] Equity will relieve against

[1] Allgear *v.* Walsh, 24 Mo. App. 134.

[2] Adams *v.* Barrett, 5 Ga. 404; Welsh *v.* Cutler, 44 N. H. 561; Meech *v.* Stoner, 19 N. Y. 26; Hudspeth *v.* Wilson, 2 Dev. 372; 21 Am. Dec. 344; McCullam *v.* Gourlay, 8 Johns. 147; Thrift *v.* Redman, 13 Iowa, 25; Danforth *v.* Evans, 16 Vt. 548; Tindall *v.* Childress, 2 Stew. & P. 250; Babcock *v.* Thompson, 3 Pick. 446; 15 Am. Dec. 235; Gill *v.* Webb, 4 T. B. Mon. 299; Guthman *v.* Parker, 3 Head, 234; Allen *v.* Dodd, 4 Humph. 131; 40 Am. Dec. 633; Webb *v.* Fulchire, 3 Ired. 485; 40 Am. Dec. 419; Hockaday *v.* Willis, 1 Spear, 379; 40 Am. Dec. 606; Downs *v.* Quarles, Litt. Sel. Cas. 489; 12 Am. Dec. 337.

[3] Hickerson *v.* Benson, 8 Mo. 8; 40 Am. Dec. 115; McKee *v.* Manice, 11 Cush. 357; Harper *v.* Crain, 36 Ohio St. 338; 38 Am. Rep. 589.

[4] Monroe *v.* Smelly, 25 Tex. 586; 78 Am. Dec. 541; Stone *v.* Mitchell, 7 Ark. 91; Turner *v.* Peacock, 2 Dev. 303; Chiles *v.* Coleman, 2 A. K. Marsh. 396; 12 Am. Dec. 396; Morton *v.* Fletcher, 2 A. K. Marsh. 137; 12 Am. Dec. 366; Edgell *v.* McLaughlin, 6 Whart. 176; 36 Am. Dec. 214; Shropshire *v.* Glasscock, 4 Mo. 536; 31 Am. Dec. 189; Russell *v.* Ryland, 2 Humph. 131; 36 Am. Dec. 307; Bettis *v.* Reynolds, 12 Ired. 344; 55 Am. Dec. 417; Foreman *v.* Hardwick, 10 Ala. 316; Jordan *v.* Locke, Minor, 254.

[5] Chapin *v.* Dake, 57 Ill. 295; 11 Am. Rep. 15; Unger *v.* Boas, 13 Pa. St. 601; Harmon *v.* Boyce, 2 Tread. Const. 209; Holman *v.* Ringo, 36 Miss. 690; Williams *v.* Judy, 3 Gilm. 282; 44 Am. Dec. 699. A promissory note given for losses in a speculation in cotton "futures" is void, even in the hands of an innocent purchaser: Cunningham *v.* Augusta Bank, 71 Ga. 400; 51 Am. Rep. 266.

[6] Jones *v.* Levier, 1 Litt. 50; 13 Am. Dec. 218; Bell *v.* Parker, 3 Dana, 51; 28 Am. Dec. 55; Haight *v.* Joyce, 2 Cal. 64; 56 Am. Dec. 311.

[7] Hockaday *v.* Willis, 1 Spear, 379; 40 Am. Dec. 606.

a judgment founded on a gaming debt, though the defendant failed to make defense at law.[1]

After the agreement has been executed by the loser's payment of the money or conveyance of the property, equity will not interfere, and order a reconveyance or a cancellation, unless there were such circumstances of fraud, oppression, duress, etc., in procuring the payment or transfer as would, on general principles, call for the aid of a court of equity.[2] But as long as the contract is executory, equity will aid the losing party by ordering the property to be surrendered, or by enjoining its transfer to third parties.[3] Money knowingly lent to be used in gaming cannot be recovered of the borrower by the lender.[4] One who knowingly lends money to be used in purchasing oil on margins cannot recover it back.[5]

§ 2424. Gambling Contracts—Option Contracts.—A contract for the delivery of goods or commodities at a future day is valid. But if at the time of making the contract it is agreed, or it can be implied, that the parties intended that no property was to pass, but that one party should pay to the other the difference between the selling price of the article at that time and at the time of contracting, the agreement is a mere wager, and, as such, void.[6] Time contracts made in good faith for the future delivery of grain or other commodity are not prohibited

[1] Skipwith *v.* Strother, 3 Rand. 214; Lucas *v.* Waul, 20 Miss. 157; Martin *v.* Terrell, 20 Miss. 571.

[2] Pomeroy's Eq. Jur., sec. 938.

[3] Pomeroy's Eq. Jur., sec. 938; citing Skipwith *v.* Strother, 3 Rand. 214. And see Manning *v.* Manning, 8 Ala. 138; Lucas *v.* Waul, 20 Miss. 157.

[4] Tyler *v.* Carlisle, 79 Me. 210; 1 Am. St. Rep. 301; Morgan *v.* Groff, 5 Denio, 364; 49 Am. Dec. 273; Mather *v.* Moore, 2 Gratt. 257. As money loaned in "poker-chips," and used at a game of chance: Williamson *v.* Baley, 78 Mo. 636.

[5] Waugh *v.* Beck, 114 Pa. St. 422; 60 Am. Rep. 354.

[6] Conner *v.* Robertson, 37 La. Ann. 814; 55 Am. Rep. 521; Bullard *v.* Smith, 139 Mass. 492; Gregory *v.* Wendell, 39 Mich. 337; 33 Am. Rep. 390; 40 Mich. 432; Cassaid *v.* Hinman, 1 Bosw. 207; Samson *v.* Shaw, 101 Mass. 145; 3 Am. Rep. 327; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Clarke *v.* Foss, 7 Biss. 540; In re Green, 7 Biss. 338; Login *v.* Musick, 81 Ill. 415; Pickering *v.* Cease, 79 Ill. 328; Rumsey *v.* Berry, 65 Me. 570; Waterman *v.* Buckland, 1 Mo. App. 45; Crawford *v.* Spencer, 92 Mo. 498; 1 Am. St. Rep. 745; McGrew *v.* City Produce Exchange, 85 Tenn. 572; 4 Am. St. Rep. 771; Tomblin *v.* Callen, 69 Iowa,

either by the common law or statute.[1] But if, under guise of a contract to deliver goods at a future day, the real intent be to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is a wager, and is void.[2] A bargain for an option to call for a delivery of goods on certain notice may be legitimate, but its character may be weighed, in connection with other evidence on the question, whether the transaction was a gambling scheme.[3] If the intention of the parties is doubtful, the party claiming rights under the contract must show affirmatively that it was intended that the commodity should be delivered.[4] Where it is doubtful whether a contract for the delivery of cotton was a gambling contract in futures or a legal contract, the presumption is in favor of its legality.[5]

229; Pearce *v.* Foot, 113 Ill. 228; 55 Am. Rep. 414; Bartlett *v.* Smith, 13 Fed. Rep. 263; Beveridge *v.* Hewitt, 8 Brad. App. 467; Enderby *v.* Gilpin, 5 Moore, 571; Swartz's Appeal, 3 Brewst. 131; Bainard *v.* Backus, 52 Wis. 593; Everingham *v.* Meighan, 55 Wis. 354; Yerkes *v.* Salomon, 11 Hun, 473; Grizewood *v.* Blane, 11 Com. B. 526; Story *v.* Salomon, 71 N. Y. 426; Lyon *v.* Culbertson, 83 Ill. 33; 25 Am. Rep. 349; Bigelow *v.* Benedict, 70 N. Y. 202; 26 Am. Rep. 573; Malton *v.* Sheen, 75 Pa. St. 166; Peabody *v.* Speyers, 56 N. Y. 230; Bran's Appeal, 55 Pa. St. 298; Williams *v.* Teidmann, 6 Mo. App. 296; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287; Pixley *v.* Boynton, 79 Ill. 351. In Rumsey *v.* Berry, 65 Me. 574, the court say: "A contract for the sale and purchase of wheat, to be delivered in good faith at a future time, is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with the understanding that, at the appointed time, the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure." A broker sued his principal in a Maryland court to recover a balance for services, advances, etc., on sales of stocks, bonds, and grain. The contract was a Pennsylvania contract. Held, that, although in form the transactions were legal, defendant might show them to be gambling transactions under the Pennsylvania law: Stewart *v.* Schall, 65 Md. 299; 57 Am. Rep. 327.

[1] Wolcott *v.* Heath, 78 Ill. 433; Cole *v.* Milmine, 88 Ill. 349.

[2] Irwin *v.* Williar, 110 U. S. 499; Gregory *v.* Wendell, 39 Mich. 337; 33 Am. Rep. 390.

[3] Kirkpatrick *v.* Bonsall, 72 Pa. St. 155.

[4] Cobb *v.* Prell, 15 Fed. Rep. 774.

[5] Clay *v.* Allen, 63 Miss. 426.

Tested by those principles, the following transactions are not illegal, viz.: A contract known among stock-dealers as a "straddle," by which the promisor agrees, for a certain price, either to buy from or sell to another, at the latter's option, certain shares;[1] a contract for future delivery of merchandise in warehouse receipts, within a limited time, the seller having an option as to the precise time, the buyer to put up margins, and the measure of damages for breach to be the difference between the contract price and the market price in the chamber of commerce where the contract is made;[2] a contract to purchase gold coin at a certain price, and within a specified time, deliverable at the seller's option;[3] or where a stock-broker agreed to buy and sell stocks for A as ordered, without a margin, and agreed that A should be liable for differences only;[4] or where the defendant wrote the plaintiff, a stock-broker, to buy him a certain number of shares of a given stock "on margin," offering a collateral security, and the plaintiff complied, receiving the stock, and afterwards selling it on the defendant's order at a profit.[5] But "puts," or the privilege, for a nominal consideration, of delivering a large quantity within a certain time at a specified price, when taken by persons who are known to be endeavoring to effect what is technically called a "corner" in the grain market, are wager contracts, and void as against public policy.[6] So is a contract for the sale of wheat to be delivered at seller's option, and requiring margins as security, and providing that the failure of either party to put up margins on demand, according to the market price, should authorize the other to consider the contract as filled, and to recover the difference between the market

[1] Story *v.* Salomon, 6 Daly, 531; 71 N. Y. 426.
[2] Wall *v.* Schneider, 59 Wis. 352; 48 Am. Rep. 520.
[3] Bigelow *v.* Benedict, 70 N. Y. 202; 26 Am. Rep. 573.
[4] Earl *v.* Howell, 14 Abb. N. C. 474.
[5] Hatch *v.* Douglas, 48 Conn. 116; 40 Am. Rep. 154.
[6] In re Young, 6 Biss. 53.

price and the contract price, without showing an offer or ability to perform.[1]

If a broker be employed to make wager contracts, and pays the amount of the difference due on the contract, he may recover it from his principal, and the illegality of the proceeding is no defense.[2]

§ 2425. Contracts in Restraint of Marriage Void. — Restrictions on marriage are contrary to public policy, and therefore agreements or conditions creating or involving such restrictions are void.[3] Therefore where a man agreed to pay a woman a certain sum of money if he married any one but her, it was held void.[4] So of a contract or wager by a person that he would not marry within a certain number of years.[5]

§ 2426. Restrictions on Marriage in Gifts and Wills. — Conditions restraining marriage in gifts and wills are void if the restraint is unreasonable, but valid if the restraint is not absolute, but reasonable in respect to time, place, or person.[6] Thus these conditions have been held valid, viz.: A condition not to marry under the age of twenty-eight;[7] or without the consent of parent or guardian;[8] or not to marry a particular person.[9] But an absolute restriction in a gift or will upon the second marriage of a man or woman is valid.[10]

[1] Lyon *v.* Culbertson, 83 Ill. 33; 25 Am. Rep. 349.

[2] Warren *v.* Billings, 33 L. J. 55; Pidgeon *v.* Burslun, 3 Ex. 465; Jessopp *v.* Surtoryche, 10 Ex. 614; Petri *v.* Hannay, 3 Term Rep. 418; Bartlett *v.* Smith, 13 Fed. Rep. 263; Lehmann *v.* Strassberger, 2 Woods, 554; Warren *v.* Hewitt, 45 Ga. 501; Owen *v.* Davis, 1 Bail. 315; Armstrong *v.* Toler, 11 Wheat. 294; Durant *v.* Burt, 98 Mass. 167. *Contra*, In re Green, 7 Biss. 338.

[3] Conrad *v.* Williams, 6 Hill, 444; Sterling *v.* Sinnickson, 5 N. J. L. 756; Waters *v.* Tazewell, 9 Md. 291; Maddox *v.* Maddox, 11 Gratt. 804. As to agreements of separation between husband and wife, see *ante*, Title Husband and Wife, § 778.

[4] Lowe *v.* Peers, 4 Burr. 2225; Conrad *v.* Williams, 6 Hill, 444.

[5] Hartley *v.* Rice, 10 East, 22; Chalfant *v.* Payton, 91 Ind. 202; 46 Am. Rep. 586.

[6] Pomeroy's Eq. Jur., sec. 933; Scott *v.* Tyler, 2 Dick. 712.

[7] Young *v.* Fruze, 8 De Gex, M. & G. 756.

[8] Clarke *v.* Parker, 19 Ves. 1; Scott *v.* Tyler, 2 Brown Ch. 431; Collier *v.* Slaughter, 20 Ala. 263.

[9] Scott *v.* Tyler, 2 Brown Ch. 431.

[10] Newton *v.* Marsden, 2 Johns. & H. 356; Allen *v.* Jackson, L. R. 1 Ch. Div. 399; Phillips *v.* Medberry, 7 Conn.

§ 2427. **Marriage Brokage Contracts Void.** — Contracts by which one person agrees to give another a compensation if he will negotiate an advantageous marriage for him are void.[1] So a promise by A to pay B for services to be rendered in procuring a wife for A is void.[2] A contract to pay a certain sum of money to A on his marriage with B, on condition that A shall give the promisor "the exclusive right to carry the marriage benefit insurance" on A and B, is void.[3] And a "marriage insurance" contract has been held void.[4]

§ 2428. **Immoral and Criminal Contracts.** — Agreements which provide for the commission of a crime or an immoral act are void. The following have been held to be such contracts, viz.: A contract with a printer to print, or a publisher to sell, a libelous work;[5] an agreement with a woman made in contemplation of future illicit cohabitation;[6] a contract to write an immoral book;[7] a contract to board a bastard and its mother, the father to be allowed to continue the illicit intercourse;[8] the furnishing of goods to a prostitute, with the intention of assisting her in her trade;[9] a contract to indemnify the publisher of a libel;[10] a promise to marry a woman in consideration of her allowing the promisor to have sexual connection with her before marriage;[11] a promise by a man who had connection with a married woman, who threatened him with prosecution, that he would make a

568; Collier *v.* Slaughter, 20 Ala. 263; Holmes *v.* Field, 12 Ill. 424; Bennett *v.* Robinson, 10 Watts, 348.

[1] Drury *v.* Hooke, 1 Vern. 412; Crawford *v.* Russell, 62 Barb. 92.

[2] Johnson *v.* Hunt, 81 Ky. 321.

[3] James *v.* Jellison, 94 Ind. 292; 48 Am. Rep. 151.

[4] White *v.* Equitable Nuptial Benefit Union, 76 Ala. 251; 52 Am. Rep. 325.

[5] Poppett *v.* Stockdale, 1 Russ. & M. 337.

[6] Beaumont *v.* Reeve, 8 Q. B. 482.

[7] Gale *v.* Leckie, 2 Stark. 98.

[8] Trovinger *v.* McBurney, 5 Cow. 253.

[9] Pearce *v.* Brooks, L. R. 1 Ex. 213. And see § 2430, *post*, Participation in Illegal Purpose Necessary.

[10] Arnold *v.* Clifford, 2 Sum. 238; Atkins *v.* Johnson, 43 Vt. 78; 5 Am. Rep. 260.

[11] Hanks *v.* Naglee, 54 Cal. 51; 35 Am. Rep. 67; Steinfeld *v.* Levy, 16 Abb. Pr., N. S., 26. See Kurtz *v.* Frank, 76 Ind. 594; 40 Am. Rep. 275.

will in her and her child's favor;[1] a promise to indemnify another for committing a willful and malicious trespass;[2] a contract by which the plaintiff, having a reputation as a seedsman, sold to the defendant a large quantity of empty bags for seeds with the plaintiff's label, the same to be filled by the purchaser with seeds, and sold in a certain county named in the contract, and not elsewhere;[3] a contract for the sale of domestic sardines, to be put up with labels representing the sardines as foreign sardines.[4] But a contract to make compensation for injury done by past illegal cohabitation, which contains no stipulation for future intercourse, is not invalid, and this, even though the intercourse be kept up after the contract has been fully executed.[5]

§ 2429. Agreement Good on the Face, but for Illegal Purpose. —An agreement in which no illegality appears, and of which neither the consideration nor the promise in itself imports any illegality, may, nevertheless, be made for an illegal purpose, and the agreement, though unobjectionable in its terms, may then be rendered void by the illegality of the purpose for which it is made;[6] as, for example, in the following cases, the contract has been declared void, and the seller not permitted to recover the price, viz.: A sale of goods for the purpose of being shipped in a foreign trade forbidden by statute;[7] a sale of drugs to a brewer to be used in the manufacture of beer, contrary to statute;[8] a sale of beer to be retailed at an unlicensed house;[9] the price of goods sold for the purpose of being used in the business of a brothel;[10] the price or hire of

[1] Drennan *v.* Douglass, 102 Ill. 341; 40 Am. Rep. 595.
[2] Ives *v.* Jones, 3 Ired. 538; 40 Am. Dec. 421.
[3] Bloss *v.* Bloomer, 23 Barb. 604.
[4] Materne *v.* Horwitz, 101 N. Y. 469.
[5] Smith *v.* Du Bose, 78 Ga. 413; 6 Am. St. Rep. 260.
[6] Pearce *v.* Brooks, L. R. 1 Ex. 213.
[7] Lightfoot *v.* Tenant, 1 Bos. & P. 551.
[8] Langton *v.* Hughes, 1 Maule & S. 593; 42 Geo. III., c. 38, prohibiting the brewer from using anything but malt and hops in the brewing of beer.
[9] Brooker *v.* Wood, 5 Barn. & Adol. 1052.
[10] Hamilton *v.* Grainger, 5 Hurl. & N. 40.

goods sold or let to a prostitute for the purpose of carrying on her trade;[1] the rent of lodgings let for the like purpose.[2]

ILLUSTRATIONS. — Plaintiffs contracted to publish an advertisement in the weekly (Sunday) edition of their paper for a year. *Held*, that as it did not appear and would not be presumed that the contract contemplated any labor to be done on Sunday, it was valid: *Sheffield* v. *Balmer*, 52 Mo. 474; 14 Am. Rep. 430.

§ 2430. Participation in Illegal Purpose Necessary. — There must be a participation in the illegal purpose for which the agreement is made, in order to render it void against a party to it and to deprive him of the benefit of it.[3] To invalidate a loan for a gambling transaction, the lender must not only have known the use intended, but must have been implicated as a confederate, though not necessarily for gain.[4] The mere knowledge of a vendor of property that the vendee intends to make an illegal use of it is not a defense to an action for the price.[5] But where the

[1] Pearce *v.* Brooks, L. R. 1 Ex. 213; 35 L. J. Ex. 134; Bowry *v.* Bennet, 1 Camp. 348; Lloyd *v.* Johnson, 1 Bos. & P. 340.

[2] Girardy *v.* Richardson, 1 Esp. 13; Appleton *v.* Campbell, 2 Car. & P. 347; Jennings *v.* Throgmorton, Ryan & M. 251.

[3] Pearce *v.* Brooks, L. R. 1 Ex. 213; Pellecat *v.* Angell, 2 Cromp. M. & R. 311; Cheeney *v.* Duke, 10 Gill & J. 11; Cooper *v.* Thompson, 20 La. Ann. 182; 96 Am. Dec. 372.

[4] Waugh *v.* Beck, 114 Pa. St. 422; 60 Am. Rep. 354.

[5] Tracy *v.* Talmage, 14 N. Y. 162; 67 Am. Dec. 132; O'Brien *v.* Brietenback, 1 Hilt. 304; Hedges *v.* Wallace, 2 Bush, 442; 92 Am. Dec. 497. In Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132, the court say: "There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of Holman *v.* Johnson, Cowp. 341, where the plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held upon these facts that the plaintiff could recover. The principle of the case is the same as that adopted in Faikney *v.* Reynous, 4 Burr. 2069, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in this case also, says: 'The seller indeed knows what the buyer is going to do with the goods, but the interest of the vendor is totally at an end and his contract complete by the delivery of the goods.' Where, however, the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded

contract is so connected with the illegal transaction or purpose as to be inseparable from it, the rule that mere knowledge by the seller of the buyer's intention to use the goods purchased for an unlawful purpose will not invalidate the contract does not apply.[1]

If a person enters into a lawful contract, as an agreement to let premises which may be used and applied to various lawful purposes, and afterwards discovers that it is intended to use them for an illegal purpose, the agreement is thereby avoided, and he may refuse completion.[2] But if the lease be executed, and possession given under the agreement, and the term vested in the lessee, it would not become voidable or forfeited to the lessor upon the lessee subsequently using the premises for an unlawful purpose, nor although he may have intended to do so at the time of taking the lease.[3]

ILLUSTRATIONS. — A sues for goods furnished to B. The defense is, that B was a prostitute to A's knowledge, and that the goods were intended to be used by B in her trade to the knowledge of A. This is no bar to A's recovery, unless it is shown that A expected to be paid from the profits of B's prostitution, and that he sold the goods to enable her to carry it on, "so that he might appear to have done something in furtherance of it": *Bowery* v. *Bennett*, 1 Camp. 348; *Hubbard* v. *Moore*, 24 La. Ann. 591; 13 Am. Rep. 128; *Sampson* v. *Townshend*, 25 La. Ann. 78. An action is brought for work done and materials furnished in

as *particeps criminis*, and cannot recover, as is shown by the subsequent cases of Biggs *v.* Lawrence, 3 Term Rep. 454, Clugas *v.* Penaluna, 4 Term Rep. 466, and Waymell *v.* Reed, 5 Term Rep. 590. These were all cases where the plaintiff had sold goods to the defendant knowing that they were to be smuggled into England, and in each of them the plaintiff was nonsuited. But they all differed from the case of Holman *v.* Johnson in this, that the plaintiff had in each case done some act in addition to the sale in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in the case of Waymell *v.* Reed, is very explicit. He says: 'In Holman *v.* Johnson the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling by packing the goods up in a manner most convenient for that purpose.'"

[1] Tatum *v.* Kelley, 25 Ark. 200; 94 Am. Dec. 717.

[2] Cowan *v.* Milbourn, L. R. 2 Ex. 230; 36 L. J. Ex. 124.

[3] Feret *v.* Hill, 15 Com. B. 207; Sprague *v.* Rooney, 82 Mo. 493; 52 Am. Dec. 383.

fitting up a house. It is no defense that the work was done and the materials furnished with the knowledge of the plaintiff that the defendant intended to use the house as a gambling-house: *Michael* v. *Bacon*, 49 Mo. 474; 8 Am. Rep. 138. A contract is made for the sale of a house, the vendor knowing that the house is intended by the purchaser for his mistress. The contract is valid: *Armfield* v. *Tate*, 7 Ired. 258. The plaintiffs sold to the defendant goods, with the knowledge that she intended to make an unlawful use of them; and to enable her to make such unlawful use, by her direction, put them up in packages in a convenient form for sales in violation of the law, with labels thereon calculated to facilitate such sales. *Held*, that the parties were *in pari delicto*, and that the plaintiffs could not recover the price: *Skiff* v. *Johnson*, 57 N. H. 475.

§ 2431. **Effect of Illegality on Agreement.** — The effect of illegality in the matter or purpose of an agreement is to render the agreement wholly void of legal operation. No right of action can be founded upon it. Either party may repudiate the agreement, with or without alleging a reason, and may afterwards justify on the ground of the illegality.[1] Where the contract is not consummated, the court will give relief. Thus money loaned for gambling purposes, but not so used by the borrower, may be recovered of him by the lender.[2] So money deposited by

[1] Nudd *v.* Burnett, 24 Ind. 25; Leake on Contracts, 770. In the celebrated case of Holman *v.* Johnson, 1 Cowp. 343, Lord Mansfield said: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff. The principle of public policy is this, *Ex dolo malo, non oritur actio;* no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law, there the court says he has no right to be assisted." And the effect of illegality is the same in a court of equity as in a court of law. "A contract or instrument which fails in a court of law by reason of its illegality cannot be enforced in equity; although money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defense of illegality is as available in a court of equity as it is in a court of law": In re Cork etc. R. R. Co., L. R. 4 Ch. 762.

[2] Tyler *v.* Carlisle, 79 Me. 210; 1 Am. St. Rep. 301

a principal with an agent to purchase futures in grain can be recovered by the principal when the same is not profits made by the agent in the gambling transaction for the principal, over and above the sum deposited with him, but an amount within such sum.[1] A horse-trainer may recover money laid out and expended for feed and shoes for horse which he is fitting for a race on which money is bet; for, whether the race is run or not, it is necessary that the animal should be fed and shod, and such items are not necessarily a part of the gaming transaction.[2] With an executed contract courts will not interfere. If the contract is executory, they will lend no aid to either party to enforce it.[3] An action will not lie to recover back money sent by one person to another with the object of inducing the latter to use his influence to obtain the nomination to a public office of the former without reference to fitness for the position or the public good, where the person receiving the money did not use his influence for the applicant, but against him.[4] So a bill in equity will not lie in favor of the maker to compel the surrender or cancellation of an overdue promissory note and mortgage given to secure its payment on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement. The law leaves the parties to an illegal contract exactly where it finds them.[5]

[1] Clarke *v.* Brown, 77 Ga. 606; 4 Am. St. Rep. 98.

[2] Mosher *v.* Griffin, 51 Ill. 184; 99 Am. Dec. 541.

[3] Baily *v.* Milner, 35 Ga. 330; Adams *v.* Barrett, 5 Ga. 404; Judah *v.* Trustees etc., 16 Ind. 56; Smead *v.* Williamson, 16 B. Mon. 492; State *v.* Reiss, 12 La. Ann. 166; Greene *v.* Godfrey, 44 Me. 25; Andrews *v.* Marshall, 48 Me. 26; Bagg *v.* Jerome, 7 Mich. 145; Hoover *v.* Pierce, 26 Miss. 627; Nudd *v.* Burnett, 24 Ind. 25; King *v.* Winants, 71 N. C. 470; 17 Am. Rep. 11; Schmidt *v.* Barker, 17 La. Ann. 261; 87 Am. Dec. 527; Henly *v.* Franklin, 3 Cold. 472; 91 Am. Dec. 296; Patton *v.* Gilmer, 42 Ala. 548; 94 Am. Dec. 665; Capehart *v.* Ranken, 3 W. Va. 571; 100 Am. Dec. 779. *Contra*, holding that the owner of property who disposes of it by lottery may recover it from the drawer: Martin *v.* Hodge, 47 Ark. 378; 58 Am. Rep. 763.

[4] Liness *v.* Hesing, 44 Ill. 113; 92 Am. Dec. 153.

[5] Atwood *v.* Fisk, 101 Mass. 363; 100 Am. Dec. 124.

§ 2432. **Promises Partly Illegal.** — Where an agreement contains several promises or a promise to do several matters, and some of the matters only are illegal, the promises which can be separated, or the promise so far as it can be separated, from the illegality may be valid.[1] If part of an agreement is contrary to statute, this does not avoid or annul other parts of the agreement which are separable from the bad part, and not founded upon it, unless the statute expressly or by necessary implication declares the whole void.[2] Where goods are sold at a separate price for each article, and the sale of some of the articles is illegal, an action will lie, nevertheless, for the price of any of the other articles.[3] But where a contract contains illegal stipulations, and to sustain it in part would be practically to sustain it altogether, the court will treat it as wholly void.[4] If a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating a void promise cannot give it validity.[5]

§ 2433. **Illegality Occurring Subsequent to Making of Contract.** — A contract is discharged by illegality supervening subsequently to the time of contracting, which may occur by a new statute, or other act of public authority, rendering the performance illegal.[6] If an agreement

[1] Hanauer *v.* Gray, 25 Ark. 350; 99 Am. Dec. 226. As to illegality in consideration, see *ante*, Chapter Consideration.

[2] Rand *v.* Mather, 11 Cush. 1; 59 Am. Dec. 131.

[3] Boyd *v.* Eaton, 44 Me. 51; 69 Am. Dec. 83; Carleton *v.* Woods, 28 N. H. 290.

[4] Burlington etc. R. R. Co. *v.* Northwestern Fuel Co., 31 Fed. Rep. 652; Gerlach *v.* Skinner, 34 Kan. 86; 55 Am. Rep. 240.

[5] Comstock *v.* Draper, 1 Mich. 481; 53 Am. Dec. 78.

[6] Leake on Contracts, 782. In Brewstar *v.* Kitchin, 1 Salk. 198, it is said: "The difference where an act of Parliament will amount to a repeal of a covenant, and where not, is this: Where a man covenants not to do a thing which was lawful for him to do, and an act of Parliament comes after and compels him to do it, there the act repeals the covenant; and *vice versa*, if he covenants to do a thing which is

when entered into is legal, and is afterwards made by statute illegal, acts done under it while it remained legal are legal.[1]

lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed. But where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant."

[1] Bennett v. Woolfolk, 15 Ga. 213.

CHAPTER CXVI.

INTEREST AND USURY.

§ 2434. Interest is by contract or as damages.
§ 2435. Jury may award interest as damages.
§ 2436. Interest payable by usage.
§ 2437. Interest, when allowed.
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§ 2463. Penalties also recoverable.
§ 2464. Relief in equity.
§ 2465. Who may plead usury.
§ 2466. Waiver by borrower — Estoppel.
§ 2467. Usury must be pleaded — Form of plea.
§ 2468. Evidence to support plea.

§ 2434. Interest is by Contract or as Damages.— Interest is considered as payable either by contract,

express or implied, or as damages for the detention of the principal.[1] Interest that is payable by contract may be the subject of a distinct claim, with or without the principal debt; as in the case of a debt contracted to be paid at a distant day, with interest to be paid periodically in the interval, the interest may be claimed separately as it falls due.[2] Interest that is recoverable as damages only is merely incidental to the debt, and does not constitute a debt capable of a distinct claim.[3] Where an instrument does not specify on its face that interest is to be paid, the payment of the principal will bar an action for interest; but where interest is stipulated for in the contract itself, it becomes a part of the debt, and may be recovered, although the principal has been paid.[4] A condition in a mortgage that, upon default being made in the payment of interest, the whole principal sum shall become due is valid, and enforceable in equity.[5] Interest is payable in the same kind of money as the principal.[6] The state is not bound to pay interest, and in cases where the contract contemplates the action of the legislature in order to pay the claim, interest cannot be claimed until such application is made to the legislature.[7] Where the state sues a county for taxes, interest is not recoverable.[8]

§ 2435. Jury may Award Interest as Damages.—The jury may, as damages for negligent or tortious or fraud-

[1] Foote *v.* Blanchard, 6 Allen, 221; 83 Am. Dec. 624; Hummell *v.* Brown, 24 Pa. St. 313; Smith *v.* Vanderhost, 1 McCord, 328; 10 Am. Dec. 674; Mower *v.* Kip, 6 Paige, 88; 29 Am. Dec. 748; Myers *v.* Walker, 24 Ill. 133; McCormick *v.* Elston, 16 Ill. 204; Aldrich *v.* Dunham, 16 Ill. 403.

[2] Fake *v.* Eddy, 15 Wend. 76; Edgerton *v.* Aspinwall, 3 Conn. 445; Radford *v.* Ins. Co., 12 Bush, 434; Stearns *v.* Brown, 1 Pick. 530; Ohio City *v.* R. R. Co., 6 Ohio St. 489.

[3] Howe *v.* Bradley, 19 Me. 31; Succession of Anderson, 12 La. Ann. 95.

[4] King *v.* Phillips, 95 N. C. 245; 59 Am. Rep. 238.

[5] Hale *v.* Gouverneur, 4 Edw. Ch. 209; Ferris *v.* Ferris, 28 Barb. 33; Hunt *v.* Koch, 3 Abb. Pr. 204; Noyes *v.* Clark, 7 Paige, 179; 32 Am. Dec. 621.

[6] McCalla *v.* Ely, 64 Pa. St. 254.

[7] Whitney *v.* State, 52 Miss. 732.

[8] State *v.* Multnomah County, 13 Or. 287.

ulent conduct, award interest to the plaintiff.[1] But this matter rests in their discretion.[2]

§ 2436. Interest Payable by Usage. — An agreement to pay interest may be implied from the course of dealing between the parties, or from the practice of the creditor known to the debtor to pay interest, or from the usage of the particular trade or business.[3] Where parties themselves settle their accounts at regular intervals, without charging one another with interest, in the absence of mistake or fraud, the court will not allow interest on transactions or balances anterior to such settlements.[4]

§ 2437. Interest, when Allowed. — At common law, the rule in England was to allow interest in case of contracts to pay money at a certain day; as on negotiable paper, or where there was an express promise to pay it, or where the usage of the trade permitted it.[5] In the United States the courts have been more liberal in allowing the recovery of interest in the absence of an express contract to pay it.[6] Interest is allowable on money lent or advanced to another;[7] on money paid to the use of or for the benefit of another;[8] on money received by one

[1] Walruth *v.* Redfield, 18 N. Y. 457; Vandevoort *v.* Gould, 36 N. Y. 639; Amory *v.* McGregor, 15 Johns. 24; Dox *v.* Dey, 3 Wend. 356; Stark *v.* Price, 5 Dana, 140; Young *v.* Singleton, 6 J. J. Marsh. 316; Fasholt *v.* Reed, 16 Serg. & R. 266; Hinckley *v.* Beckwith, 13 Wis. 31; McIlvaine *v.* Wilkins, 12 N. H. 474; Buford *v.* Fannen, 1 Bay, 273; 1 Am. Dec. 615; Guthrie *v.* Wickliffs, 4 Bibb, 541; 7 Am. Dec. 746; McKinney *v.* Springer, 3 Ind. 59; 54 Am. Dec. 470; Wolfe *v.* Lacy, 30 Tex. 349; Arthur *v.* Mfg. Co., 12 Mo. App. 335.

[2] Lincoln *v.* Claflin, 7 Wall. 132.

[3] Esterly *v.* Cole, 3 N. Y. 502; Adams *v.* Palmer, 30 Pa. St. 346; Veiths *v.* Hagge, 8 Iowa, 163; Reab *v.* McAllister, 4 Wend. 483; Ayers *v.* Metcalf, 39 Ill. 307; Reyburn *v.* Day, 27 Ill. 46; Fisher *v.* Sargent, 10 Cush. 250; Crosby *v.* Mason, 32 Conn. 482; Bispham *v.* Pollock, 1 McLean, 411; Raymond *v.* Isham, 8 Vt. 263; Koons *v.* Miller, 3 Watts & S. 271; Meech *v.* Smith, 7 Wend. 315.

[4] Chandler *v.* People's Savings Bank, 61 Cal. 401.

[5] De Haviland *v.* Bowerbank, 1 Camp. 50.

[6] Houghton *v.* Page, 2 N. H. 42; 9 Am. Dec. 30; Cartmill *v.* Brown, 1 A. K. Marsh. 576; 10 Am. Dec. 763; Newson *v.* Douglass, 7 Har. & J. 417; 16 Am. Dec. 317.

[7] Dilworth *v.* Sinderling, 1 Binn. 488; 2 Am. Dec. 469; Curtis *v.* Innerarity, 6 How. 156; Winthrop *v.* Carlton, 12 Mass. 4.

[8] Dilworth *v.* Sinderling, 1 Binn. 488; 2 Am. Dec. 469; Chamberlain *v.*

which he is entitled to pay over to another;[1] on money fraudulently obtained or wrongfully detained from the owner;[2] or where there is an unreasonable delay in payment;[3] or on freight, after a demand;[4] or on interest coupons after payment of them has been unjustly neglected or refused;[5] on arrears of an annuity given in lieu of dower;[6] upon an interest coupon attached to a bond, although no mention of interest is made;[7] on the amount of the penalty of a bond;[8] on a lost bond, unless the defendant tenders payment;[9] on a bid at a sheriff's sale, where the purchaser neglects to make payment according to his contract.[10] Interest is allowed in some cases on rent from the day it is due;[11] in others, it is held that interest on rent due is not recoverable, as it is interest on interest, i. e., compound interest.[12] Where property is damaged or destroyed by the negligence of another, interest is recoverable on its value from that time.[13] In an action against a carrier for the loss of property, interest is recoverable on the value of the property from the day of the

Smith, 1 Mo. 718; Gibbs *v.* Bryant, 1 Pick. 118; Thompson *v.* Stevens, 2 Nott & McC. 493; Aiken *v.* Peay, 5 Strob. 15; 53 Am. Dec. 684.

[1] Barr *v.* Hasseldon, 10 Rich. Eq. 53; Rapalje *v.* Emory, 1 Dall. 349; Atlantic *v.* Bank, 118 Mass. 147; Close *v.* Fields, 13 Tex. 623; Abbot *v.* Wilmot, 22 Vt. 437; Cease *v.* Cockle, 76 Ill. 484; Hunt *v.* Jucks, 1 Hayw. 173; 1 Am. Dec. 555; State *v.* Blount, 1 Hayw. 4; Merritt *v.* Pearson, 76 Ind. 44.

[2] Wood *v.* Robbins, 11 Mass. 504; 6 Am. Dec. 182; People *v.* Gasherie, 9 Johns. 71; 6 Am. Dec. 263; Simpson *v.* Feltz, 1 McCord Ch. 213; 16 Am. Dec. 602.

[3] Newlan *v.* Shafer, 38 Ill. 379.

[4] Schureman *v.* Withers, Anth. 166.

[5] Aurora City *v.* West, 7 Wall. 82; Pekin *v.* Reynolds, 31 Ill. 529; 83 Am. Dec. 244; Jeffersonville *v.* Patterson, 26 Ind. 15; Connecticut etc. Ins. Co. *v.* Cleveland etc. R. R. Co., 41 Barb. 9; North P. R. R. Co. *v.* Adams, 54 Pa. St. 94; Mills *v.* Jefferson, 20 Wis. 50.

[6] Beeson *v.* Beeson, 1 Harr. 106; Houston *v.* Jamison, 4 Harr. 330; Irby *v.* McCrae, 4 Desaus. Ch. 422.

[7] Humphreys *v.* Morton, 100 Ill. 592.

[8] Wyman *v.* Robinson, 73 Me. 384; 40 Am. Rep. 360.

[9] Rector *v.* Mark, 1 Mo. 288; 13 Am. Dec. 500.

[10] Atkinson *v.* Richardson, 15 Wis. 594.

[11] Obermyer *v.* Nichols, 6 Binn. 159; 6 Am. Dec. 439; Van Rensselaer *v.* Jewett, 2 N. Y. 135; 51 Am. Dec. 275; Livingston *v.* Miller, 11 N. Y. 86; Cowing *v.* Hubbard, 46 Barb. 584.

[12] Breckenridge *v.* Brooks, 2 A. K. Marsh. 835; 12 Am. Dec. 401. *Aliter* in Kentucky now by statute: 2 Stanton, 92.

[13] Parrott *v.* Ice Co., 46 N. Y. 361; Whitehall Trans. Co. *v.* New Jersey Steam. Co., 51 N. Y. 369; Mailler *v.* Ex. Prop. Line, 61 N. Y. 312; Allegheny *v.* Campbell, 107 Pa. St. 533; 52 Am. Rep. 478.

loss.[1] One who pays taxes on the land of another by mistake can recover interest thereon.[2] Where the price of goods is due on their delivery, there is an implied contract to pay interest from that time.[3] A depositor in a national bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit.[4]

The general rule is, that interest is not allowed on unliquidated demands;[5] nor is interest chargeable, except by agreement or usage, on book debts,[6] nor on open mutual accounts.[7] But "where there have been running accounts between parties, and one party has been in the habit of transmitting his accounts regularly to the other, striking a balance and charging or giving credit for interest, as the balance might be, and no objections have been made, and where this mode of stating accounts is shown to be the custom of the trade, such manner of charging interest is legal, and will be supported."[8] In-

[1] Mote v. R. R. Co., 27 Iowa, 22; 1 Am. Rep. 212. In Illinois, where interest is not recoverable, unless authorized by statute, it cannot be recovered in an action against a carrier for damages for mere delay in the transportation of goods: Illinois Central etc. R. R. Co. v. Cobb, 72 Ill. 148.

[2] Goodnow v. Plumbe, 64 Iowa, 672.

[3] Atlantic Phosphate Co. v. Grafflin, 114 U. S. 492.

[4] National Bank v. Mechanics' National Bank, 94 U. S. 437.

[5] Coburn v. Goodall, 72 Cal. 498; 1 Am. St. Rep. 75; Goff v. Rehoboth, 2 Cush. 475; White v. Miller, 78 N. Y. 393; Graham v. Williams, 16 Serg. & R. 257; 16 Am. Dec. 569; Adams Ex. Co. v. Milton, 11 Bush, 49; Neal v. Keel, 4 T. B. Mon. 162; Palmer v. Stockwell, 9 Gray, 237; Brady v. Wilcoxson, 44 Cal. 239; McConnico v. Curzen, 2 Call, 358; 1 Am. Dec. 540; Murray v. Ware, 1 Bibb, 325; 4 Am. Dec. 637; Foster v. Dupre, 5 Mart. (La.) 6; 12 Am. Dec. 466; Hoagland v. Segur, 38 N. J. L. 230; Waggoner v. Gray, 2 Hen. & M. 603; South v. Leary, Hardin, 518; Sherrel v. Givan, 2 Blackf. 312; Harrison v. Handley, 1 Bibb, 443; Flannery v. Anderson, 4 Nev. 437; Henry v. Rick, 1 Dall. 265; McClintock's Appeal, 29 Pa. St. 360; Skirving v. Stobo, 2 Bay, 233; Neyle v. Chisolm, 1 Harp. 274; Cloud v. Smith, 1 Tex. 102; Cox v. McLaughlin, 76 Cal. 60; 9 Am. St. Rep. 164.

[6] Temple v. Belding, 1 Root, 314; Crosby v. Mason, 32 Conn. 482; Tucker v. Ives, 6 Cow. 193; McKnight v. Dunlop, 4 Barb. 36.

[7] Newell v. Griswold, 6 Johns. 45; Kane v. Smith, 12 Johns. 156; Consequa v. Fanning, 3 Johns. Ch. 587; Selleck v. French, 1 Conn. 32; 6 Am. Dec. 185; Williams v. Hersey, 17 Kan. 18; Saltes v. Parkhurst, 2 Daly, 240; Flake v. Carson, 33 Ill. 518.

[8] Barclay v. Kennedy, 3 Wash. C. C. 850; Veiths v. Hagge, 8 Iowa, 163; Pearson v. Grice, 8 Fla. 214; Easterly v. Cole, 1 Barb. 235; 3 N. Y. 302; Fisher v. Sargent, 10 Cush. 250; Barelli v. Brown, 1 McCord, 449; 10 Am. Dec. 683.

terest is not allowed on taxes, unless the statute gives it;[1] nor on moneys advanced by a parent to his child.[2] A county is not bound to pay interest on county orders, bonds, or warrants.[3]

§ 2438. At What Time Interest Commences to Run. — Where a note is payable generally with interest, interest will begin to run from its date.[4] But where a note is payable on demand, interest is allowed only from the time of the demand.[5] Where, owing to a contest between third parties, it is uncertain whom the maker of the note should pay, he will not be compelled to pay interest until the question is settled.[6] Interest on a legacy is recoverable from the time it is payable.[7] For work and labor done interest is allowable from demand.[8] But where the right of the party to recover his compensation under the contract is doubtful, and is contested on reasonable grounds, and the amount due him requires to be adjusted by proceedings in the suit, interest is only recoverable after the right of the party to recover and the amount of the

[1] Western Union Tel. Co. *v.* State, 55 Tex. 314.

[2] Osgood *v.* Breed, 17 Mass. 356; Black *v.* Whitall, 9 N. J. Eq. 572; 59 Am. Dec. 423.

[3] County of Madison *v.* Bartlett, 2 Ill. 67; Allison *v.* Juanita County, 50 Pa. St. 351; City of Pekin *v.* Reynolds, 31 Ill. 529; 83 Am. Dec. 244; Township of Snyder *v.* Boviard, 122 Pa. St. 442; 9 Am. St. Rep. 118. See Clay Co. *v.* Chickosee, 64 Miss. 534.

[4] Sheehy *v.* Mandeville, 7 Cranch, 208; Freeland *v.* Edwards, 2 Hayw. (N. C.) 49; 2 Am. Dec. 620; Pittman *v.* Barrett, 34 Me. 84; Winn *v.* Young, 1 J. J. Marsh. 51; 19 Am. Dec. 52; Whitton *v.* Swope, 1 Litt. 160; Campbell Printing Press etc. Co. *v.* Jones, 79 Ala. 475.

[5] Scudder *v.* Morris, 3 N. J. L. 419; 4 Am. Dec. 382; Dodge *v.* Perkins, 9 Pick. 369; Breyfogle *v.* Beckley, 16 Serg. & R. 264; Dillon *v.* Dudley, 1 A. K. Marsh. 66; Bartlett *v.* Marshall, 2 Bibb, 464; Cannon *v.* Beggs, 1 McCord, 370; 10 Am. Dec. 677; Patrick *v.* Clay, 4 Bibb, 246; Bishop *v.* Sniffen, 1 Daly, 155; Schmidt *v.* Limehouse, 2 Bail. 276.

[6] Miles *v.* Oden, 8 Martin, N. S., 214; 19 Am. Dec. 177.

[7] Glen *v.* Fisher, 6 Johns. Ch. 33; 10 Am. Dec. 311. General pecuniary legacies are not due and payable until one year after testator's death, unless the will directs otherwise, and they therefore do not bear interest until after the expiration of that time; but if the time for payment is named by the testator, the legacies carry interest from the appointed time of payment only, even if the legacies are vested: Custis *v.* Adkins, 1 Houst. 382; 68 Am. Dec. 422.

[8] Gray *v.* Van Amringe, 2 Watts & S. 128; Obermeyer *v.* Nichols, 6 Binn. 163; Feeter *v.* Heath, 11 Wend. 478; Barnard *v.* Bartholomew, 22 Pick. 291; Amee *v.* Wilson, 22 Me. 116.

recovery have been determined.[1] "As a general rule, interest is not allowed upon partnership accounts until after a balance is struck on a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns."[2] But "where a partner agrees in writing to exhibit a partnership account on a certain day, and make settlements, and on that day refuses, and withholds the books, he is properly chargeable with interest from such day on any balance found against him, on bill for an account, up to the date of the first decree."[3]

And it has been held that interest begins to run on a recognizance from the time of forfeiture;[4] on a penal bond securing the payment of a certain sum, provided the possession of certain land was recovered, when possession was obtained, not when judgment was recovered;[5] on the amount of taxes due the state from a collector, from the time when they should have been paid over;[6] on an award of damages for the exclusive use of land taken by a railroad, from the date of filing the location;[7] for an injury to property, resulting from the negligence of the defendant, from the time the injury was done;[8] in an action for damages for breach of contract, from the breach of the contract, not from its date;[9] on a sum directed by a will to be invested for support, from the death of the testator;[10] on installments of rent due under a written lease, from the time that each becomes due;[11] for services ren-

[1] Shipman *v.* State, 44 Wis. 461; The Isaac Newton, 1 Abb. Adm. 588. In Adams Ex. Co. *v.* Milton, 11 Bush, 49, it is said: "On such demands [work and labor done] interest is sometimes allowed by way of damages, in cases in which the debtor is justly chargeable with delinquency, but never where the delay is the result of the mere failure of the creditor to press the collection of the claim."

[2] Gillman *v.* Vaughan, 44 Wis. 646; Whitcomb *v.* Converse, 119 Mass. 38; 20 Am. Rep. 311; Dexter *v.* Arnold, 3 Mason, 284; Lee *v.* Lashbrook, 8 Dana, 214; Beacham *v.* Eckford, 2 Sand. Ch. 116; Day *v.* Lockwood, 24 Conn. 185; Desha *v.* Smith, 20 Ala. 747; Gage *v.* Parmelee, 87 Ill. 329.

[3] Scroggs *v.* Cunningham, 81 Ill. 110.

[4] Swerdsfeger *v.* State, 21 Kan. 475.

[5] Wilhite *v.* Roberts, 4 Dana, 172.

[6] Dean *v.* State, 54 Tex. 313.

[7] Old Colony *v.* Miller, 125 Mass. 1; 28 Am. Rep. 194.

[8] Chicago etc. R. R. Co. *v.* Shultz, 55 Ill. 421.

[9] Brackett *v.* Edgerton, 14 Minn. 174; 100 Am. Dec. 211.

[10] In re Devlin, 1 Tuck. 460.

[11] West Chicago Alcohol Works *v.* Sheer, 8 Ill. App. 367.

dered, from the time the ascertained amount became due,[1] upon an unliquidated demand, from the time of the commencement of the action;[2] on money paid by mistake, from the date of demand and refusal;[3] where contribution towards the expense of a party-wall was decreed against one of the owners, from the time when contribution was demanded and refused;[4] on a promissory note for a particular sum, payable with annual interest, on the happening of a certain event, from the date of the note;[5] on a certificate of deposit "to pay the money, with interest, if ten days' notice was given," only from ten days after notice;[6] on a note payable one day after date, with an indorsement thereon that it was not to be paid until the death of the maker, from the time it became due, according to its tenor, without reference to the indorsement;[7] on an agreement to pay rent at a day certain, from that day;[8] on advancements, from the time of the testator's death;[9] on money wrongfully obtained and fraudulently withheld, from the time of obtaining it;[10] on goods sold for cash, and payable on delivery, from the date of the delivery.[11]

A stipulation in a note to pay interest "from 1835," means from the first day of that year.[12] Upon a contract to pay a sum in installments, the payments to begin at a

[1] Carpenter *v.* Brand, 40 N. Y. Sup. Ct. 551.

[2] McCollum *v.* Seward, 62 N. Y. 316. In mutual accounts, interest is to be cast on the annual balances: Davis *v.* Smith, 48 Vt. 53. Where a debtor, on presentation of his account, admits its correctness, and promises to pay it, this will render it liquidated so as to draw interest thereafter: Haight *v.* McVeagh, 69 Ill. 624; Daniels *v.* Osborn, 75 Ill. 615.

[3] Simmons *v.* Walter, 1 McCord, 97; Northrop *v.* Graves, 19 Conn. 548; 50 Am. Dec. 264.

[4] Campbell *v.* Mesier, 6 Johns. Ch. 21.

[5] Washband *v.* Washband, 24 Conn. 500.

[6] Cruikshank *v.* Comyns, 24 Ill. 602.

[7] Powell *v.* Guy, 3 Dev. & B. 70.

[8] Elkin *v.* Moore, 6 B. Mon. 462; Honore *v.* Murray, 3 Dana, 31; Clark *v.* Barlow, 4 Johns. 183; Van Rensselaer *v.* Jewett, 2 N. Y. 135; Van Rensselaer *v.* Jones, 2 Barb. 643; Crane *v.* Hardman, 4 E. D. Smith, 448.

[9] Steele *v.* Frierson, 85 Tenn. 430; Roberson *v.* Nail, 85 Tenn. 124.

[10] Manufacturers' Bank *v.* Perry, 144 Mass. 313.

[11] Foote *v.* Blanchard, 6 Allen, 221; 83 Am. Dec. 624.

[12] Evans *v.* Sanders, 8 Port. 497; 33 Am. Dec. 297.

future time, "with interest," the interest begins to run from the making of the contract.[1] A note payable on a certain day, if not paid at maturity, to bear interest payable annually at a certain rate, does not bear interest from date.[2] A promise to pay a sum of money, "with three dollars per month interest after due until paid," is a promise to pay three dollars interest per month for the use of the principal, and not at the rate of three per cent per month.[3] The day on which a note is discounted is to be excluded in the computation of interest, but a day's interest has accrued at any time of the next day.[4] Where a note is made payable at a future day, "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect.[5] If a promissory note is given, payable by installments, "with interest on the said sum," no interest is due upon the last installment until the installment becomes due.[6] A note made payable during the whole of a given month does not bear interest until after the last day of the month.[7] Interest is chargeable from the time money was wrongfully obtained, and not merely from the time of demand.[8] A contractor with a county is entitled to interest on a payment deferred after the performance of the contract, if there was a stipulation that payment should be made as soon as the work contracted for was completed.[9]

§ 2439. Interest on Judgments.—At common law a judgment did not carry interest, but in an action upon a judgment for a sum certain, payable at a certain day,

[1] Conners v. Holland, 113 Mass. 50.
[2] Billingsly v. Cahoon, 7 Ind. 184.
[3] Latham v. Darling, 2 Ill. 203.
[4] Bank of Burlington v. Durkee, 1 Vt. 403.
[5] Tanner v. Dundee Land Investment Co., 8 Saw. 187. *Contra*, Horn v. Nash, 1 Iowa, 204; 63 Am. Dec. 437.
[6] Saunders v. McCarthy, 8 Allen, 42.
[7] Pollard v. Yoder, 2 A. K. Marsh. 264.
[8] Atlantic Nat. Bank v. Harris, 118 Mass. 147.
[9] Risley v. Andrew County, 46 Mo. 382.

interest might be given as damages.[1] But by statute in most of the states, interest on the judgment may be included in the execution,[2] and the judgment draws interest up to the time of payment.[3] But if the judgment does not call for interest, the execution cannot.[4] Interest will be allowed on awards and verdicts after their date up to the time of judgment.[5] Where, after verdict, judgment is delayed by defendant's motion for a new trial, which is afterwards overruled, the judgment should include interest on the verdict from the time it was rendered, both in actions of contract and tort.[6] A judgment for a penalty in the United States district court bears interest.[7] A judgment should draw interest at the same rate as the instrument upon which it was rendered.[8]

§ **2440. Statutory Interest.** — In most of the states interest is recoverable by statute. These statutes are very broad, allowing interest on all contracts for the payment of money, bonds, accounts, money lent or due, etc.[9] Where the rate of interest is changed by law, it does not affect contracts entered into before the change.[10] So a

[1] Hodgdon *v.* Hodgdon, 2 N. H. 169; Watson *v.* Fuller, 6 Johns. 283; Sayre *v.* Austin, 3 Wend. 496; Collais *v.* McLeod, 8 Ired. 221; 49 Am. Dec. 376; Thompson *v.* Monrow, 2 Cal. 99; 56 Am. Dec. 318. *Contra*, Crawford *v.* Simonton, 7 Port. 110.

[2] Tazewell *v.* Saunders, 13 Gratt. 354; Freeman on Judgments, 441; Shaller *v.* Brand, 6 Binn. 435; 6 Am. Dec. 483; Finley *v.* Carothers, 9 Tex. 517; 60 Am. Dec. 179; Townsend *v.* Smith, 20 Tex. 465; 70 Am. Dec. 400. A statute which provides that judgments shall bear the same rate of interest as the contract upon which they are recovered gives such rate of interest upon the damages recovered, as well as upon the original debt: Henry *v.* Ward, 4 Ark. 150.

[3] Houston *v.* Mossman, T. U. P. Charlt. 138; Fitzgerald *v.* Caldwell, 4 Dall. 251; Ijams *v.* Rice, 17 Ala. 404; Sanborn *v.* Steele, 20 N. H. 34; Deloach *v.* Worke, 3 Hawks, 36; Berryhill *v.* Wells, 5 Binn. 56; In re Wither, 16 Pa. St. 151; Norwood *v.* Manning, 2 Nott & McC. 395; Fishburn *v.* Sanders, 1 Nott & McC. 242; Snickers *v.* Dorsey, 2 Munf. 505.

[4] Solen *v.* R. R. Co., 14 Nev. 405.

[5] Sproat *v.* Cutler, 37 Pa. St. 157; Shockey *v.* Glasford, 6 Dana, 9; Vredenbergh *v.* Hallett, 1 Johns. Cas. 27; Buckman *v.* Davis, 28 Pa. St. 211. *Contra*, Blickenstaff *v.* Perrin, 27 Ind. 527; Kelsey *v.* Murphy, 30 Pa. St. 340.

[6] Gibson *v.* Cincinnati Inquirer, 2 Flip. 88.

[7] Booth *v.* Ableman, 20 Wis. 602.

[8] Wilson *v.* King, 1 Morris, 106.

[9] See the provisions of the statutes in 1 Stimson's American Statute Law, 4842-4844; Lurton *v.* Gilliam, 1 Scam. 577; 33 Am. Dec. 430.

[10] Lee *v.* Davis, 1 A. K. Marsh. 397; 10 Am. Dec. 746; Cox *v.* Marlatt, 36 N. J. L. 389; 13 Am. Rep. 454; N.

statute providing for interest on debts not before drawing interest is unconstitutional as to debts contracted before its passage.[1] Where the legal rate was six per cent at the time a contract was entered into, but was afterwards changed to ten, it is improper to allow six per cent up to that time and ten per cent afterwards.[2] By the words "legal interest," found in a statute, is to be understood the rate of interest prescribed by law, in the absence of special agreement, at the date of the passage of the act.[3] Where the legislature has limited the amount of interest to be paid on one peculiar character of paper authorized to be issued by a city, the presumption arises that upon all other kinds no limitation was intended.[4]

§ 2441. **Trustees, Executors, and Partners.** — A trustee or executor or guardian who unnecessarily keeps in his hands moneys which it is his duty to invest, or to pay to the persons entitled, will be charged with interest.[5] An administrator who keeps no accounts by which the amount of interest received by him can be ascertained will be charged with interest on all debts due the estate from the time of their becoming due.[6] If a guardian lends his ward's money on insufficient security, he may be

R. Meadow Co. *v.* Shrewsbury Church, 22 N. J. L. 424; 53 Am. Dec. 258; Hubbard *v.* Callahan, 42 Conn. 524; 19 Am. Rep. 564. Where an account extending over a number of years is ordered as to an estate, etc., and the rate of interest during that time had been changed by law, the interest payable on the accounting must conform to such fluctuation: Wilson *v.* Cobb, 31 N. J. Eq. 91.

[1] Goggans *v.* Turnipseed, 1 S. C. 80; 7 Am. Rep. 23.

[2] Aguirre *v.* Packard, 14 Cal. 171; 73 Am. Dec. 645.

[3] Beals *v.* Amador County, 35 Cal. 624.

[4] Douglass *v.* Virginia City, 5 Nev. 147.

[5] Attorney-General *v.* Alford, 4 De Gex, M. & G. 843, 851; Stacpoole *v.* Stacpoole, 4 Dow, 209, 224; Blogg *v.* Johnson, 15 Week. Rep. 626; L. R. 2 Ch. 225; Wyman *v.* Hubbard, 13 Mass. 232; Boynton *v.* Dyer, 18 Mass. 2; Williams *v.* Bank, 4 Met. 317; Turney *v.* Williams, 7 Yerg. 173; Fridge *v.* State, 3 Gill & J. 103; 20 Am. Dec. 463; Johnson *v.* Hedrick, 33 Ind. 129; 5 Am. Rep. 191; In re Murick, 1 Ashm. 305; Glenn *v.* Cockey, 16 Md. 446; Gray *v.* Thompson, 1 Johns. Ch. 82; Worrell's Appeal, 23 Pa. St. 44; Armstrong *v.* Walkup, 12 Gratt. 608; Bond *v.* Lockwood, 33 Ill. 212; Clarkson *v.* De Peyster, Hopk. Ch. 424; Armstrong *v.* Miller, 6 Ohio, 118; Huffer's Appeal, 2 Grant Cas. 341; Pennypacker's Appeal, 41 Pa. St. 494; Walker *v.* Bynum, 4 Desaus. Eq. 555; Garrett *v.* Carr, 1 Rob. (La.) 196; Cruce *v.* Cruce, 81 Mo. 676; Mount *v.* Van Ness, 35 N. J. Eq. 113.

[6] Finch *v.* Ragland, 2 Dev. Eq. 137.

charged with interest.[1] It has been held that where a trustee converts trust money to his own use, or employs them for his private profit, or sometimes where he fails to invest, he will be charged with compound interest.[2] On the other hand, if it can be shown to be necessary to meet the exigencies of the testator's affairs that moneys should be kept uninvested, the executor will escape this liability.[3] Interest is only charged on funds which the executor or trustee has actually retained. If he has lost the trust fund through neglect in calling it in, the court will not charge him with interest.[4] And if an executor, acting *bona fide*, pays money to the wrong person by mistake, the court, although requiring him to make it good, will not, it seems, make him restore it with interest.[5]

[1] Brewer *v.* Ernest, 81 Ala. 435.

[2] See In re Kernochan, 104 N. Y. 618; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; 7 Am. Dec. 507; Wright *v.* Wright, 2 McCord Ch. 185; Karr *v.* Karr, 6 Dana, 3; Williams *v.* Petticrew, 62 Mo. 460; Price *v.* Peterson, 38 Ark. 494; In re Camp, 6 Mo. App. 563; Boynton *v.* Dyer, 18 Pick. 1; Bradford *v.* Bodfish, 39 Iowa, 681; Johnson *v.* Hedrick, 33 Ind. 129; 5 Am. Rep. 191. In Barney *v.* Saunders, 16 How. 535, it is said that "interest is compounded as a punishment or as a measure of damage for undisclosed profits, or in place of them. For mere neglect to invest, simple interest only is generally imposed." In a careful article published in the Central Law Journal of April 13, 1883, the writer (Mr. McClain) concludes that "to justify a compounding of interest against the trustee, there must be a breach of duty in the management of the fund; for without this, even simple interest should not be taxed, either for failure to invest or even for mingling the trust fund with private moneys, unless it appears that, in the latter case, some profits were realized: Rapalje *v.* Hall, 1 Sand. Ch. 399; Radford *v.* Folsom, 55 Iowa, 276; Dietrich *v.* Heft, 5 Pa. St. 87. 2. Where there is a breach of trust in failing to invest when that is the proper course, or in mingling the trust funds with private moneys, in violation of duty, interest will be charged, but it will not be compounded for failure to invest, unless, perhaps, in case of gross delinquency: Boynton *v.* Dyer, 18 Pick. 1; Bradford *v.* Bodfish, 39 Iowa, 681; 2 Kent's Com. 231; Ames *v.* Scudder, 11 Mo. App. 168. Nor for mingling with private funds, unless such funds are so used that profits are realized; in which case, if the profits are not disclosed so as to be recoverable by the beneficiary, as such, compound interest will be given to cover what profits may have been realized": Schieffelin *v.* Stewart, 1 Johns. Ch. 620; 7 Am. Dec. 507; Hooke *v.* Payne, 14 Wall. 252; Harlan's Accounts, 5 Rawle, 353; Spear *v.* Finkham, 2 Barb. Ch. 211; Hazard *v.* Durant, 14 R. I. 25. A mere neglect to invest small sums of unexpended moneys will not render an administrator chargeable with compound interest: Lovett *v.* Thomas, 81 Va. 245.

[3] Franklin *v.* Frith, 3 Brown Ch. 444; Littlehales *v.* Gascoyne, 3 Brown Ch. 72; Dawson *v.* Massey, 1 Ball & B. 231.

[4] Tebbs *v.* Carpenter, 1 Madd. 290; Lowson *v.* Copeland, 2 Brown Ch. 156.

[5] Saltmarsh *v.* Barrett, 31 Beav. 350.

But the payment by an administrator of a legacy barred by lapse of time is a misappropriation of funds, for which he is chargeable with interest from the date of the misappropriation.[1]

And it has been held that an executor or administrator is not liable for interest on money deposited in bank under the authority of the ordinary;[2] or for money in his hands, except where he actually receives it, or makes some use of the funds, or is guilty of negligence in accounting for them;[3] or where, with funds to distribute, he delayed for two months, during vacation and illness of the probate judge, to file his account;[4] or because he has deposited the money of the estate with his own money, so long as it remains subject to his command and to the order of court;[5] or on the value of non-perishable personal property retained by him, unless the will requires it to be disposed of at once, or a sale be necessary to pay debts and legacies;[6] or for retaining funds as stake-holder until the settlement of conflicting claims thereto.[7]

As a general rule, in the absence of express stipulation, no interest will be allowed on partnership shares;[8] nor is a partner chargeable with interest on balances and overdrafts, except by agreement.[9] But where one of the partners, of his own motion, advanced a large sum to save the firm from insolvency and foreclosure,[10] and where partners agreed to invest an equal amount of capital, and one furnished for the use and benefit of the copartnership

[1] Moody *v.* Hemphill, 71 Ala. 169.

[2] Springer *v.* Oliver, 21 Ga. 519.

[3] Boynton *v.* Dyer, 18 Pick. 1, 7; Wyman *v.* Hubbard, 13 Mass. 232; Stearns *v.* Brown, 1 Pick. 530; Lamb *v.* Lamb, 11 Pick. 371; Forward *v.* Forward, 6 Allen, 494; Wendell *v.* French, 19 N. H. 205; Lund *v.* Lund, 41 N. H. 355; Hallett *v.* Hare, 5 Paige, 315; Hasler *v.* Hasler, 1 Bradf. 248; Cooch *v.* Irwin, 7 Ohio St. 22.

[4] Seligman's Estate, Myrick's Prob. 8.

[5] In re Schofield, 99 Ill. 513.

[6] Greeno *v.* Greeno, 23 Hun, 478.

[7] Burlows *v.* O'Neal, 4 Desaus. Eq. 394.

[8] Desta *v.* Smith, 20 Ala. 747; Dexter *v.* Arnold, 3 Mass. 284; Miller *v.* Lord, 11 Pick. 11; Moss *v.* McCall, 75 Ill. 190; Pearce *v.* Pierce, 77 Ill. 284; Tutt *v.* Land, 50 Ga. 339; Jackson *v.* Johnson, 11 Hun, 509.

[9] Brown's Estate, 11 Phila. 127; Holden *v.* Peace, 4 Ired. Eq. 223; 45 Am. Dec. 414.

[10] McMillan *v.* James, 105 Ill. 194.

a sum exceeding his agreed proportion,[1] interest was allowed on the advance and the overplus. A partner who, without the consent of his partners, withdraws some of the partnership funds from the business, and misapplies it to his own use, will be charged with interest on the amount from that time.[2]

Money received for another, and retained without the owner's consent, is entitled to carry interest.[3] A bailee or trustee who disclaims that relation is chargeable with interest without a demand.[4] On money of the principal detained against right, the agent is chargeable with interest from the time when it should have been paid, at the rate fixed by the law of the place where it is detained.[5] A garnishee who has used the money attached in his hands is liable to pay interest from the time of the attachment.[6]

An officer charged with the disbursement of public moneys is not liable for interest thereon, if he has not converted them to his own use, nor neglected to disburse them pursuant to law, nor, when required, failed to account for or transfer them.[7] Interest is properly charged upon the amount due from a county treasurer from the time of the qualification of his successor.[8] A city treasurer having failed to pay over to the county collector the county's quota of taxes, he was charged with interest upon the same from the time when he ought to have paid them.[9] A collector of taxes is liable for interest from the time of demand on taxes not collected and lost by his negligence,

[1] Baker *v.* Mayo, 129 Mass. 117; Reynolds *v.* Mardis, 17 Ala. 32; Lloyd *v.* Carrier, 2 Lans. 364.

[2] Miller *v.* Lord, 11 Pick. 11; Winsor *v.* Savage, 9 Met. 357; Hodges *v.* Parker, 17 Vt. 242; 44 Am. Dec. 331; Hollister *v.* Barkley, 11 N. H. 502; Robins *v.* Laswell, 58 Ill. 203; Coddington *v.* Idell, 30 N. J. Eq. 540.

[3] Rapalje *v.* Emory, 1 Dall. 349; Abbott *v.* Wilmot, 22 Vt. 437; Close *v.* Fields, 13 Tex. 623.

[4] Dickinson *v.* Owen, 11 Cal. 71.

[5] Bischoffsheim *v.* Baltzer, 21 Fed. Rep. 531.

[6] Mattingly *v.* Boyd, 20 How. 128.

[7] United States *v.* Denvir, 106 U. S. 536.

[8] Monroe Co. Supervisors *v.* Clarke, 25 Hun, 282.

[9] Sheridan *v.* Van Winkle, 43 N. J. L. 125.

and for interest on taxes collected by him from the time when it was his duty to pay them into the town treasury.[1]

Where money is properly advanced by an administrator, interest will be allowed him.[2] A legal claim against the estate of one deceased bears interest from the time of its presentation to the administrator.[3]

§ 2442. Rate of Interest after Maturity. — Where the agreement is to pay a certain rate of interest up to maturity, and nothing is said as to the rate of interest afterwards, it is held in some jurisdictions that the same rate of interest mentioned in the contract may be recovered until payment is made.[4] In other jurisdictions the very opposite is held, viz., that after maturity only the legal rate can be recovered.[5] A promissory note payable on a

[1] Pittsburg *v.* Tabor, 61 N. H. 100.

[2] Liddel *v.* McVickar, 11 N. J. L. 44; 19 Am. Dec. 369. *Contra*, Storer *v.* Storer, 9 Mass. 37.

[3] Pico *v.* Stevens, 18 Cal. 376.

[4] Kohler *v.* Smith, 2 Cal. 597; 56 Am. Dec. 369; Brannon *v.* Hursell, 112 Mass. 63; Marietta Iron Works *v.* Lottimer, 25 Ohio St. 621; Monett *v.* Sturges, 25 Ohio St. 384; Kilgore *v.* Powers, 5 Blackf. 22; Phinney *v.* Baldwin, 16 Ill. 108; 61 Am. Dec. 62; Etnyre *v.* McDaniel, 28 Ill. 201; Spencer *v.* Maxfield, 16 Wis. 178, 541; Pruyn *v.* City of Milwaukee, 18 Wis. 367; McLane *v.* Abrams, 2 Nev. 199; Hopkins *v.* Crittenden, 10 Tex. 189; Shaw *v.* Rigby, 84 Ind. 375; 43 Am. Rep. 96; Hand *v.* Armstrong, 18 Iowa, 324; Cox *v.* Smith, 1 Nev. 161; 90 Am. Dec. 476; Lucas *v.* Pickel, 20 Ind. 490; Cromwell *v.* County of Sac, 96 U. S. 51; Overton *v.* Bolton, 9 Heisk. 762; 24 Am. Rep. 367; Cecil *v.* Hicks, 29 Gratt. 1; 26 Am. Rep. 391; Paine *v.* Caswell, 68 Me. 80; 28 Am. Rep. 21; Pridgen *v.* Andrews, 7 Tex. 461; Union Inst. *v.* Boston, 129 Mass. 82; 37 Am. Rep. 305; Meaders *v.* Gray, 60 Miss. 400; 45 Am. Rep. 414; Kellogg *v.* Lavender, 15 Neb. 256; 48 Am. Rep. 339; Brewster *v.* Wakefield, 1 Minn. 352; 69 Am. Dec. 343; Seymour *v.* Continental Life Ins. Co., 44 Conn. 300; 26 Am. Rep. 469. A sealed note, payable twelve months after date, "with interest at twelve and a half per cent per annum, interest payable annually," and described, in a contemporaneous mortgage executed to secure it, as a note "with interest thereon at the rate of twelve and a half per cent per annum till paid," draws the same rate of interest after maturity as before: Mobley *v.* Davega, 16 S. C. 73; 42 Am. Rep. 632. Interest as damages for the non-payment of overdue railroad bonds, issued by the state's authority at a higher rate of interest than other contracts for the payment of money, must be allowed at the same rate as before they fell due: Beckwith *v.* Trustees of Hartford etc. R. R. Co., 29 Conn. 268; 76 Am. Dec. 599.

[5] Ludwick *v.* Huntzinger, 5 Watts & S. 51; Holden *v.* Trust Co., 100 U. S. 72; Brewster *v.* Wakefield, 22 How. 127; Burnshel *v.* Firman, 22 Wall. 170; U. S. Bank *v.* Chapin, 9 Wend. 471; Macomber *v.* Dunham, 8 Wend. 550; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Eaton *v.* Boissonnault, 67 Me. 540; 24 Am. Rep. 52; Hubbard *v.* Callahan, 42 Conn. 524; 19 Am. Rep. 564; Pearce *v.* Hennessy, 10 R. I. 223; Rilling *v.* Thompson, 12 Bush, 310; Kitchen *v.* Bank of Mobile, 14 Ala. 233; Searle *v.* Adams, 3 Kan. 515; 89

certain day, with "interest after maturity," draws interest from that day, and not from the third day of grace.[1] In Alabama it has been held that a note payable one year from date, "to bear interest from date if not punctually paid," carries interest from maturity only.[2]

§ 2443. **Compound Interest.**—Compound interest may be charged according to a customary course of dealing to which the debtor has assented; as where an agent for a mercantile business delivers accounts with yearly or half-yearly rests, charging interest on the balances due, and adding it to the balance at the end of each rest.[3] So it is generally held that an agreement to pay compound interest is valid.[4] Otherwise interest upon interest is not allowed, except where there is an express agreement to that effect.[5] It is held that interest upon interest may be recovered where the first interest is payable at particular times by the contract, and may be then recovered in an action of debt, with damages for the detention.[6] If a promissory note states that "interest is to be paid annually," the

Am. Dec. 598; Moreland *v.* Lawrence, 23 Minn. 84; Newton *v.* Kennerly, 31 Ark. 626; 25 Am. Rep. 592; Briggs *v.* Winsmith, 10 S. C. 133; 30 Am. Rep. 46; Sheffield Soc. *v.* Loomis, 42 Conn. 570. See Cramer *v.* Lepper, 26 Ohio St. 59; 20 Am. Rep. 756. No recovery can be had on a coupon, though severed from the bond, for greater interest than provided for by the bond: Goodwin *v.* Bath, 77 Me. 462.

[1] Wheeless *v.* Williams, 62 Miss. 369; 52 Am. Rep. 190.

[2] Fugua *v.* Carriel, Minor, 170; 12 Am. Dec. 46.

[3] Bruce *v.* Hunter, 3 Camp. 467; Young *v.* Hill, 67 N. Y. 162; 23 Am. Rep. 99; Isett *v.* Ogilvie, 9 Iowa, 313. *Contra*, Graham *v.* Williams, 16 Serg. & R. 257; 16 Am. Dec. 569.

[4] Camp *v.* Bates, 11 Conn. 487; Young *v.* Hill, 67 N. Y. 162; 23 Am. Rep. 99; Connecticut *v.* Jackson, 1 Johns. Ch. 13; 7 Am. Dec. 471; Van Benschooten *v.* Lawson, 6 Johns. Ch. 313; 10 Am. Dec. 333; Hale *v.* Hale, 1 Cold. 233; 78 Am. Dec. 490; Quickenbush *v.* Leonard, 9 Paige, 334.

[5] Aspinwall *v.* Blake, 25 Iowa, 319; Preston *v.* Walker, 26 Iowa, 205; 96 Am. Dec. 140; Banks *v.* McClellan, 24 Md. 62; 87 Am. Dec. 594; Von Hemert, *v.* Porter, 11 Met. 210; Van Husan *v.* Kanouse, 13 Mich. 303; Brewster *v.* Wakefield, 1 Minn. 352; 69 Am. Dec. 343; Stover *v.* Evans, 38 Me. 461. Unless the statute so provides, compound interest is not recoverable: Denver Brick Manufacturing Co. *v.* McAllister, 6 Col. 261.

[6] Kennon *v.* Dickens, Cam. & N. 357; 2 Am. Dec. 642; Gibbs *v.* Chisholm, 2 Nott & McC. 38; 10 Am. Dec. 560; Talliaferro *v.* King, 9 Dana, 331; 35 Am. Dec. 140; Doe *v.* Vallejo, 29 Cal. 392; Doig *v.* Barkley, 3 Rich. 125; 45 Am. Dec. 762; Bledsoe *v.* Nixon, 69 N. C. 89; 12 Am. Rep. 642; Calhoun *v.* Marshall, 61 Ga. 275; 34 Am. Rep. 99.

payee or holder is entitled to interest upon the interest thus annually reserved, if it be not paid according to the tenor of the instrument.[1] Thus interest by way of damages is recoverable on overdue coupons of bonds after demand and refusal of payment.[2] In some states it is held that interest upon interest cannot be recovered even where it is agreed to by the debtor, such a contract being considered as against public policy.[3]

§ 2444. Interest, how Lost or Suspended.—Interest in all cases depends as accessory upon the principal, so that if the claim for the principal debt be barred, as by the statute of limitations, the claim for future interest ceases with it.[4] So if the principal be received by the creditor, the right to interest is lost,[5] unless the contract contains an express agreement to pay interest.[6] A legal tender will stop the running of interest.[7] So no interest is recoverable where the delay in payment is occasioned by the creditor.[8] Interest on unpaid purchase-money is not allowable until the title is made good.[9] Where a debtor

[1] Preston *v.* Walker, 26 Iowa, 205; 96 Am. Dec. 140.

[2] Whitaker *v.* R. R. Co., 8 R. I. 47; 5 Am. Rep. 547; Hollingsworth *v.* Detroit, 3 McLean, 472; Rich *v.* Seneca Falls, 19 Blatchf. 558.

[3] Hastings *v.* Wiswall, 8 Mass. 455; Barrell *v.* Joy, 16 Mass. 227; Wilcox *v.* Howland, 23 Pick. 167; Henry *v.* Flagg, 13 Met. 64; Newell *v.* Houlton, 22 Minn. 19; White *v.* Iltus, 54 Minn. 43; Cox *v.* Smith, 1 Nev. 161; 90 Am. Dec. 476. In Oregon an agreement to compound interest oftener than once a year cannot be enforced, but does not render the agreement void as to the principal sum secured and simple interest: Murray *v.* Oliver, 3 Or. 539. An agreement to pay interest upon interest must, in order to be valid, be made after the interest which is to bear interest has become due, and it must be supported by a sufficient consideration: Young *v.* Hill, 67 N. Y. 162; 23 Am. Rep. 99.

[4] Leake on Contracts, 1100.

[5] Stone *v.* Burnett, 8 Mo. 41; Tillotson *v.* Preston, 3 Johns. 229; Abbott *v.* Wilmot, 22 Vt. 437; Johnson *v.* Brann, 6 Johns. 268; People *v.* New York, 5 Cow. 331; Am. Bible Soc. *v.* Wells, 68 Me. 572; 28 Am. Rep. 82.

[6] Fake *v.* Eddy, 15 Wend. 76; Robbins *v.* Cheek, 32 Ind. 328; 2 Am. Rep. 348; overruling Comparet *v.* Ewing, 8 Blackf. 328.

[7] Hidden *v.* Jordan, 39 Cal. 61; McNeill *v.* Call, 19 N. H. 403; 51 Am. Dec. 188; Morton *v.* Ludlow, 1 Edw. Ch. 639; Lusk *v.* Smith, 21 Wis. 27; Williams *v.* Willhite, 3 Head, 344. But not readiness to pay a debt without a tender: Hummel *v.* Brown, 24 Pa. St. 310. Nor a tender of a less sum than is due: Shobe *v.* Carr, 3 Munf. 10.

[8] De Peau *v.* Russell, 1 Brev. 441; 2 Am. Dec. 676; Hart *v.* Brand, 1 A. K. Marsh. 159; 10 Am. Dec. 715.

[9] Bouthemy *v.* Ducournau, 6 Martin, N. S., 657; 12 Am. Dec. 487.

is prevented by law from the payment of the debt, he is not chargeable with interest.[1] So the summoning of the debtor by garnishee or trustee process stops the running of interest against him during the pendency of the suit,[2] unless he deny his liability,[3] or practice unreasonable delay in answering interrogatories,[4] or continue to use the money,[5] or withhold more money than is necessary to satisfy the garnishment.[6] A sheriff is not liable for interest where the money is tied up in his hands by order of court.[7] It has been held that interest due on a debt — where the creditor lived in the North and the debtor in the South — was not suspended by the war of the rebellion.[8] Especially is this so where there was an express contract to pay interest.[9] Where a party allows his suit to remain *in fieri* for twenty-six years before taking the judgment, which he might have had at any time on his verdict, interest on his demand should not be allowed during the period. A statute allowing interest on verdicts will not embrace such a case.[10] But the death of a debtor does not stop interest,[11] nor does his insolvency;[12] nor is interest stopped by a bill of interpleader improperly filed;[13] nor by notices from each one of two partners requesting the debtor not to pay to the other any moneys due the partnership.[14]

[1] Chase *v.* Manhardt, 1 Bland, 333; Le Branthwait *v.* Halsey, 9 N. J. L. 3; Stevens *v.* Barringer, 13 Wend. 639; Jackson *v.* Lloyd, 44 Pa. St. 82; Irwin *v.* R. R. Co., 43 Pa. St. 488; Osborn *v.* Bank, 6 Wheat. 738; Gillespie *v.* New York, 3 Edw. Ch. 512.

[2] Hoare *v.* Allen, 2 Dall. 102; Ryan *v.* Baldrich, 3 McCord, 498; Little *v.* Owen, 32 Ga. 20; Morris *v.* Ins. Co., 25 N. H. 22; Adams *v.* Cadis, 8 Pick. 260.

[3] Hollingsworth *v.* Hammond, 30 Ala. 668; Work *v.* Glaskins, 33 Miss. 539.

[4] Oriental Bank *v.* Ins. Co., 4 Met. 1; Hubbard *v.* R. R. Co., 11 Met. 128; Jones *v.* Bank, 99 Pa. St. 317.

[5] Woodruff *v.* Bacon, 35 Conn. 97.

[6] Sickman *v.* Lapsley, 13 Serg. & R. 224; 15 Am. Dec. 597.

[7] Stewart *v.* Stocker, 13 Serg. & R. 199; 15 Am. Dec. 589.

[8] Shortridge *v.* Mason, 2 Am. Law Rev. 95; Spencer *v.* Brower, 32 Tex. 663; 5 Am. Rep. 254. *Contra*, as to a right of action: Selden *v.* Preston, 11 Bush, 191.

[9] Lash *v.* Lambert, 15 Minn. 416; 2 Am. Rep. 142. Here the creditor lived in North Carolina and the debtor in Minnesota.

[10] Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174.

[11] Dodge *v.* Breed, 13 Mass. 537.

[12] Bryant *v.* Russell, 23 Pick. 508. *Contra*, In re Hauck, 2 Saw. 231.

[13] Michigan etc. Co. *v.* White, 44 Mich. 25.

[14] King *v.* Kelley, 51 Pa. St. 36.

§ 2445. Payments Made on Account—Rules for Calculating and Applying Interest.—Interest should be calculated whenever a payment is made. To this interest the payment is first to be applied, and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest.[1] When payments are made at different times on an interest-bearing debt, the amount of principal and interest due at the time of the first payment is the amount from which the payment is to be deducted; interest then is to be computed on this sum until the time

[1] Smith *v.* Shaw, 2 Wash. C. C. 167; Dunlop *v.* Alexander, 1 Cranch C. C. 468; Russell *v.* Lucas, Hemp. 91; Ross *v.* Russell, 31 N. H. 386; Huner *v.* Doolittle, 3 G. Greene, 76; 54 Am. Dec. 489; In re Den, 35 Cal. 692; Smith *v.* Coopers, 9 Iowa, 376; Baker *v.* Baker, 28 N. J. L. 13; 75 Am. Dec. 243; Stark *v.* Hunton, 3 N. J. Eq. 300; Lightfoot *v.* Price, 4 Hen. & M. 431; Wasson *v.* Gould, 3 Blackf. 18; Backus *v.* Minor, 3 Cal. 231. See Anketel *v.* Converse, 17 Ohio St. 11; 91 Am. Dec. 115; Smith *v.* Coopers, 9 Iowa, 387; Riney *v.* Hill, 14 Mo. 500; 55 Am. Dec. 119. In Hart *v.* Dorman, 2 Fla. 445, 50 Am. Dec. 285, it is said: "It is said in a note to Fonblanque's Equity that 'it is usual amongst merchants in stating their accounts to let the principal continue upon interest, and to compute the interest upon the payments as they are successively made'; but the annotator adds: 'It is the debtor who gains and the creditor who loses by this mode; for it is susceptible of mathematical demonstration that a debt will be wholly extinguished in the course of a few years (and the time will be longer or shorter, according to the rate of interest) by the payments of interest, without paying a cent of principal; and Chancellor Kent makes the same remark in the case of Stoughton *v.* Lynch, 2 Johns. Ch. 214; and in Wasson *v.* Gould, 3 Blackf. 21, the court held that this mode is not correct; that it subjects the creditor to a loss which he ought not to bear; citing Stoughton *v.* Lynch. In the case of State of Connecticut *v.* Jackson, 1 Johns. Ch. 17, 7 Am. Dec. 471, Chancellor Kent held the rule for casting interest, when partial payments have been made, to be, to apply the payments in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal; and the subsequent interest is to be computed on the balance of the principal remaining due. If the payments be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due; and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance of principal, as aforesaid'; and this rule is sustained by Penrose *v.* Hart, 1 Dall. 378; Lightfoot *v.* Price, 4 Hen. & M. 431; Wasson *v.* Gould, 3 Blackf. 21; Smith *v.* Shaw's Adm'r, 2 Wash. C. C. 167–169; Williams *v.* Houghtailing and Bevier, 3 Cow. 87, note A; Fonblanque's Eq. 654, note above cited; Meredith *v.* Banks, 6 N. J. L. 408, 409, note; Story *v.* Livingston, 13 Pet. 371; Edes *v.* Goodridge, 4 Mass. 103; and United States *v.* McLemore, 4 How. 288. And this rule is, we think, more entirely free from objection than any other that has been adopted."

of the next payment, and so on, except that the new capital must in no case be greater than the former capital.[1] Where a promissory note is made payable at a given time after date, with interest payable semi-annually, interest may be computed in making up the judgment on all installments of interest overdue and remaining unpaid; but no installments of semi-annual interest will be considered as due after the maturity of the note, because after that both the accruing interest and principal are due, not on any particular day, but every day, until they are paid.[2] It is a proper way of computing interest, in making an abatement of the purchase-money, to divide the amount of the damages by the number of notes given for the purchase-money, and to calculate interest on each sum from the time the original notes respectively fell due to when the new notes were given.[3]

§ 2446. **Usury—Statutory Provisions as to.**—Usury is the taking of more for the use of money than the law allows.[4] At common law parties may agree on any rate of interest they please for the use of money. So in several states, viz., California, Colorado, Florida, Maine, Massachusetts, Nevada, and Rhode Island, and the territories of Dakota, Montana, Washington, and Wyoming, any rate of interest may be contracted for, provided it is done in writing.[5] In the other states and territories it is unlawful to take or receive higher interest than what the statutes prescribe shall be legal interest.[6] In Connecticut, Georgia, Indiana, Kansas, Kentucky, Maryland, Michigan, New Hampshire, Pennsylvania, Tennessee, and West

[1] Hurst *v.* Hite, 20 W. Va. 183.

[2] Wheaton *v.* Pike, 9 R. I. 132; 11 Am. Rep. 227.

[3] Stow *v.* Bozeman, 29 Ala. 397.

[4] The code of Georgia thus defines usury: "Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest": Ga. Code, sec. 4812. For the history of usury laws, see the opinion of Chancellor Kent in Dunham *v.* Gould, 16 Johns. 367; 8 Am. Dec. 323.

[5] Stimson's American Statute Law, 4812.

[6] Stimson's American Statute Law, 4831.

Virginia, the creditor cannot recover more than the rate prescribed by law.[1] In Alabama, the District of Columbia, Illinois, Iowa, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, South Carolina, Texas, Virginia, Wisconsin, the whole interest is forfeited.[2] In Arkansas, Minnesota, New York, and Oregon, the contract on which the interest is given is made void, and in Oregon the entire debt is forfeited to the county school fund.[3] Although a statute declares a contract "void for usury," the word "void" is used in the sense of "voidable."[4] The repeal of a usury law takes away the defense of usury in all actions thereafter brought, whether the contract was made before or after the repeal.[5] But when the law is repealed after the action is brought, the defense may be set up.[6] Although a statute modifying the rate of interest or the penalties for usury cannot apply to a loan made before the act took effect, it may apply to a subsequent agreement by which the parties extend the time for payment of the loan, the terms remaining unchanged.[7] So an agreement for a greater rate of interest than that allowed by the statute on a pre-existing debt for an extension of the time for its payment is within the statute.[8]

ILLUSTRATIONS. — A loan of money in currency was made, the borrower to pay one half of one per cent a month in currency and seven per cent per annum in gold, gold being then at a premium of nearly forty per cent. *Held*, that the contract was usurious: *Tyng* v. *Commercial Co.*, 58 N. Y. 308. A, being indebted to B in the sum of six thousand dollars, payable, in four annual installments, in about three years, agreed with C that the latter, in consideration of A's paying him four thousand dollars cash, would discharge his debt. *Held*, usurious: *Watkins* v. *Taylor*, 2 Munf. 424; 5 Am. Dec. 486. A agreed to loan to B two thousand eight hundred dollars on condition that B would

[1] Stimson's American Statute Law, 4832.
[2] Stimson's American Statute Law, 4832.
[3] Stimson's American Statute Law, 4832.
[4] Ewell v. Daggs, 108 U. S. 143.
[5] Woodruff v. Scrugga, 27 Ark. 26; 11 Am. Rep. 777.
[6] Smith v. Glanton, 39 Tex. 365; 19 Am. Rep. 31.
[7] Story v. Kimbrough, 33 Ga. 21.
[8] Shirley v. Welty, 19 Ill. 623; 71 Am. Dec. 244.

receive from A eight hundred dollars in goods, at prices fixed by A, and pay, or allow A to retain, five per cent, or one hundred dollars, on the remaining two thousand dollars, and give A his bond and mortgage for two thousand eight hundred dollars with lawful interest. *Held*, that the bond and mortgage were usurious: *Brolasky* v. *Miller*, 8 N. J. Eq. 626. A loaned to B $360 at ten per cent interest, but B gave and A took his note for $400, with ten per cent interest, payable in twelve months. *Held*, that the note was usurious: *Hyde* v. *Finley*, 26 Miss. 468. A debtor agreed that the creditor might retain out of certain rents as they accrued sufficient sums to reimburse him for usury, which, owing to the debtor's default, he had been compelled to pay on borrowed money. *Held*, illegal and void: *White* v. *Ault*, 19 Ga. 551.

§ 2447. Intent to Take Illegal Interest Essential — Mistake. — In order to constitute usury, there must have been an intent on the part of debtor and creditor to take more for the use of the money than is allowed by law.[1] Thus if a contract be really usurious on account of some accident or mistake in calculation, it is not illegal.[2] And

[1] Tyson *v.* Ricard, 3 Har. & J. 109; 5 Am. Dec. 424; Price *v.* Campbell, 2 Call, 110; 1 Am. Dec. 535; Bearce *v.* Barstow, 9 Mass. 45; 6 Am. Dec. 25; Shoop *v.* Clark, 4 Abb. Dec. 235; Condit *v.* Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; Lloyd *v.* Scott, 4 Pet. 205; McFarland *v.* Bank, 4 Ark. 44; 37 Am. Dec. 761; United States Bank *v.* Waggener, 9 Pet. 378; Ely *v.* McClung, 4 Port. 128; Gregory *v.* Bewly, 9 Ark. 22; Smith *v.* Beach, 3 Day, 268; McGill *v.* Ware, 5 Ill. 21; Duncan *v.* Maryland etc. Inst., 10 Gill & J. 299; Howell *v.* Auten, 2 N. J. Eq. 44; Doak *v.* Snapp, 1 Cold. 180; Fay *v.* Lovejoy, 20 Wis. 407; Sizer *v.* Miller, 1 Hill, 227; First Nat. Bank *v.* Plankinton, 28 Wis. 177; 9 Am. Rep. 473, holding that intent on the part of the lender alone is sufficient. And in Sylvester *v.* Swan, 5 Allen, 134, 81 Am. Dec. 734, the court say: "The argument in behalf of the plaintiff goes upon the ground that there can be no usury where there is no intention on the part of the lender of money to take a greater rate of interest than is allowed by law. But this is a mistake. Usury does not consist in the intent with which parties take or pay unlawful interest. It is the transaction to which the law looks, in order to ascertain whether it is usurious or otherwise. The prohibition of the statute embraces every contract or assurance for the payment of money with interest at a greater rate than is allowed by law, irrespective of the motive or intent of the parties in making it. Whatever form or disguise the dealing of the parties may assume, it will be deemed usurious if in effect it is a loan of money at an unlawful rate of interest. Thus it had been held that where a greater rate than legal interest was reserved on a contract without any intention by the lender to receive usurious interest, but under a mistaken supposition of a legal right to make a deduction from the sum lent, it was nevertheless a usurious contract under the statute, and for that reason void: Maine Bank *v.* Butts, 9 Mass. 49, 55."

[2] Gibson *v.* Stearns, 3 N. H. 185; Lloyd *v.* Scott, 4 Pet. 224; N. Y. Fire Ins. Co. *v.* Parsons, 2 Cow. 678; Bevier *v.* Covell, 87 N. Y. 50; Marvine *v.* Hymers, 12 N. Y. 223; McElfetrick *v.* Hicks, 21 Pa. St. 402.

if the transaction is not usurious, the fact that it was intended to be is irrelevant.[1] A mistake of law will not prevent the transaction from being usurious.[2] But both parties must have had knowlege of the facts which render the transaction usurious.[3] The lender may receive an excess over legal interest voluntarily paid by a third person.[4]

§ 2448. Lending and Borrowing of Money Essential. — In order to constitute usury, it is essential that there should be a lending and borrowing.[5] Therefore on a loan of chattels any compensation which is agreed upon is legal.[6] So an exchange of securities is not usurious, unless it is a device to evade the statute.[7] And the same has been held of the following transactions: The sale of a school bond for less than its face value;[8] a contract to exchange a state bond for a note at three months, to be indorsed by a certain party, the bond to be sold the same day by the maker of the note at ninety-three per cent in the market;[9] an agreement, on a sufficient consideration, to ship cotton to a certain factor, or to pay commissions;[10] the purchase of a mortgage for less than its face, the debtor, with the knowledge of the purchaser, paying to the seller the amount of the discount;[11] a contract to return in the autumn corn borrowed in the winter preceding, with more than seven per cent of the amount added;[12] the lenders exacting as a condition of the loan that the borrower should secure to them the payment of

[1] Smith *v.* Paton, 31 N. Y. 66.
[2] Bank *v.* Alvord, 31 N. Y. 473; Maine Bank *v.* Butts, 9 Mass. 49.
[3] Powell *v.* Jones, 44 Barb. 521; Smith *v.* Beach, 3 Day, 268.
[4] McArthur *v.* Schenck, 31 Wis. 673; 11 Am. Rep. 643.
[5] Tardeveau *v.* Smith, Hardin, 175; 3 Am. Dec. 727; Spencer *v.* Tilden, 5 Cow. 144; Perrine *v.* Hotchkiss, 2 Lans. 416; Foote *v.* Emerson, 10 Vt. 338; 33 Am. Dec. 205.
[6] Bull *v.* Rice, 5 N. Y. 315; Hall *v.* Haggart, 17 Wend. 280; Cummings *v.* Williams, 4 Wend. 679.
[7] Perrine *v.* Hotchkiss, 2 Lans. 416.
[8] Orchard *v.* School District, 14 Neb. 378.
[9] England *v.* Moore, 4 Houst. 289.
[10] Norwood *v.* Faulkner, 22 S. C. 367; 53 Am. Rep. 717.
[11] Siewert *v.* Hamel, 91 N. Y. 199.
[12] Easterlin *v.* Rylander, 59 Ga. 292.

a subsisting and a genuine debt due them from a third person.[1]

ILLUSTRATIONS. — A printing-office, which had been run at a loss, was mortgaged, the mortgage stipulating that the mortgagee should not be liable for any profit or revenue that he might derive from the use of the property. *Held*, not usurious. *Rapier* v. *Gulf City Paper Co.*, 77 Ala. 126. A note promised to pay twenty dollars for forty bushels of corn, at ten and one half per cent interest, and if not paid by July 8th, twenty-four dollars at same rate of interest. *Held*, not usurious: *Garrity* v. *Cripp*, 4 Baxt. 86. A and B entered into partnership. A advanced capital on the bonds of B, who was the active partner. On A's retiring from the firm, B gave him a bond for the amount of capital advanced, and his share of the profits, amounting to twelve per cent, and also a bond of indemnity against the debts of the concern. *Held*, not usurious: *Huston* v. *Moorhead*, 7 Pa. St. 45. A, a leather-dealer, applied to B to accommodate him with a note on which he could raise money. B refused, but took from A an agreement to deliver a certain quantity of hides on a certain day, or to pay a note which B then made and delivered to A, and which A sold to C at a discount of ten per cent. B received the hides, and when sued by C upon the note, pleaded usury. *Held*, that B was liable: *Maas* v. *Chatfield*, 90 N. Y. 303.

§ 2449. **Sales of Land or Chattels.** — On a sale of chattels or land, a seller may demand a larger price for a sale on credit than for cash, but the contract is not usurious.[2] But where property is sold, and the purchaser pays more than legal interest on the price under the name of rent, this is usurious.[3] So where land is sold at a cash price, and time is given on a portion of the purchase-money, and a greater rate of interest than that allowed by law is charged on such deferred payments, the contract is usurious.[4] A loan of money to a corporation

[1] Valentine *v.* Conner, 40 N. Y. 248; 100 Am. Dec. 476.

[2] Hogg *v.* Ruffner, 1 Black, 115; Brooks *v.* Avery, 4 N. Y. 225; Brown *v.* Gardner, 4 Lea, 145; Gilmore *v.* Ferguson, 28 Iowa, 220; Ball *v.* Rice, 5 N. Y. 315.

[3] Scofield *v.* McNaught, 52 Ga. 69; Phelps *v.* Bellows, 53 Vt. 539. Rent will not be taken as a cover for usury, unless it is so excessive that, taken in connection with other facts, it affords a presumpsion that such is the intent: Sessions *v.* Richmond, 1 R. I. 298.

[4] Irvin *v.* Mathews, 75 Ga. 739.

on condition that the lender shall be employed in an official position where he is not needed, and paid a very large salary, though the place is in fact a sinecure, is usurious.[1]

ILLUSTRATIONS.—A proposes to sell to B a certain property for ten thousand dollars cash, or for twenty thousand dollars payable in installments. B accepts the latter method. The contract is not usurious: *Hogg* v. *Ruffner*, 1 Black, 115. A agreed to build houses for fifty-four thousand seven hundred dollars, payable in annual installments, to bear interest at seven and one half per cent. The legal rate of interest was six per cent. *Held*, that if the interest was part of the contract price of the houses, the contract was not usurious: *Graeme* v. *Adams*, 23 Gratt. 225; 14 Am. Rep. 130. A note given in purchase of land stipulated that interest to be paid on deferred payments constituted a part of the price of the land. *Held*, that such interest was not usurious: *Gruell* v. *Smalley*, 1 Duvall, 358. A party sold a number of cows on a contract to return double the number of the same description at the end of four years. *Held*, not usurious: *Spencer* v. *Tilden*, 5 Cow. 144. Stock was purchased at par which was worth but ninety per cent, and the purchaser gave his note for such par value on legal interest; it clearly appeared that the transaction was not intended as a loan. *Held*, not usurious: *Willoughby* v. *Comstock*, 3 Edw. Ch. 424.

§ 2450. Sale of Choses in Action.—For like reasons, the sale of a promissory note or bill of exchange, after it is put in circulation, at a discount exceeding the legal rate of interest, is not usurious.[2] And this is so even where the note is an accommodation note.[3]

[1] Griffin v. New Jersey Co., 11 N. J. Eq. 49.

[2] Lloyd v. Keech, 2 Conn. 175; 7 Am. Dec. 256; Belden v. Lamb, 17 Conn. 441; Nichols v. Frearson, 7 Pet. 103; Alabama etc. Co. v. Hall, 58 Ala. 1; Freeman v. Britten, 17 N. J. L. 191; Cram v. Hendricks, 7 Wend. 569; Munn v. Commission Co., 15 Johns. 44; 8 Am. Dec. 219; Flemming v. Mulligan, 2 McCord, 173; 13 Am. Dec. 707; Ramsay v. Clark, 4 Humph. 244; 40 Am. Dec. 645; Holmes v. Williams, 10 Paige, 326; 40 Am. Dec. 251; Bailey v. Smith, 14 Ohio St. 396; 84 Am. Dec. 385. *Contra*, Sylvester v. Swan, 5 Allen, 134; 81 Am. Dec. 734.

[3] Veazie Bank v. Paulk, 23 Me. 128. In Dickerman v. Day, 31 Iowa, 44, 7 Am. Rep. 156, the conflicting authorities on this point are collected. The court say: "It is uniformly held that where a promissory note has been fairly made, and there is no usury between the original parties, so that the payee has acquired a legal right to sue the maker thereon, he may then dispose of it at any rate of discount from its face, and the purchaser will have a right to enforce its full payment

So a sale of bank stock, at whatever price, is not usurious.[1]

§ 2451. Usury by Corporations.—If a charter forbid a corporation to take more than a certain rate of interest, the taking of a higher rate is usury.[2] And provision in a

against the maker: Nichols *v.* Fearson, 7 Pet. 103; Powell *v.* Waters, 8 Cow. 685; Rice *v.* Mather, 3 Wend. 62; Cram *v.* Hendricks, 7 Wend. 569; Munn *v.* Commission Co., 15 Johns. 44; 8 Am. Dec. 219; Rapelye *v.* Anderson, 4 Hill, 472; Holmes *v.* Williams, 10 Paige, 326; 40 Am. Dec. 250; Holford *v.* Blatchford, 3 Sand. Ch. 149; Churchill *v.* Suter, 4 Mass. 162; Lloyd *v.* Keach, 2 Conn. 175; 7 Am. Dec. 256; French *v.* Grindle, 15 Me. 163; Farmer *v.* Sewall, 16 Me. 456; May *v.* Campbell, 7 Humph. 450; Saltmarsh *v.* Planters' and Merchants' Bank of Mobile, 17 Ala. 761. But in respect to an accommodation note sold or negotiated at a greater rate of discount than legal interest, the authorities are not uniform; some of the cases holding that the purchaser of such note from the payee, being the first party paying anything for it, is therefore the first owner, and that, as the payee before the sale of the note had not acquired a legal right to sue the accommodation maker, the purchaser must pay the full face of the note, or the transaction will be usurious; that, as between the maker and the payee, the note is without consideration and void in the hands of the payee, and becomes valid only upon being negotiated to a *bona fide* purchaser, and hence a party who buys an accommodation note before it has been used for any business purpose, stands in the same situation, in respect to the defense of usury, as if he were the payee named therein, and this, though he had no knowledge that the note was accommodation paper, and supposing it to be business paper. The cases holding this view are as follows: Aebey *v.* Rapelye, 1 Hill, 10; Holmes *v.* Williams, 10 Paige, 326; 40 Am. Dec. 250; Jones *v.* Hake, 2 Johns. Cas. 60; Wilkie *v.* Roosevelt, 3 Johns. Cas. 66; Munn *v.* Commission Co., 15 Johns. 44; Powell *v.* Waters, 17 Johns. 176; Cram *v.* Hendricks, 7 Wend. 569; Dowe *v.* Schutt, 2 Denio, 621; Dix *v.* Van Wyck, 2 Hill, 522; Holford *v.* Blatchford, 2 Sand. Ch. 149; Knights *v.* Putnam, 3 Pick. 184; Churchill *v.* Suter, 4 Mass. 156, 162; Van Shaack *v.* Stafford, 12 Pick. 565; Sauerwein *v.* Brunner, 1 Har. & G. 474; Metcalf *v.* Watkins, 1 Port. 57; Cockey *v.* Forest, 3 Gill & J. 483; Carlisle *v.* Hill, 10 Ala. 398; Williams *v.* Banks, 11 Md. 198; Corcoran *v.* Powers, 6 Ohio St. 19; Bossange *v.* Ross, 29 Barb. 576; Sylvester *v.* Swan, 5 Allen, 134; 81 Am. Dec. 734; Whitten *v.* Hayden, 7 Allen, 407; Catlin *v.* Gunter, 11 N. Y. 368; 62 Am. Dec. 113; Clark *v.* Sisson, 22 N. Y. 312. On the other hand, the courts of many other of the states hold that the defense of usury cannot be set up against the purchaser of an accommodation note taken at a greater rate of discount than legal interest, unless such purchaser have knowledge of the character of the paper. The cases holding this view are the following: Otto *v.* Durege, 14 Wis. 571; Whitworth *v.* Adams, 5 Rand. 333; Taylor *v.* Bruce, Gilmer, 42; Jackson *v.* Fassitt, 33 Barb. 645; Sherman *v.* Blackman, 24 Ill. 347; Byrne *v.* Grayson, 15 La. Ann. 457; Smith *v.* Beach, 3 Day, 268; Middletown Bank *v.* Jerome, 18 Conn. 448; Humphrey *v.* Clark, 27 Conn. 381; Gaul *v.* Willis, 26 Pa. St. 257; 4 Am. Law Rev. 5561; Ramsey *v.* Clark, 4 Humph. 244. In our opinion, this latter view is the more reasonable and just, and more in harmony with well-settled principles."

[1] Greenhow *v.* Harris, 6 Munf. 472; 8 Am. Dec. 751; Brockenbrough *v.* Spindle, 17 Gratt. 33.

[2] Bank *v.* Swayne, 8 Ohio, 257; 32 Am. Dec. 707; Planters' Bank *v.* Sharp, 4 Smedes & M. 75; 43 Am. Dec. 470; Russell *v.* Failor, 1 Ohio St. 327; 59 Am. Dec. 631; Hill *v.* Barre Bank, 15 Fed. Rep. 432. See National Banks, Title II., Corporations.

bank charter authorizing the bank "to pay and receive such rate of interest as may be mutually agreed upon" does not authorize charging a rate unlawful for others.[1] In several states it is provided that no corporation shall be allowed to set up the defense of usury in any action;[2] nor can a surety of a corporation set it up.[3] A statute providing that no corporation "shall hereafter interpose the defense of usury" applies to contracts made before the passage of the act, though then in suit.[4]

§ 2452. Devices to Cover Usury — Form of Contract not Regarded. — The form of the contract is not regarded by the courts, who are vigilant in looking at the real transaction, notwithstanding its form.[5] It is not necessary, in order to constitute usury, that more than the legal rate per cent is stipulated for. It is sufficient if more is taken.[6] If what appears on its face to be a sale be really a loan, "no shift or contrivance, however disguised, can avail to evade the statute."[7] If a transaction was in reality an agreement for forbearance, the fact that it took the form of, and that the parties agreed that it should be considered, an exchange of paper cannot conceal its usurious nature.[8] When the manifest intention of the transaction is a loan at a usurious rate, it is not the less illegal because of an attempt to disguise it as a

[1] Tishimingo Savings Inst. *v.* Buchanan, 60 Miss. 496.

[2] Stimson's American Statute Law, 4835.

[3] Rosa *v.* Butterfield, 33 N. Y. 665; Freeze *v.* Drownell, 35 N. J. L. 285; 10 Am. Rep. 239.

[4] Town of Danville *v.* Pace, 25 Gratt. 1; 18 Am. Rep. 663.

[5] Scott *v.* Lloyd, 9 Pet. 446; Williams *v.* Williams, 15 N. J. L. 255; Hewitt *v.* Dement, 57 Ill. 500; Van Tassell *v.* Wood, 12 Hun, 388; Mitchell *v.* Preston, 5 Day, 100; Corcoran *v.* Powers, 6 Ohio St. 19; Black *v.* Ryder, 5 Daly, 304; Rosa *v.* Doggett, 8 Neb. 48; Sanner *v.* Smith, 89 Ill. 123; 31 Am. Rep. 70; Elston *v.* Keely, 34 Minn. 409; Chapman *v.* Clark, 5 Mackey, 527.

[6] Wright *v.* Elliott, 1 Stew. 391.

[7] Tardeveau *v.* Smith, Hardin, 175; 3 Am. Dec. 727; Quackenbos *v.* Sayer, 62 N. Y. 344; Heytle *v.* Logan, 1 A. K. Marsh. 529; Ford *v.* Hancock, 36 Ark. 248; Barr *v.* Collier, 54 Ala. 39; Collier *v.* Barr, 64 Ala. 543; Dunham *v.* Gould, 16 Johns. 367; 8 Am. Dec. 323; Ruffin *v.* Armstrong, 2 Hawks, 411; 11 Am. Dec. 774; Clague *v.* Creditors, 2 La. 114; 20 Am. Dec. 300; Hewitt *v.* Dement, 57 Ill. 500; Matcalf *v.* Pitcher, 6 B. Mon. 529; Johnson *v.* Smith, 39 Iowa, 549.

[8] Nickerson *v.* Babcock, 23 Ill. 561.

pretended sale of merchandise.[1] A contract for a loan of money at a legal rate of interest, six per cent, but in case the debtor's business succeeds, the rate to be paid by him to be twenty-five per cent, is a usurious contract.[2] Payment of a debt by way of offset upon a claim of two per cent above the legal rate of interest is usury.[3] Where a contract is simply for a loan of money, and the capital is to be returned at all events, any profit made or loss imposed upon the borrower in addition to the legal rate of interest is usury, no matter what form or disguise it may assume.[4] An agreement by a borrower upon mortgage to allow the lender to retain part of the land mortgaged after being repaid principal and interest of the loan, if it is a part of the mortgage transaction, is usurious, and will not be enforced.[5] Selling property to a needy borrower at an extravagant price has in several cases been held to be a shift to evade the statute.[6] Where the lender of money exacts as a condition of the loan that the borrower shall purchase of him a piece of land or a chattel at an exorbitant price, the transaction is usurious.[7] Whether a transaction fair on its face is a device to obtain usury is a question of fact for the jury.[8] Under a statute allowing interest at a specified rate "upon the amount of such note, payable annually," the reservation of such interest payable semi-annually is not usurious.[9]

ILLUSTRATIONS. — Chattels are conveyed upon an agreement that the owner may repurchase them within a certain time by paying the amount advanced and two and one half per cent per month for its use. *Held*, usurious: *Starkweather* v. *Prince*, 1 McAr. 144. A promissory note was executed, payable six months after date, with interest, annually, at fifteen per cent

[1] Grider *v.* Driver, 46 Ark. 50.
[2] Sheridan *v.* Medara, 10 N. J. Eq. 469; 64 Am. Dec. 464.
[3] Dean *v.* Herrick, 54 Vt. 573.
[4] Buttrick *v.* Harris, 1 Biss. 442.
[5] Gleason *v.* Burke, 20 N. J. Eq. 300.
[6] Dowdall *v.* Lenox, 2 Edw. Ch. 273; Morgan *v.* Schermerhorn, 1 Paige, 544; 19 Am. Dec. 449; Quackenbos *v.* Sayer, 62 N. Y. 344.
[7] Earnest *v.* Hoskins, 100 Pa. St. 551; Hathaway *v.* Hagan, 59 Vt. 75.
[8] Vail *v.* Heustis, 14 Ind. 607; McKesson *v.* McDowell, 4 Dev. & B. 120.
[9] Cook *v.* Courtright, 40 Ohio St. 248; 48 Am. Rep. 681.

from "due until paid." The first six months' interest was paid in advance, and after maturity many installments of interest, at fifteen per cent, were paid, usually every six months in advance, for several years. *Held*, usurious: *Sanner* v. *Smith*, 89 Ill. 123; 31 Am. Rep. 70. A gave to B depreciated bank notes, taking a note for their nominal amount, payable, at a future day, in specie, with interest. *Held*, usurious: *Warfield* v. *Boswell*, 2 Dana, 224. Partners in the banking business agreed that each should be allowed six and one half per cent interest annually on the average amount of his deposits, and should be charged ten per cent on the amount of his overdrafts. *Held*, not usurious: *Payne* v. *Freer*, 91 N. Y. 43; 43 Am. Rep. 640.

§ 2453. **Bonus or Commission.** — A broker's commission on the money loaned, in addition to the legal interest, is not usurious, provided it is a *bona fide* charge for extra trouble and expense.[1] And in a number of cases it is held that this principle covers any *bona fide* service or expense rendered or incurred by the lender himself, who may legally exact a bonus or commission from the borrower.[2] In other cases it is held that if the lender exact a bonus from the borrower in addition to legal interest, the transaction is usurious.[3]

§ 2454. **Agent Receiving Bonus or Illegal Interest — When Principal Bound.** — If a bonus is charged by the agent, or he otherwise extorts an illegal commission from the borrower without the knowledge of the principal, the

[1] Suydam *v.* Westfall, 4 Hill, 211; Hall *v.* Daggett, 6 Cow. 653; Nourse *v.* Prime, 7 Johns. Ch. 69; 11 Am. Dec. 403; Boardsman *v.* Taylor, 66 Ga. 638; Eddy *v.* Badger, 8 Biss. 238; Matthews *v.* Coe, 70 N. Y. 239; 26 Am. Rep. 583; Cockle *v.* Flack, 93 U. S. 344; White *v.* Dwyer, 31 N. J. Eq. 40; Morton *v.* Thurber, 85 N. Y. 550; Smith *v.* Price, 2 Heisk. 293. *Contra*, Haven *v.* Hudson, 12 La. Ann. 660; Stark *v.* Sperry, 6 Lea, 441; 40 Am. Rep. 47.

[2] Van Tassell *v.* Wood, 12 Hun, 388; Dayton *v.* Moore, 30 N. J. Eq. 543; Morton *v.* Thurber, 85 N. Y. 550; Atlanta etc. Mining Co. *v.* Gwyer, 48 Ga. 11; Eaton *v.* Alger, 2 Abb. App. 5; Eldridge *v.* Reed, 2 Sweeny, 155; Cockle *v.* Flack, 93 U. S. 344; Trotter *v.* Curtis, 19 Johns. 160; 10 Am. Dec. 211; Thurston *v.* Corne, 38 N. Y. 281; Hall *v.* Daggett, 6 Cow. 653; De Forest *v.* Strong, 8 Conn. 513; Hargar *v.* McCulloch, 2 Denio, 119; Matthews *v.* Coe, 70 N. Y. 239; 26 Am. Rep. 583.

[3] Walter *v.* Fouts, 52 Md. 147; Andrews *v.* Poe, 30 Md. 485; Fanning *v.* Dunham, 5 Johns. Ch. 122; 9 Am. Dec. 283; Hewitt *v.* Dement, 57 Ill. 500; Harris *v.* Wicks, 28 Wis. 198; Haven Hudson, 12 La. Ann. 630; Rowland *v.* *v.* Bull, 5 B. Mon. 146; Stark *v.* Sperry, 6 Lea, 411; 40 Am. Dec. 47.

latter is not affected thereby.[1] This is the rule adopted in most of the cases, though there are also decisions to the effect that the receipt of unlawful interest or a bonus without the knowledge of the principal renders the transaction usurious.[2] So where a guardian takes a bonus for lending his ward's money to one who knows the ownership of the money, the transaction is not usurious.[3] But if the principal has knowledge of the transaction, or consents to or ratifies the agent's act, he is bound by it, and charged with the illegality of the contract.[4] And in the case of a general agency, knowledge by the principal will be presumed.[5] If an agent for loaning money takes a security in his own name as principal for usurious interest, the borrower, supposing him to be the principal, may afterwards plead usury.[6]

§ 2455. **Negotiable Paper — Bona Fide Holder.** — In some states it is held that if negotiable paper is given on a usurious contract, it is void in the hands even of an innocent holder for value,[7] while in others, the defense of usury cannot be set up as against a *bona fide* holder for value.[8] In Tennessee, if the usury does not appear on its

[1] Estevez *v.* Purdy, 66 N. Y. 446; Condit *v.* Baldwin, 21 N. Y. 219; 78 Am. Dec. 137; Bell *v.* Day, 32 N. Y. 165; Conover *v.* Van Meter, 18 N. J. Eq. 151; Moore *v.* Bogart, 19 Hun, 227; Manning *v.* Young, 28 N. J. Eq. 868; Acheson *v.* Chase, 28 Minn. 211; Muir *v.* Savings Inst., 16 N. J. Eq. 537; Gokey *v.* Knapp, 44 Iowa, 32; Van Wyck *v.* Watters, 81 N. Y. 352; Ballinger *v.* Bounland, 87 Ill. 513; 29 Am. Rep. 69; Boylston *v.* Bain, 90 Ill. 285; Crane *v.* Hubel, 7 Paige, 413; Boardman *v.* Taylor, 66 Ga. 638. This rule applies, although the agent and principal are husband and wife: Brigham *v.* Myers, 51 Iowa, 397; 33 Am. Rep. 140.

[2] Philo *v.* Butterfield, 3 Neb. 256; Cheney *v.* White, 5 Neb. 261; 25 Am. Rep. 487; Cheney *v.* Eberhart, 8 Neb. 423.

[3] Fellows *v.* Longyor, 91 N. Y. 324.

[4] Algur *v.* Gardner, 54 N. Y. 360; Payne *v.* Newcomb, 100 Ill. 611; 39 Am. Rep. 69; Borcheling *v.* Trefz, 40 N. J. Eq. 502.

[5] Austin *v.* Harrington, 28 Vt. 130; Rogers *v.* Buckington, 33 Conn. 81; McFarland *v.* Carr, 16 Wis. 259.

[6] Erickson *v.* Bell, 53 Iowa, 627; 36 Am. Rep. 247.

[7] Wilkie *v.* Roosevelt, 3 Johns. Cas. 206; 2 Am. Dec. 149; King *v.* Johnson, 3 McCord, 365; Churchill *v.* Suter, 4 Mass. 156; Young *v.* Berkley, 2 N. H. 410; Powell *v.* Waters, 8 Cow. 669; Solomons *v.* Jones, 3 Brev. 54; 5 Am. Dec. 538.

[8] Creed *v.* Stevens, 4 Whart. 223; Wendlebone *v.* Parks, 18 Iowa, 546; Otto *v.* Dingge, 14 Wis. 571.

face, a usurious note is held to be valid to the extent of the principal and legal interest. If the note be void, any security for the note is also void; but if partially valid, the security is valid to the same extent.[1] A note has no legal inception in the hands of one to whom it was delivered without consideration by the maker, for the purpose of raising money for the benefit of either, and a negotiation of it by such holder upon a usurious consideration renders it inoperative and void in the hands of a third person.[2] When the holder of a usurious note transfers it for value, without indorsement, representation, or knowledge of its illegality, he does not impliedly warrant its validity, and no action can be maintained against him by the purchaser to recover damages for the loss, nor for the purchase-money, on the ground of failure of consideration.[3]

§ 2456. **Bank Discounts and Exchange.** — Where a bank's discounts are higher than allowed by its charter, they are usurious.[4] So where exchange is charged as a means of obtaining more than the legal interest, it is usury.[5] "Exchange" on a note payable at home renders it usurious.[6] It is not usury in a bank authorized to deal in exchange to charge the market rates of exchange on time bills taken for loans of money.[7]

§ 2457. **Where Loan or Undertaking is Hazardous.** — It is laid down in some cases that where the contract or security is hazardous, the lender may take more than legal interest, to compensate or insure him for the risk;[8] as

[1] McFerrin *v.* White, 6 Cold. 499.
[2] Catlin *v.* Gunter, 11 N. Y. 368; 62 Am. Dec. 113.
[3] Littauer *v.* Goldman, 72 N. Y. 506; 28 Am. Rep. 171.
[4] Planters' Bank *v.* Sharp, 4 Smedes & M. 75; 43 Am. Dec. 470; Butterworth *v.* Pecare, 8 Bosw. 671.
[5] Cornell *v.* Barnes, 26 Wis. 473; Oliver etc. Bank *v.* Wallbridge, 19 N. Y. 134; Andrews *v.* Pond, 13 Pet. 65; Price *v.* Lyons Bank, 33 N. Y. 55; 88 Am. Dec. 368. See Marvine *v.* Hymers, 12 N. Y. 223.
[6] Mix *v.* Madison Ins. Co., 11 Ind. 117.
[7] Buckingham *v.* McLean, 13 How. 151.
[8] Spencer *v.* Tilden, 5 Cow. 144; Morrison *v.* McKinnon, 12 Fla. 552; Thorndike *v.* Stone, 11 Pick. 183; Com.

where A loaned to B $37.50 in specie, and received A's note for $90, payable in one year in commonwealth's notes, said notes at the time of the contract being worth but fifty per cent.[1] So if a promise to pay a sum in excess of legal interest is dependent upon an uncertain contingency, the contract is not usurious.[2] But the ordinary risk of the death or insolvency of the borrower is not such a hazard as will authorize the lender to reserve a profit beyond the legal rate of interest.[3]

§ 2458. Penalties for Failure to Pay at Maturity — Attorney's Fee. — An agreement that if the debt is not paid at maturity, interest exceeding the legal rate or a gross sum shall be made as damages is not usurious.[4] Thus an agreement to pay a certain sum of money at a certain time after date, and if not paid then, to pay interest from date, is valid.[5] So a stipulation in a bill or note for an attorney's fee to be paid by the maker, if it has to be collected, is not usurious;[6] nor is such a condition in a mortgage.[7]

§ 2459. Taking Interest in Advance — Compound Interest. — It is not usurious to take the highest legal in-

Bank *v.* Nolan, 8 Miss. 508. In Lloyd *v.* Scott, 4 Pet. 205, it is said: "Where a loan is made to be returned at a fixed day, with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury."

[1] Wilson *v.* Kilburn, 1 J. J. Marsh. 494.

[2] Truby *v.* Mosgrove, 118 Pa. St. 89; 4 Am. St. Rep. 575.

[3] Colton *v.* Dunham, 2 Paige, 267.

[4] Tardeveau *v.* Smith, Hardin, 175; 3 Am. Dec. 727; Downey *v.* Beach, 78 Ill. 53; Ramsay *v.* Morrison, 39 N. J. L. 591; McNairy *v.* Bell, 1 Yerg. 502; 24 Am. Dec. 454; Gambril *v.* Rose, 8 Blackf. 140; 44 Am. Dec. 760; Gruell *v.* Smalley, 1 Duvall, 358; Gower *v.* Carter, 3 Iowa, 244; 66 Am. Dec. 71; Davis *v.* Rider, 53 Ill. 416; Conrad *v.* Gibbon, 29 Iowa, 120; Righter *v.* Warehouse Co., 99 Pa. St. 289; Fisher *v.* Anderson, 25 Iowa, 28; 95 Am. Dec. 761. Unless it is a mere device to cover up a usurious bargain: Pike *v.* Crist, 62 Ill. 461; Mason *v.* Callender, 2 Minn. 350; 72 Am. Dec. 102; White Iltis, 24 Minn. 43.

[5] Horn *v.* Nash, 1 Iowa, 204; 63 Am. Dec. 437; Gould *v.* Bishop Hill Colony, 35 Ill. 324; Davis *v.* Rider, 53 Ill. 416; Withrow *v.* Briggs, 67 Ill. 96; Alexander *v.* Troutman, 1 Ga. 469; Walker *v.* Abt, 83 Ill. 226; Hackenberry *v.* Shaw, 11 Ind. 392; Rogers *v.* Sample, 33 Miss. 310; 69 Am. Dec. 349. *Contra*, Waller *v.* Long, 6 Munf. 71; Dinsmore *v.* Hand, Minor, 126.

[6] First Nat. Bank *v.* Canatsey, 34 Ind. 149; Miner *v.* Bank, 53 Tex. 559; Smith *v.* Silvers, 32 Ind. 321.

[7] Weatherly *v.* Smith, 30 Iowa, 131; 6 Am. Rep. 663.

terest out of the loan in advance.[1] Although, as we have seen, compound interest is disallowed by some courts as contrary to public policy,[2] yet the compounding of interest is held not to be usurious.[3] Charging interest on monthly balances, according to the custom of stock-brokers, does not constitute usury.[4]

§ 2460. Forbearance, or Extension of Time. — An agreement to forbear to enforce a demand, or to extend the time of payment in consideration of the payment of interest at more than the legal rate, is usurious.[5] Where a note is given on a usurious contract, and partly paid, a new note given for the balance is likewise usurious.[6]

ILLUSTRATIONS. — A note for five hundred dollars became due, the holder took a new note for that sum and a note for fifty dollars for forbearance for sixty days. *Held*, usurious, and both notes void under the statute: *Motte* v. *Dorrell*, 1 McCord, 350; 10 Am. Dec. 675. A owes B, and B owes C. An agreement between A and C that C should give B further time upon a payment of extra interest by A is not usurious: *Gleason* v. *Childs*, 52 Vt. 421.

[1] English *v.* Smock, 34 Ind. 115; 7 Am. Rep. 215; Bank *v.* Smoot, 2 McAr. 371; Parker *v.* Cousins, 2 Gratt. 372; 44 Am. Dec. 372; Meyer *v.* Muscatine, 1 Wall. 384; Newall *v.* Bank, 12 Bush, 57; Goodrich *v.* Reynolds, 31 Ill. 490; 83 Am. Dec. 240; Hawks *v.* Weaver, 46 Barb. 164; Brown *v.* Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250; Magruder *v.* Bank, 18 Ark. 9.

[2] See *ante*, § 2443.

[3] Culver *v.* Bigelow, 43 Vt. 249; Miner *v.* Bank, 53 Tex. 559; Woods *v.* Rankin, 2 Heisk. 46; Com'rs *v.* King, 13 Fla. 461; Austin *v.* Bacon, 28 Wis. 416; Jones *v.* Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250; Stewart *v.* Petree, 55 N. Y. 621; 14 Am. Rep. 353; Hale *v.* Hale, 1 Cold. 233; 78 Am. Dec. 491; Fitzhugh *v.* McPherson, 3 Gill, 408; Quimby *v.* Cook, 10 Allen, 32; Tylee *v.* Yates, 3 Barb. 222; Fobes *v.* Cantfield, 3 Ohio, 18; Sinclair *v.* Peebles, 3 Cold. 584. *Contra*, Kimbrough *v.* Lukins, 70 Ind. 373; Cox *v.* Brookshire, 76 N. C. 314; Mason *v.* Callender, 2 Minn. 350; 72 Am. Dec. 102; Leonard *v.* Patton, 106 Ill. 91.

[4] Hatch *v.* Douglas, 48 Conn. 116; 40 Am. Rep. 154.

[5] Cobb *v.* Morgan, 83 N. C. 211; Paulling *v.* Creagh, 54 Ala. 646; Rosa *v.* Doggett, 8 Neb. 48; Rosebrough *v.* Ansley, 35 Ohio St. 37; Glisson *v.* Newton, 1 Hayw. (N. C.) 336; 1 Am. Dec. 559; Gibson *v.* Fristoe, 1 Call, 62; 1 Am. Dec. 502; Motte *v.* Dorrell, 1 McCord, 350; 10 Am. Dec. 675; Swartwout *v.* Payne, 19 Johns. 294; 10 Am. Dec. 228; Erwin *v.* Lowry, 2 La. Ann. 314; 46 Am. Dec. 545; Gates *v.* Hockenthal, 57 Ill. 534; 11 Am. Rep. 45; Galesburg Bank *v.* Davis, 108 Ill. 633.

[6] Warren *v.* Crabtree, 1 Me. 167; 10 Am. Dec. 51; Flemming *v.* Mulligan, 2 McCord, 173; 13 Am. Dec. 707; Reynolds *v.* Carter, 12 Leigh, 166; 37 Am. Dec. 642. *Contra*, State Bank *v.* Ayers, 7 N. J. L. 130; 11 Am. Dec. 535; Chadbourn *v.* Watts, 10 Mass. 121; 6 Am. Dec. 100.

§ 2461. Substituted or New Securities. — Where a security is tainted with usury, a new security, or a security substituted for it, is still affected with the original usury.[1] A new security including a sum for unlawful unpaid interest is so far without consideration, and liable to abatement to that extent.[2] All consecutive securities growing out of a usurious contract are tainted therewith, and none of them, however remote, can be free from it, if the descent can be traced.[3] A mere renewal of a usurious note between the original parties does not remove its usurious character.[4] A usurious loan is none the less usurious because it was made to enable the borrower to take up securities which were not tainted with usury, and such securities were assigned to the usurious lender as collateral.[5] But where a *bona fide* holder receives the new security without any knowledge of the usury, it is valid in his hands.[6] "If the immediate parties to the transaction repent, and by mutual consent the usurious security be surrendered, a new promise to pay the sum loaned with legal interest may then be enforced";[7] even though the lender knows that the original loan was usurious, and is aware of the borrower's object in obtaining the new loan.[8] Where the promisor in a usurious contract makes it the

[1] Bridge *v.* Hubbard, 15 Mass. 96; 8 Am. Dec. 86; Powell *v.* Waters, 8 Cow. 669; Tuthill *v.* Davis, 20 Johns. 285; Fulton Bank *v.* Benedict, 1 Hall, 481; Walker *v.* Bank, 3 How. 62; Reynolds *v.* Carter, 12 Leigh, 166; 37 Am. Dec. 642; King *v.* Ins. Co., 57 Ala. 118; Campbell *v.* Sloan, 62 Pa. St. 481; Miller *v.* Erwin, 85 Pa. St. 376; Judy *v.* Gerard, 4 McLean, 360; Rudd *v.* Planters' Bank, 78 Ky. 513; Wilday *v.* Morrison, 66 Ill. 532; Stanton *v.* Demeritt, 122 Mass. 495; Price *v.* Lyons Bank, 33 N. Y. 55; 88 Am. Dec. 368; Campbell *v.* McHarg, 9 Iowa, 354; Sugart *v.* Mays, 54 Ga. 554; Seneca Co. Bank *v.* Schermerhorn, 1 Denio, 133.

[2] Smith *v.* Stoddard, 10 Mich. 148; 81 Am. Dec. 778; Fitzpatrick *v.* Apperson, 79 Ky. 272.

[3] Schutt *v.* Evans, 109 Pa. St. 625.

[4] Masterson *v.* Grubbs, 70 Ala. 406.

[5] King *v.* Cushman, 41 Ill. 31; 89 Am. Dec. 366.

[6] Kent *v.* Walton, 7 Wend. 256; Aldrich *v.* Reynolds, 1 Barb. Ch. 43; Flemming *v.* Mulligan, 2 McCord, 173; 13 Am. Dec. 707; Palmer *v.* Call, 2 McCrary, 522; Mitchell *v.* McCullough, 59 Ala. 179; Jackson *v.* Henry, 10 Johns. 185; 6 Am. Dec. 328.

[7] Taylor *v.* Morris, 22 N. J. Eq. 606; De Wolf *v.* Johnson, 10 Wheat. 367; Miller *v.* Hull, 4 Denio, 104; Barber *v.* Ketchum, 7 Hill, 444.

[8] Vaught *v.* Rider, 83 Va. 669; 5 Am. St. Rep. 305.

consideration of a new contract with a third person, not a party to the original contract, or to the usury paid or reserved on it, and the new contract is not a contrivance to evade the statutes against usury, the new contract is not usurious;[1] as where a bond executed by three persons for a loan of money at usurious interest is subsequently superseded by a new bond for the amount of the former bond, principal and interest, which new bond is signed by two persons, strangers to the former bond, as principals, and by one of the former obligors as surety.[2] An obligation, valid in its inception, is not invalidated by a usurious agreement for the extension of the time of payment.[3] A contract legal when made will not be avoided by a subsequent agreement to pay usurious interest.[4] Thus a security made on a good and *bona fide* consideration is not made invalid by a subsequent usurious assignment.[5]

ILLUSTRATIONS. — A advanced money to pay a mortgage, taking a second mortgage to secure the advance. The latter was declared void for usury. *Held*, that it did not affect the first, which could be enforced by A: *Patterson* v. *Birdsall*, 64 N. Y. 294; 21 Am. Rep. 609. A borrowed of B three thousand six hundred dollars on his note and mortgage, and on his asking to borrow some more, which she did not have, she sold the three-thousand-six-hundred-dollar note, to a purchaser whom he furnished, for three thousand four hundred dollars; and A then borrowed the three thousand four hundred dollars, and secured the same by his note and mortgage for three thousand six hundred dollars, allowing her the two hundred dollars in compensation for the discount, and for expenses in examining the title to the property mortgaged to secure the second loan. *Held*, that there was no usury: *Comstock* v. *Wilder*, 61 Iowa, 274.

[1] Call *v.* Palmer, 116 U. S. 98.

[2] Drake's Executor *v.* Chandler, 18 Gratt. 909; 98 Am. Dec. 762.

[3] Swartwout *v.* Payne, 19 Johns. 294; 10 Am. Dec. 228; Real Estate Co. *v.* Keech, 69 N. Y. 248; 25 Am. Rep. 181; Terhune *v.* Taylor, 27 N. J. Eq. 80; Winsted Bank *v.* Webb, 39 N. Y. 325; 100 Am. Dec. 435.

[4] Chastain *v.* Johnson, 2 Bail. 574; York Bank *v.* Asbury, 1 Biss. 230; Emmons *v.* Barnes, 4 Daly, 148; Swartwout *v.* Payne, 19 Johns. 294; 10 Am. Dec. 228; Farmers' Bank *v.* Joslyn, 37 N. Y. 355.

[5] Bush *v.* Livingston, 2 Caines Cas. 66; 2 Am. Dec. 316.

§ 2462. Usurious Interest may be Recovered back — Set-off. — In most states usurious interest may be recovered back,[1] while in some such an action is not permitted.[2] But the payment must have been voluntary, to estop the borrower. Thus in Illinois, where the usurious interest had been paid to a *bona fide* indorsee of the note, it was held that the maker might recover it from the payee, this being an involuntary payment, as the maker could not set up the defense of usury against a *bona fide* indorsee before maturity.[3] In some states such relief is given by statute; but it is also held that these statutes are cumulative, and that the right to recover back usurious interest is a common-law right.[4] A sealed release of all claims for usurious interest, executed at the time the loan was made, is no bar to a suit to recover the amount usuriously paid.[5] So a party sued on the debt may set off the excessive interest paid by him.[6] Where usurious interest is paid on a note after its execution, it amounts to a payment of so much on the principal; and if the amount thus paid exceeds the principal, it may be recovered back.[7]

[1] Albany *v.* Abbott, 61 N. H. 313; Wheaton *v.* Hibbard, 20 Johns. 290; 11 Am. Dec. 284; Philanthropic Bldg. Ass'n *v.* McKnight, 35 Pa. St. 470; Nat. Bank *v.* Lewis, 81 N. Y. 15; Grow *v.* Albee, 19 Vt. 540; Ware *v.* Bennett, 18 Tex. 794; Hodge *v.* Owings, 5 T. B. Mon. 94; Webb *v.* Wilshire, 20 Me. 406; West *v.* Meddock, 16 Ohio St. 417; Coughman *v.* Drafts, 1 Rich. Eq. 414; Zeigler *v.* Scott, 10 Ga. 389; 54 Am. Dec. 395; Wood *v.* Kenny, 19 Ind. 68; Willie *v.* Green, 2 N. H. 333; Bond *v.* Jones, 8 Smedes & M. 368; Fay *v.* Lovejoy, 20 Wis. 403.

[2] Latham *v.* Building Ass'n, 77 N. C. 125; Woolfolk *v.* Bird, 22 Minn. 341; Quinn *v.* Boynton, 40 Iowa, 304; Hadden *v.* Inness, 24 Ill. 381; Perkins *v.* Conant, 29 Ill. 184; 81 Am. Dec. 305; Rutherford *v.* Williams, 42 Mo. 18; Manny *v.* Stockton, 34 Ill. 306; Carter *v.* Moses, 39 Ill. 539; Nichols *v.* Skeel, 12 Iowa, 300; Spurlin *v.* Milliken, 16 La. Ann. 217; Dickerson *v.* Raleigh Building Ass'n, 89 N. C. 37. Where one has recovered in the United States courts the statutory penalty against a national bank for taking usury, he cannot maintain *assumpsit* in the state courts for the excess above legal interest: Hill *v.* Barre Bank, 56 Vt. 582.

[3] Woodworth *v.* Huntoon, 40 Ill. 131; 89 Am. Dec. 340.

[4] Palmer *v.* Lord, 6 Johns. Ch. 65; Porter *v.* Mount, 41 Barb. 561.

[5] Herrick *v.* Dean, 54 Vt. 568.

[6] Hass *v.* Flint, 8 Blackf. 67; Bartlow *v.* Bond, 3 Dana, 591; Clark *v.* Hunter, 2 Spear, 83; Farwell *v.* Myer, 35 Ill. 41; Threadgill *v.* Timberlake, 2 Head, 395; Herring *v.* Woodhull, 29 Ill. 92; 81 Am. Dec. 297.

[7] Musselman *v.* McElhenny, 23 Ind. 4; 85 Am. Dec. 445.

Where judgment is obtained for principal and usurious interest, the latter cannot be recovered back in an action at law. The judgment operates as an estoppel, and the party should have interposed the defense in the first action.[1] Equity, however, has in some instances granted relief in such cases.[2] The reservation of an illegal rate of interest does not prevent recovery of the principal and legal interest thereon.[3]

ILLUSTRATIONS. — A paid usurious interest on four notes. He was sued upon a fifth note. *Held*, that he could not set up by way of defense the usurious interest paid on the other notes: *Riddle* v. *Rosenfeld*, 103 Ill. 600. At the request of S., and for his benefit, A. borrowed money of L. on a usurious contract to loan to S. *Held*, that A. could not recover of S. the usury paid by him to L.: *Swift* v. *Adkins*, 2 Lea, 137. A person wrongfully converted a promissory note, and collected the amount due on the note, together with the usurious interest, which was contracted for on the note. *Held*, that he was liable to account for the full amount collected, including the sum for the usurious interest: *Allison* v. *King*, 25 Iowa, 56.

§ 2463. Penalties also Recoverable. — In some states, also, certain penalties for taking unlawful interest are by statute recoverable.[4]

§ 2464. Relief in Equity. — Equity will also relieve against a usurious contract.[5] But "the right to this relief only exists where from the form of the security the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of

[1] Hopkins *v.* West, 83 Pa. St. 109; Lawless *v.* Blakely, 4 T. B. Mon. 488; McDonald *v.* Smith, 53 Vt. 33; Dooley *v.* Stipp, 26 Ill. 86; Moseley *v.* Smith, 21 Tex. 441; Bank *v.* Stevens, 1 Ohio St. 233; 59 Am. Dec. 619; Bartholomew *v.* Yaw, 9 Paige, 165.

[2] Lawless *v.* Blakely, 4 T. B. Mon. 488; Dooley *v.* Stipp, 26 Ill. 86; Doub *v.* Barnes, 1 Md. Ch. 137; Thompson *v.* Ware, 8 B. Mon. 26.

[3] Philadelphia etc. R. R. Co. *v.* Lewis, 33 Pa. St. 33; 75 Am. Dec. 574.

[4] Nat. Bank of Gloversville *v.* Johnson, 104 U. S. 271; Gruber *v.* Bank, 87 Pa. St. 465. To create a forfeiture under United States Revised Statutes, sections 5197, 5198, it is only necessary that the usurious interest has been "taken, received, or charged"; the note need not bear interest on its face: Auburn Bank *v.* Lewis, 75 N. Y. 516.

[5] 2 Pomeroy's Eq. Jur., sec. 937.

equity is shown."[1] And to entitle a person to relief in equity, he must pay, or offer to pay, the debt and legal interest.[2] A party praying an injunction to stay proceedings at law on a usurious contract must bring into court the money actually due upon the contract, with lawful interest.[3] A mortgagor cannot obtain an injunction to restrain a sale under the power of sale in the mortgage, which was given to secure a note for money loaned, on the ground that the note is infected with usury, unless he tenders to the mortgagee the sum borrowed, with legal interest.[4]

§ 2465. Who may Plead Usury.—The defense of usury is personal to the party himself, his privies or representatives, and cannot be set up by a stranger to the transaction.[5] Thus in an action by the indorsee against the maker of a note, usury between the indorser and indorsee cannot be set up;[6] nor can creditors before judgment;[7] nor a second mortgagee or encumbrancer, as to a prior

[1] Allerton *v.* Belden, 49 N. Y. 378; Marks *v.* Morris, 2 Munf. 407; 5 Am. Dec. 481: Greer *v.* Caldwell, 14 Ga. 207; 58 Am. Dec. 553.

[2] Fanning *v.* Dunham, 5 Johns. Ch. 122; 9 Am. Dec. 283; Eslava *v.* Elmore, 50 Ala. 587; Anthony *v.* Lawson, 34 Ark. 628; Reitze *v.* Foeste, 30 Wis. 693; Tooke *v.* Newman, 75 Ill. 215; Hill *v.* Reifsnider, 39 Md. 429; Parnell *v.* Vaughan, 82 N. C. 134; Morgan *v.* Schermerhorn, 1 Paige, 544; 19 Am. Dec. 449; Williams *v.* Fitzhugh, 37 N. Y. 453; Baugher *v.* Nelson, 9 Gill, 299; 52 Am. Dec. 694; Welch *v.* Wadsworth, 30 Conn. 149; 79 Am. Dec. 236. See Morrison *v.* Miller, 46 Iowa, 84.

[3] Rogers *v.* Rathbun, 1 Johns. Ch. 367; Mitchell *v.* Oakley, 7 Paige, 68.

[4] Anthony *v.* Lawson, 34 Ark. 628.

[5] Conwell *v.* Pumphrey, 9 Ind. 135; 68 Am. Dec. 611; Safford *v.* Vail, 22 Ill. 327; Ransom *v.* Hays, 39 Mo. 445; Loomis *v.* Eaton, 32 Conn. 550; Fenno *v.* Sayre, 3 Ala. 458; Cain *v.* Gimon, 36 Ala. 168; Cutchen *v.* Coleman, 3 Ind. 568; Farmers' Bank *v.* Kimmel, 1 Mich. 84; Clapp *v.* Hanson, 15 Me. 345; Drake *v.* Lowry, 14 Iowa, 125; Taylor *v.* Jackson, 5 Daly, 497; Gwynn *v.* Lee, 9 Gill, 137; Stanhope *v.* Kempton, 30 Me. 118; Drake *v.* Chandler, 18 Gratt. 909; 98 Am. Dec. 762; McArthur *v.* Schenck, 31 Wis. 673; 11 Am. Rep. 643; Mordecai *v.* Stewart, 37 Ga. 364; Lehman *v.* Marshall, 47 Ala. 362; Pritchett *v.* Mitchell, 17 Kan. 355; 22 Am. Rep. 287; Lee *v.* Feamster, 21 W. Va. 108; 45 Am. Rep. 549; Stephens *v.* Muir, 8 Ind. 352; 65 Am. Dec. 764; Ladd *v.* Wiggin, 35 N. H. 421; 69 Am. Dec. 551; Stein *v.* Ind. Building Ass'n, 18 Ind. 237; 81 Am. Dec. 353.

[6] Cowles *v.* McVickar, 3 Wis. 725; Armstrong *v.* Gibson, 31 Wis. 61; 11 Am. Rep. 599; Conwell *v.* Pumphrey, 9 Ind. 135; 68 Am. Dec. 611. *Contra*, Lloyd *v.* Keach, 2 Conn. 175; 7 Am. Dec. 256.

[7] Graham *v.* Moore, 7 B. Mon. 53; Carow *v.* Kelly, 59 Barb. 239; Mills *v.* Camly, 1 Bosw. 159.

mortgage or encumbrance;[1] nor the purchaser of a mere equity of redemption.[2] The right to avoid a claim for usury does not pass by an assignment; the assignee can only take advantage of the defense by a purchase of the property on which the security is a lien.[3] A purchaser of land at an assignee's sale sold subject to a mortgage

[1] Powell *v.* Hunt, 11 Iowa, 430; Pritchett *v.* Mitchell, 17 Kan. 355; 22 Am. Rep. 287; Ready *v.* Huebner, 46 Wis. 792; 32 Am. Rep. 749. In Pritchett *v.* Mitchell, 17 Kan. 355, 22 Am. Rep. 287, the court say: "Can a second mortgagee plead usury in a prior mortgage? Can he do it either to defeat or postpone the lien of such prior mortgage? Authorities are well divided on this question. That he can, is affirmed in Indiana, Pennsylvania, Ohio, New York, Maryland, and New Jersey: Cole *v.* Bansemer, 26 Ind. 94; Greene *v.* Tyler & Co., 39 Pa. St. 361 (though under the present statute the opposite ruling seems to to obtain: Miner's Trust Co. *v.* Roseberry, 2 L. & Eq. Rep. 478); Union Bank *v.* Bell, 14 Ohio St. 200; Brooks *v.* Avery, 4 N. Y. 225; Post *v.* Dart, 8 Paige, 639; Banks *v.* McClellan, 24 24 Md. 62; 87 Am. Dec. 594; Cummins *v.* Wire, 6 N. J. Eq. 73. That he cannot, is affirmed in Alabama, Connecticut, Illinois, Iowa, Kentucky, Michigan, Missouri, Vermont: Cain *v.* Gimon, 36 Ala. 168; Fielder *v.* Varner, 45 Ala. 429; Loomis *v.* Eaton, 32 Conn. 550; Adams *v.* Robertson, 37 Ill. 45; Powell *v.* Hunt, 11 Iowa, 430; Huston *v.* Stringham, 21 Iowa, 36; Carmichael *v.* Bodfish, 32 Iowa, 418; Campbell *v.* Johnston, 4 Dana, 177; F. & M. Bank *v.* Kimmel, 1 Mich. 84; Ransom *v.* Hays, 39 Me. 445; Austin *v.* Chittenden, 33 Vt. 553. These last two cases were not mortgage cases, but the decisions plainly indicate the judgments of the courts upon the question. See also 3 Parsons on Contracts, 122; Ladd *v.* Wiggin, 35 N. H. 421; 69 Am. Dec. 551; De Wolf *v.* Johnson, 10 Wheat. 367; Green *v.* Kemp, 13 Mass. 515. We incline to the latter view, and to regard the plea of usury as a personal privilege. When the parties to a contract are willing to abide by its terms, why should one not a party thereto be permitted to interfere? If the debts were unsecured, no one would think that the second creditor had any right to interfere. The payor, by payment of the first note according to its terms, and without insisting on any plea of usury, might so diminish his means as to render himself unable to pay the second note, but still that would not give the holder of the second the right to restrain such payment. And the rule would be the same if the securities for the two notes were separate and distinct. Why, then, should the mere giving of a single security for the two notes enable the holder of the second to interfere?"

[2] Green *v.* Kemp, 13 Mass. 515; 7 Am. Dec. 169; Lee *v.* Stiger, 30 N. J. Eq. 610; Ferris *v.* Crawford, 2 Denio, 595; Wells *v.* Chapman, 13 Barb. 361. In 2 Jones on Mortgages, sec. 644, it is said that the correct rule is that the defense cannot be set up if the purchaser has assumed the mortgage or agreed to pay it: Hough *v.* Horsey, 36 Md. 181; 11 Am. Rep. 484; Cramer *v.* Leffer, 26 Ohio St. 59; 20 Am. Rep. 756; Conover *v.* Herbert, 24 N. J. Eq. 120; Reading *v.* Weston, 7 Conn. 143; 18 Am. Dec. 89; Stephen *v.* Muir, 8 Ind. 352; 65 Am. Dec. 764; Bridge *v.* Hubbard, 15 Mass. 103; 8 Am. Dec. 86; Ferris *v.* Crawford, 2 Denio, 595; Hartley *v.* Harison, 24 N. Y. 171; Freeman *v.* Ault, 44 N. Y. 50; McArthur *v.* Schenck, 31 Wis. 673; 11 Am. Rep. 643; Morris *v.* Floyd, 5 Barb. 130; De Wolf *v.* Johnson, 10 Wheat. 367. And that where he has not done so, he may set up the defense: Berdau *v.* Sedgwick, 44 N. Y. 626; Brooks *v.* Avery, 4 N. Y. 225; Cole *v.* Savage, 10 Paige, 583; Shufelt *v.* Shufelt, 9 Paige, 137; 37 Am. Dec. 387.

[3] Bullard *v.* Raynor, 30 N. Y. 197.

cannot set up usury against the mortgage.[1] A mortgagor of chattels after he has sold them cannot bring an action to cancel the mortgage on the ground of usury.[2] A surety cannot avail himself of usurious interest paid by his principal on a non-negotiable note, in reduction thereof;[3] nor can a surety who has given his own note in part payment of his principal's usurious note plead usury in an action upon his own note.[4] One who satisfies a judgment by giving a note for the amount cannot, when sued upon the note, plead that usurious interest entered into the judgment.[5]

But it is held that judgment creditors may avail themselves of the plea of usury;[6] or an assignee or trustee for the benefit of creditors;[7] or a receiver;[8] or an accommodation indorser;[9] or the purchaser of real estate at a sale under a mechanic's lien as to a prior mortgage.[10]

§ 2466. Waiver by Borrower — Estoppel. — The borrower, after the loan is made, may waive the forfeiture or penalty.[11] A party to a bill or note may be estopped by

[1] Nance *v.* Gregory, 6 Lea, 343; 40 Am. Rep. 41.

[2] James *v.* Oakley, 1 Abb. Pr. 324.

[3] Lamoille Bank *v.* Bingham, 50 Vt. 105; 28 Am. Rep. 490.

[4] Culver *v.* Wilbern, 48 Iowa, 26; 30 Am. Rep. 385.

[5] Gipson *v.* Shanklin, 83 Ind. 147.

[6] Dix *v.* Van Wyck, 2 Hill, 522; Thompson *v.* Van Vechten, 27 N. Y. 568; Mason *v.* Lord, 40 N. Y. 176; Phillips *v.* Walker, 48 Ga. 55; Butler *v.* Meyer, 17 Ind. 77; Carow *v.* Kelly, 59 Barb. 239. *Contra*, Carmichael *v.* Bodfish, 32 Iowa, 418; Good *v.* Grant, 76 Pa. St. 52; McKinney *v.* Hotel Co., 12 Heisk. 104; Bensley *v.* Homier, 42 Wis. 631.

[7] Beach *v.* Fulton Bank, 3 Wend. 573; Pratt *v.* Adams, 7 Paige, 639; Tamplin *v.* Wentworth, 99 Mass. 63; Corcoran *v.* Powers, 6 Ohio St. 19; Tiffany *v.* Boatman's Inst., 18 Wall. 375; Moore *v.* Jones, 23 Vt. 739; Pearsall *v.* Kingsland, 3 Edw. Ch. 195. *Contra*, Nichols *v.* Bellows, 22 Vt. 581; 54 Am. Dec. 85.

[8] Palen *v.* Johnson, 46 Barb. 21; 50 N. Y. 49.

[9] Weimer *v.* Shelton, 7 Mo. 237; Dunscomb *v.* Bunker, 2 Met. 8; Warren *v.* Crabtree, 1 Me. 167; 10 Am. Dec. 51.

[10] Knickerbocker Life Ins. Co. *v.* Hill, 6 Thomp. & C. 285.

[11] An agreement to waive usury, and not to set it up as a defense, is void: Mabee *v.* Crozier, 22 Hun, 264. "After the loan has been made, and he is not under the necessity of borrowing or of forbearance, and when the remedy of the statute is fully in his own hands, and within his control, he is considered legally competent to waive it, and upon this point the rules of the court have been very severe and stringent, and that he must exercise his privilege with the utmost promptness and diligence, or otherwise no relief will be afforded": McArthur *v.* Schenck, 31 Wis. 673; 11 Am. Rep. 643.

his own acts or representations from setting up the defense of usury.[1] Where a person borrowing money on a mortgage covenants that it is a valid lien, and subject to no defense, he and his privies are estopped from setting up the defense of usury against it.[2] A covenant by the mortgagee and affidavit by the mortgagor that the mortgage was valid has been held to estop them and those claiming under them from setting up usury against a *bona fide* purchaser.[3] The lender cannot set up the usury to avoid the contract he has entered into.[4] A corporation cannot plead usury in defense to a suit upon its own obligation.[5]

§ 2467. **Usury must be Pleaded — Form of Plea.** — The defense of usury must be specially pleaded; it cannot be made on the trial.[6] It is not admissible under *non assumpsit*.[7] The interest on a usurious contract may be recovered, unless the party affected by the usury sets up the usury in his answer, and tenders the principal sum.[8] The usury laws of another state must be proved; the court will not take judicial notice of them.[9]

§ 2468. **Evidence to Support Plea.** — The defense of usury must be sustained by strict proof.[10] Where the facts relied on are susceptible of a different explanation, usury is not proved.[11] So a written contract will not be declared

[1] Hungerford Bank *v.* Dodge, 30 Barb. 628; Mason *v.* Anthony, 3 Abb. App. 208; Strong *v.* Mfg. Co., 37 N. Y. Sup. Ct. 285. Representations by an accommodation indorser that note sued on was business paper held not to estop him from pleading usury: Truscott *v.* Davis, 4 Barb. 495.

[2] Union Dime Savings Inst. *v.* Wilmot, 94 N. Y. 221; 46 Am. Rep. 137.

[3] Real Est. Co. *v.* Seagreave, 49 How. Pr. 489. But see Payne *v.* Burnham, 4 N. Y. Sup. Ct. 678; 62 N. Y. 69.

[4] Billington *v.* Wagoner, 33 N. Y. 31; La Farge *v.* Hester, 9 N. Y. 241; Draper *v.* Trescott, 29 Barb. 401.

[5] Frazier *v.* Trow's Printing and Bookbinding Co., 24 Hun, 281. See *ante*, Title Corporations.

[6] Morford *v.* Davis, 28 N. Y. 481; Bush *v.* Bush, 7 B. Mon. 53; Newall *v.* Nixon, 4 Wall. 572; Frank *v.* Morris, 57 Ill. 138; 11 Am. Rep. 4.

[7] Frank *v.* Morris, 57 Ill. 138; 11 Am. Rep. 4.

[8] Rock River Bank *v.* Sherwood, 10 Wis. 230; 78 Am. Dec. 669.

[9] Klinck *v.* Price, 4 W. Va. 4; 6 Am. Rep. 268; Balfour *v.* Davis, 14 Or. 47.

[10] Frank *v.* Morris, 57 Ill. 138; 11 Am. Rep. 4.

[11] Sujette *v.* Wilson, 13 Or. 514; Holladay *v.* Holladay, 13 Or. 523.

usurious upon its face where it is equally well open to a contrary construction.[1] Where usury is set up as a defense, proof of other usurious transactions on plaintiff's part in loans effected at or about the time when the note in suit was executed is not admissible.[2] But where money is retained, and no reason or explanation is given, usury may be inferred.[3]

[1] Van Beil *v.* Fordney, 79 Ala. 76.
[2] Ottillie *v.* Waechter, 33 Wis. 255.
[3] Egbert *v.* Peters, 35 Minn. 312.

PART IV. — THE DISCHARGE OF THE CONTRACT.

CHAPTER CXVII.

ALTERATION OF INSTRUMENTS.

§ 2469. Alteration of instruments generally — Effect of is to avoid them.
§ 2470. Alteration by a stranger.
§ 2471. Alteration before execution or delivery.
§ 2472. Alteration by accident or mistake.
§ 2473. Alteration by consent — Ratification.
§ 2474. Alteration must be material — What alterations are and are not material in writings — Contracts and deeds generally.
§ 2475. In bonds.
§ 2476. In negotiable paper.
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§ 2478. Filling blanks in instruments — Negligence of maker.
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§ 2480. Recovery upon original consideration.
§ 2481. Effect of an alteration upon sureties.
§ 2482. Release of principal discharges surety.
§ 2483. Discharge by new agreement — Other cases.
§ 2484. Guaranty of performance of duties.
§ 2485. When surety not discharged.

§ 2469. Alteration of Instruments Generally — Effect of is to Avoid Them. — An alteration of an instrument is something by which its meaning or language is changed, either in a material or immaterial particular,[1] and by the party entitled to the instrument; for if done by a stranger, without the participation of the party interested, it is a spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible.[2] It is a doctrine of the law that if a written instrument is, after the execution and delivery, altered in a material point by the promisee, without the

[1] Morrill v. Otis, 12 N. H. 466. 97 Am. Dec. 443. See the next section.
[2] Bridges v. Winters, 42 Miss. 135;

consent of the promisor, by an interlineation, erasure, or addition, it is thereby avoided as against the promisee, who cannot afterwards enforce it.[1] The alteration, so far as regards the party who made it or is responsible for it, vitiates the instrument altogether, even as to terms not affected by it. "It is no answer to the objection to say that the alteration is not made in respect of the duty of the breach of which the plaintiff complains."[2] The other party to the agreement is not precluded from availing himself of it, further than by the difficulty of proving the original state possibly caused by the alteration or erasure. And as to what has been already done under the agreement, he can only claim upon the strength of it; he cannot refer his claim to any other agreement or ground than that in fact existing.[3] The alteration of a deed or other agreement is not retroactive; it does not affect its past operation as to anything done, or any estate, right, or title vested under it.[4] Where a lease is in dupli-

[1] Angle *v.* Ins. Co., 92 U. S. 330; Benedict *v.* Cowden, 49 N. Y. 396; 10 Am. Rep. 382; Bennhany *v.* Ayer, 35 N. H. 351; Brown *v.* Straw, 6 Neb. 537; 29 Am. Rep. 369; Davis *v.* Coleman, 7 Ired. 424; Tillou *v.* Ins. Co., 7 Barb. 564; Den *v.* Wright, 7 N. J. L. 175; 11 Am. Dec. 564; Hunt *v.* Gray, 35 N. J. L. 227; 10 Am. Rep. 232; Smith *v.* Weld, 2 Pa. St. 54; Campbell *v.* McArthur, 2 Hawks, 33; 11 Am. Dec. 738; Bliss *v.* McIntyre, 18 Vt. 466; 46 Am. Dec. 165; Stewart *v.* Preston, 1 Fla. 10; 44 Am. Dec. 621; Greenfield Bank *v.* Stowell, 123 Mass. 196; 25 Am. Rep. 67; Draper *v.* Wood, 112 Mass. 315; 17 Am. Rep. 62; Wait *v.* Pomeroy, 20 Mich. 425; 4 Am. Rep. 395; Trigg *v.* Taylor, 27 Mo. 245; 72 Am. Dec. 263. Some cases hold that in the case of a deed any alteration whether material or not avoids it: Den *v.* Wright, 7 N. J. L. 175; 11 Am. Dec. 546; Wallace *v.* Harmstead, 15 Pa. St. 462; 53 Am. Dec. 603.

[2] Maule, J., in Mollett *v.* Wackerberth, 5 Com. B. 193. If the payee of an order fills a blank space without authority after acceptance, the acceptance becomes void: Lammers *v.* White Sewing Machine Co., 23 Mo. App. 471.

[3] Leake on Contracts, 811; Pattinson *v.* Luckley, L. R. 10 Eq. 330.

[4] Jackson *v.* Jacoby, 9 Cow. 125; Hatch *v.* Hatch, 9 Mass. 307; 6 Am. Dec. 67; Waring *v.* Smyth, 2 Barb. Ch. 119; 47 Am. Dec. 299; Van Horn *v.* Bell, 11 Iowa, 465; 79 Am. Dec. 506. Destroying a conveyance does not divest the title of the grantee: Sally *v.* Sandifer, 2 Mill Const. 445; 12 Am. Dec. 687; Farrar *v.* Farrar, 4 N. H. 191; 17 Am. Dec. 410. "There is no ground for saying that if a deed be altered in a material part it is rendered void from the beginning. It ceases to have any new operation; and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed or to prove any collateral fact": Argicultural Ins. Co. *v.* Fitzgerald, 16 Q. B. 432. In Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513, the court say: "It is a mis-

cate, each party having a copy, the alteration of one of them, the other remaining intact, does not affect the contract.[1] The question whether or not a paper has been altered is a question for the jury.[2]

§ 2470. Alteration by a Stranger.—A material alteration of an instrument by a stranger while in his possession is held in England to have the same effect as an alteration by a party.[3] But in the United States the rule is, that an alteration made by a stranger, without the procurance or connivance of either party, will not avoid the instrument.[4] Thus an alteration by the agent of the

take to suppose that an alteration in a deed of conveyance, after delivery, operates to reconvey the title to the original grantor. A total destruction of the instrument will not have that effect, but the title remains in the grantee, and he may bring ejectment upon it. The title passed by the deed; it has performed its office, and its continued existence or integrity is not essential to the title, although a fraudulent and material change may disable the holder from bringing an action upon its covenants: 1 Greenleaf on Real Property, sec. 568; Lewis *v.* Payn, 8 Cow. 71; 18 Am. Dec. 427; Jackson *v.* Gould, 7 Wend. 364; Herrick *v.* Malin, 22 Wend. 388; Alexander *v.* Hickox, 34 Mo. 496; 86 Am. Dec. 118. Whether a deed thus altered may be used in evidence of the real grant is, perhaps, not well settled. In Withers *v.* Atkinson, 1 Watts, 236, and in Chesley *v.* Frost, 1 N. H. 145, it is held that a fraudulent alteration of a conveyance by the grantee in a material matter utterly destroys it; and while the title thereby does not reinvest, the deed cannot be used by him for any purpose, either to sustain an action upon the covenants or as evidence of his title. But in Doe *v.* Hirst, 3 Stark. 60, and in Jackson *v.* Gould, 7 Wend. 364, an altered deed was allowed to be read in evidence to sustain the title created by it."

[1] Lewis *v.* Payn, 8 Cow. 71; 18 Am. Dec. 427.

[2] Printup *v.* Mitchell, 17 Ga. 558; 63 Am. Dec. 258; Clark *v.* Eckstein, 22 Pa. St. 507; 62 Am. Dec. 307; Bliss *v.* McIntyre, 18 Vt. 466; 46 Am. Dec. 165.

[3] Piget's Case, 11 Coke, 27 b; Davidson *v.* Cooper, 13 Mees. & W. 343.

[4] Ford *v.* Ford, 17 Pick. 418; Waring *v.* Smyth, 2 Barb. Ch. 119; 47 Am. Dec. 299; Davis *v.* Carlisle, 6 Ala. 707; Piersol *v.* Grimes, 30 Ind. 129; 95 Am. Dec. 673; Crockett *v.* Thompson, 5 Sneed, 342; City of Boston *v.* Benson, 12 Cush. 61; Nichols *v.* Johnson, 10 Conn. 192; Rees *v.* Overbaugh, 6 Cow. 192; Louis *v.* Payn, 8 Cow. 71; 18 Am. Dec. 427; Hunt *v.* Gray, 35 N. J. L. 227; 10 Am. Rep. 232; Bigelow *v.* Stephens, 35 Vt. 521; Boyd *v.* McConnell, 10 Humph. 68; Croft *v.* White, 36 Miss. 445; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Lee *v.* Alexander, 9 B. Mon. 25; 48 Am. Dec. 412. In Bridges *v.* Winters, 42 Miss. 135, 2 Am. Rep. 598, it is said: "There is a distinction to be observed between an alteration and a spoliation of an instrument as to the legal consequences. An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from an instrument has no tendency to produce this result or to mislead any person, it is not an alteration. This term is applied when the act is done by the party entitled to the instrument. But the act of a stranger, without the participation of the party interested, is a

maker of a note will not avoid it.[1] So if one with whom, for safe-keeping, an instrument containing mutual covenants has been left, alters it without permission, it is not avoided, although formerly this person was the agent of one of the parties for certain other purposes.[2]

§ 2471. **Alteration before Execution or Delivery.**—And an alteration or interlineation made before the execution and delivery of an instrument does not affect its validity.[3] But an alteration of a note after a surety has signed it, but before it is delivered to the payee, will discharge the surety.[4] Whether the alteration was made before or after the execution or delivery is a question of fact for the jury.[5]

§ 2472. **Alteration by Accident or Mistake.**—An alteration or erasure made by accident or mistake will not avoid the instrument.[6]

§ 2473. **Alteration by Consent — Ratification.** — If the alteration is made by the consent of both parties, or if, after it is done, it is ratified by the parties, the instrument

mere spoliation or mutilation of the instrument not changing its legal operation, so long as the original writing remains legible." An indorsement on a deed by a stranger thereto will not affect the grantee's rights: Moore *v.* Ivers, 83 Mo. 29.

[1] Collins *v.* Makepeace, 13 Ind. 448; Hunt *v.* Gray, 35 N. J. L. 227; 10 Am. Rep. 232; Bigelow *v.* Stephens, 35 Vt. 521; Miller *v.* Reed, 3 Grant Cas. 51; Langenberger *v.* Kroeger, 48 Cal. 147; 17 Am. Rep. 418. An alteration made by a man's wife was held to avoid a note in Maryland: Morrison *v.* Wetty, 18 Md. 169.

[2] Yeager *v.* Musgrave, 28 W. Va. 90.

[3] Hunt *v.* Gray, 35 N. J. L. 227; 10 Am. Rep. 233; Wickes *v.* Caulk, 5 Har. & J. 36; Ravises *v.* Alson, 5 Ala. 296. Erasures made during the execution of a deed, and noted in the attestation, will not vitiate it: Britton *v.* Stanley, 4 Whart. 114.

[4] Draper *v.* Wood, 112 Mass. 315; 17 Am. Rep. 92; Wood *v.* Steele, 6 Wall. 80; Goodman *v.* Eastman, 4 N. H. 455; Britton *v.* Dierker, 46 Mo. 591; 2 Am. Rep. 553; Lisle *v.* Rogers, 18 B. Mon. 528; McGrath *v.* Clark, 56 N. Y. 34; 15 Am. Rep. 372; Neff *v.* Horner, 63 Pa. St. 327; 3 Am. Rep. 555; Jones *v.* Bangs, 40 Ohio St. 139; 48 Am. Rep. 664. But see, *contra*, Bingham *v.* Reddy, 5 Ben. 266.

[5] Hunt *v.* Gray, 35 N. J. L. 227; 10 Am. Rep. 233; Bailey *v.* Taylor, 11 Conn. 531; 29 Am. Dec. 321.

[6] Wilkinson *v.* Johnson, 3 Barn. & C. 428; Raper *v.* Birbeck, 15 East, 17; Cochran *v.* Nebeker, 48 Ind. 459; Rogers *v.* Shaw, 59 Cal. 260; Horst *v.* Wagner, 43 Iowa, 373; 22 Am. Rep. 255.

is not invalidated.[1] One who procures an extension on a note which, for an alteration, he might have avoided ratifies the alteration.[2] The party making the alteration must prove the assent of the other party.[3] This assent may be implied as well as expressed. Thus where the maker, on the note being presented to him, said that it had been altered, and he was not bound to pay it, but he would pay it, as it was justly due, this was held a sufficient assent.[4]

§ 2474. Alteration must be Material — What Alterations are and are not Material in Writings — Contracts and Deeds Generally. — The alteration, in order to avoid the instrument, must be material, that is, it must change in some way its meaning or its legal effect. An alteration that does not produce this result does not avoid the instrument.[5] An alteration of a written instrument is immaterial if neither the rights or interests, duties or obligations, of either of the parties are in any manner changed.[6] Even though made with a fraudulent intent, an immaterial alteration does not vitiate the instrument,[7]

[1] Camden Bk. *v.* Hall, 14 N. J. L. 583; Hills *v.* Barnes, 11 N. H. 395; Collins *v.* Collins, 51 Miss. 311; 24 Am. Rep. 632; Wooley *v.* Constant, 4 Johns. 54; 4 Am. Dec. 246; King *v.* Hunt, 13 Mo. 97; Grimstead *v.* Briggs, 4 Iowa, 559; Penny *v.* Corwhite, 18 Johns. 499; Humphreys *v.* Guillow, 13 N. H. 385; 38 Am. Dec. 499; Pelton *v.* Prescott, 13 Iowa, 567; Wilson *v.* Henderson, 9 Smedes & M. 375; 48 Am. Dec. 716; Jackson *v.* Johnson, 67 Ga. 167; Canon *v.* Grigsby, 116 Ill. 151; 56 Am. Rep. 769.

[2] Bell *v.* Mahin, 69 Iowa, 408.

[3] Humphreys *v.* Guillow, 13 N. H. 385; 38 Am. Dec. 499.

[4] Humphreys *v.* Guillow, 13 N. H. 385; 38 Am. Dec. 499.

[5] Nichols *v.* Johnson, 10 Conn. 192; Huntington *v.* Finch, 3 Ohio St. 445; Pequawket Bridge *v.* Mathes, 8 N. H. 139; Morrill *v.* Otis, 12 N. H. 466; Kountz *v.* Kennedy, 63 Pa. St. 187; 3 Am. Rep. 541; Burnham *v.* Ayer, 35 N. H. 351; Bridges *v.* Winters, 42 Miss. 135; 2 Am. Rep. 598. "We conceive that he is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. If a promissory note payable at three months after date were altered by the payee to six months, or if, being made for one hundred pounds, he should alter it to fifty pounds, we conceive that he could not sue the maker upon it after the alteration, either in its altered or original form": Gardner *v.* Walah, 5 El. & B. 83.

[6] Vogle *v.* Ripper, 34 Ill. 100; 85 Am. Dec. 298.

[7] Robinson *v.* Ins. Co., 25 Iowa, 430; Moye *v.* Herndon, 30 Miss. 110; Miller *v.* Reed, 27 Pa. St. 246; 67 Am. Dec. 459; Miller *v.* Gilleland, 19 Pa. St. 119; Booth *v.* Powers, 56 N. Y. 22.

though an innocent material alteration would.[1] Whether an alteration is material is a question of law for the court, and not one to be left to a jury.[2]

These have been held material alterations, viz.: An alteration in a sale note of goods by the seller adding a stipulation to the effect that damaged goods should be taken at an allowance by valuation;[3] altering a sale note by sample, by the buyer inserting the words "of their own manufacture";[4] altering a written contract of guaranty by the addition of a seal to the signature so as to make it appear to be a contract under seal;[5] changing the date for the performance of the work under the contract;[6] the addition of the name of the assignee to an assignment;[7] including other property in a bill of sale of goods;[8] accelerating the time of payment of a mortgage;[9] even trifling alterations in a deed which has been certified and recorded;[10] inserting the words "it is to be good hard wood," in a contract for the sale of wood;[11] an increase of the consideration of a mortgage by the mortgagee, after delivery, without the knowledge of the mortgagor;[12] a change in a mortgage, in the description of the premises, after the execution, without the mortgagor's assent, to make it conform to the contract as he (the officer making the change) understood it;[13] an alteration in an agreement to buy a book, by the addition of the word "cloth," as specifying the style of binding, and by the insertion of a price.[14]

These have been held immaterial, viz.: Interlining a

[1] Booth *v.* Powers, 56 N. Y. 22; Miller *v.* Reed, 27 Pa. St. 246; 67 Am. Dec. 459; Fay *v.* Smith, 1 Allen, 477; 79 Am. Dec. 752; Murray *v.* Graham, 29 Iowa, 520; Marshall *v.* Gougler, 10 Serg. & R. 164.

[2] Stephens *v.* Graham, 7 Serg. & R. 508; 10 Am. Dec. 485; Robinson *v.* Ins. Co., 25 Iowa, 430; Bowers *v.* Jewell, 2 N. H. 543; Steele *v.* Spencer, 1 Pet. 552.

[3] Powell *v.* Divitt, 15 East, 29.

[4] Mollett *v.* Wodsworth, 5 Com. B. 181.

[5] Davidson *v.* Cooper, 13 Mees. & W 343.

[6] Getty *v.* Shearer, 20 Pa. St. 12.

[7] Park *v.* Glover, 23 Tex. 469.

[8] Babb *v.* Clemson, 10 Serg. & R. 419; 13 Am. Dec. 684.

[9] Waring *v.* Smyth, 2 Barb. Ch. 119; 47 Am. Dec. 299.

[10] Moore *v.* Bickham, 4 Binn. 1; Coit *v.* Starkweather, 8 Conn. 289.

[11] Schwalm *v.* McIntyre, 17 Wis. 232.

[12] Johnson *v.* Moore, 33 Kan. 90.

[13] Pereau *v.* Frederick, 17 Neb. 117.

[14] Osgood *v.* Stevenson, 143 Mass. 399.

word which had been omitted by oversight, and which the law would read as if there;[1] adding in a mortgage the name of the grantor's wife;[2] tracing over in ink a paper written in pencil;[3] changing the name of the grantor copied in the deed erroneously;[4] adding the description of a party as the sheriff of ——, etc.;[5] altering a name in a recital.[6]

§ 2475. **In Bonds.** — The erasure of the names of a part of the obligors in a bond is a material alteration;[7] so the erasure of the name of one obligee and substituting the name of another;[8] making a replevin bond payable to A payable to B;[9] inserting the amount of the penalty,[10] or increasing it;[11] or adding the words "in specie."[12]

But these have been held not such material alterations as to avoid the bond: Cutting off a receipt written on the margin of the bond;[13] obliterating a payment indorsed on it;[14] inserting the name of the obligor in the bond after he had executed it;[15] adding a date;[16] adding a subscribing witness;[17] adding the word "dollars" after the words "five hundred";[18] changing, after the bond was due, of the rate of interest;[19] altering the numbers;[20] making a memorandum at the foot thereof, stating that the obligation was to bear interest from its date;[21] the inser-

[1] Waugh *v.* Bussell, 5 Taunt. 707; Hunt *v.* Adams, 6 Mass. 519.
[2] Kendall *v.* Kendall, 12 Allen, 92.
[3] Reed *v.* Roark, 14 Tex. 329; 65 Am. Dec. 127.
[4] Pardee *v.* Lindley, 31 Ill. 174; 83 Am. Dec. 219; Hatch *v.* Hatch, 9 Mass. 307; 6 Am. Dec. 67.
[5] Pigot's Case, 11 Coke, 26 b.
[6] Trew *v.* Burton, 1 Car. & M. 533.
[7] Briggs *v.* Glen, 7 Mo. 572; State *v.* Polke, 7 Blackf. 27; Martin *v.* Thomas, 24 How. 315; Ryan *v.* Parker, 1 Ired. Eq. 89.
[8] Smith *v.* Weld, 2 Pa. St. 54.
[9] Dolbier *v.* Norton, 17 Me. 307.
[10] State *v.* Boring, 15 Ohio, 507; Famulener *v.* Anderson, 15 Ohio St. 473; People *v.* Brown, 2 Doug. (Mich.) 9.
[11] Mathis *v.* Mathis, 3 Dev. & B. 60.
[12] Darwin *v.* Rippey, 63 N. C. 318.
[13] Goodfellow *v.* Inslee, 12 N. J. Eq. 355.
[14] Simms *v.* Paschall, 5 Ired. 276.
[15] Stone *v.* Wilson, 4 McCord, 203; Wilder *v.* Butterfield, 50 How. Pr. 386.
[16] State *v.* Miller, 3 Gill, 335.
[17] Blackwell *v.* Lane, 4 Dev. & B. 113; 32 Am. Dec. 675. But see Adams *v.* Frye, 3 Met. 103.
[18] Whitney *v.* Darrow, 5 Or. 442.
[19] Burkholder *v.* Lapp, 31 Pa. St. 322.
[20] Commonwealth *v.* Emigrant etc. Bank, 98 Mass. 12; 93 Am. Dec. 126.
[21] Tremper *v.* Hemphill, 8 Leigh, 623; 31 Am. Dec. 673.

tion of the words "are held and firmly bound," where omitted;[1] changing the christian name of the claimant, and filling up a blank left for the schedule of the property;[2] where the obligee in a bond attempted to retrace part of the obligor's name, which had been blotted with ink and obscured, and in doing so, misspelled it, but not so as to alter the sound;[3] where a bond was made by mistake to the acting sheriff, instead of the party who was to be protected by its execution, and when the mistake was discovered, the name of the officer was erased, and that of the proper officer inserted;[4] where, after the execution of a bond given by the proprietor of a tobacco warehouse, the date was changed from "February" to "March."[5]

§ 2476. In Negotiable Paper.—In the case of negotiable instruments, these have been held material alterations, viz.: Altering the date of a bill or note;[6] adding a rate of interest;[7] adding a place of payment,[8] or a different place than that stated in the bill;[9] changing the words "to the order of A" to "to A or bearer";[10] adding the words "bearer" or "order" to a non-negotiable note;[11] adding

[1] West. Bldg. Ass'n v. Fitzmaurice, 7 Mo. App. 283.

[2] State v. Dean, 40 Mo. 464.

[3] Dunn v. Clements, 7 Jones, 58.

[4] Turner v. Billagram, 2 Cal. 520.

[5] Terry v. Hazlewood, 1 Duvall, 104.

[6] Brown v. Straw, 6 Neb. 536; 29 Am. Rep. 369; Master v. Miller, 4 Term Rep. 320; Hirschman v. Budd, L. R. 8 Ex. 111; Britton v. Dierker, 46 Mo. 591; 2 Am. Rep. 553; Letcher v. Bates, 6 J. J. Marsh. 524; 22 Am. Dec. 92; Aubuchon v. McKnight, 1 Mo. 312; 13 Am. Dec. 502; Mitchell v. Ringgold, 3 Har. & J. 159; 5 Am. Dec. 433; Bank v. McChord, 4 Dana, 191; 29 Am. Dec. 398; Stephens v. Graham, 7 Serg. & R. 505; 10 Am. Dec. 485; Owings v. Arnot, 33 Mo. 406; Hamilton v. Wood, 70 Ind. 306. *Aliter* where the date of the instrument does not affect the day of payment or the amount: Inglish v. Breneman, 5 Ark. 377; 41 Am. Dec. 96.

[7] Warrington v. Early, 3 El. & B. 763; Woodworth v. Anderson, 63 Iowa, 503.

[8] Burchfield v. Moore, 3 El. & B. 683; Woodworth v. Bank, 19 Johns. 391; 10 Am. Dec. 239; Nazro v. Fuller, 24 Wend. 374; Sturges v. Williams, 9 Ohio St. 443; 75 Am. Dec. 473; Toomer v. Rutland, 57 Ala. 379; 29 Am. Rep. 722.

[9] Tidmarsh v. Grover, 1 Maule & S. 735; White v. Hass, 32 Ala. 430; 70 Am. Dec. 548; Woodworth v. Bank, 19 Johns. 391; 10 Am. Dec. 239.

[10] Booth v. Powers, 56 N. Y. 22; Union Nat. Bank v. Roberts, 45 Wis. 373; McCauley v. Gordon, 64 Ga. 221; 37 Am. Rep. 68; Medles v. Shaffer, 60 Iowa, 65.

[11] Johnson v. Bank, 2 B. Mon. 350; Bruce v. Westcott, 3 Barb. 374; Scott v. Walker, Dud. 243; Morehead v. Bank, 5 W. Va. 74; 13 Am. Rep. 636. See Croswell v. Latree, 10 Am. St. Rep. 238.

or altering the place of payment;[1] adding the name of another person as maker;[2] altering the amount payable,[3] even by diminishing it;[4] adding a consideration;[5] adding or increasing interest;[6] adding the words "with difference of exchange;[7] adding the words "without defalcation or set-off";[8] adding the name of a subscribing witness;[9] adding the words "on demand";[10] altering the time of payment;[11] erasing the place of payment;[12] adding or altering special stipulations of any kind;[13] changing the name of the payee;[14] severing a memorandum made on the note;[15] adding to his name as maker and indorser the words "Presdt. O. F. B. Ass'n";[16] erasing the word

[1] Cronkhite *v.* Nebeker, 81 Ind. 319; 42 Am. Rep. 127; Whitesides *v.* Northern Bank, 10 Bush, 501; 19 Am. Rep. 74; Woodworth *v.* Bank, 19 Johns. 391; 10 Am. Dec. 239; Major *v.* Hansen, 2 Biss. 195; Townsend *v.* Star Wagon Co., 10 Neb. 615; 29 Am. Rep. 493; Adair *v.* England, 58 Iowa, 314.

[2] Wallace *v.* Jewell, 21 Ohio St. 163; 8 Am. Rep. 48; Nicholson *v.* Combs, 90 Ind. 515; 46 Am. Rep. 229; Brownell *v.* Winnie, 29 N. Y. 400; 86 Am. Dec. 314. (*Aliter* where the note was a several one: Brownell *v.* Winnie, 29 N. Y. 400; 86 Am. Dec. 314.) Or as surety: Bank of Limestone *v.* Perrick, 2 T. B. Mon. 28; 15 Am. Rep. 136. Or as payee: Aldrich *v.* Smith, 37 Mich. 468; 26 Am. Rep. 536.

[3] Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Goodman *v.* Eastman, 4 N. H. 455; Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196; 25 Am. Rep. 67; Fordyce *v.* Kosminski, 49 Ark. 40; 4 Am. St. Rep. 19.

[4] Portage County Bank *v.* Lane, 8 Ohio St. 405; Chism *v.* Toomer, 27 Ark. 108.

[5] Lowe *v.* Argrove, 30 Ga. 129.

[6] Fulmer *v.* Seitz, 68 Pa. St. 237; 8 Am. Rep. 172; Holmes *v.* Trumper, 22 Mich. 427; 7 Am. Rep. 661; Neff *v.* Homer, 63 Pa. St. 327; 3 Am. Rep. 555; McGrath *v.* Clark, 56 N. Y. 34; 15 Am. Rep. 372; Glover *v.* Robbins, 49 Ala. 219; 20 Am. Rep. 272; Patterson *v.* McNeely, 16 Ohio St. 348; Evans *v.* Foreman, 60 Mo. 449; Schuerwund *v.* Hackett, 54 Ind. 248; Lee *v.* Starbird, 55 Me. 491; Fay *v.* Smith, 1 Allen, 477; 79 Am. Dec. 752; Harsh *v.* Klepper, 28 Ohio St. 200; Bradley *v.* Mann, 37 Mich. 1; Washington Sav. Bank *v.* Eckey, 51 Mo. 272; Benedict *v.* Miner, 58 Ill. 19; Brooks *v.* Allen, 62 Ind. 401; Plyther *v.* Elliott, 19 S. C. 257.

[7] Merrick *v.* Bowry, 4 Ohio St. 69.

[8] Davis *v.* Carlisle, 6 Ala. 707.

[9] Homer *v.* Wallis, 11 Mass. 309; 6 Am. Dec. 169. *Contra*, Thornton *v.* Appleton, 29 Me. 298; Eddy *v.* Bond, 19 Me. 461; 36 Am. Dec. 767; Fuller *v.* Green, 64 Wis. 159; 54 Am. Rep. 600.

[10] Benjamin *v.* McConnell, 9 Ill. 536; 46 Am. Dec. 474.

[11] Owings *v.* Arnot, 33 Mo. 406; King *v.* Hunt, 13 Mo. 97; Wyman *v.* Yerman, 84 Ill. 403; Charlton *v.* Reed, 61 Iowa, 166; 47 Am. Rep. 808.

[12] White *v.* Hass, 32 Ala. 430; 70 Am. Dec. 548.

[13] Martindale *v.* Follett, 1 N. H. 95; Benjamin *v.* McConnell, 4 Gilm. 536; 46 Am. Dec. 474.

[14] Stoddard *v.* Penniman, 108 Mass. 366; 11 Am. Rep. 363.

[15] Benedict *v.* Cowden, 49 N. Y. 396; 10 Am. Rep. 382; Wheelock *v.* Freeman, 13 Pick. 165; 23 Am. Dec. 674.

[16] First Nat. Bank *v.* Fricke, 75 Mo. 178; 42 Am. Rep. 397.

"surety";[1] adding a seal to the note;[2] changing a joint and several note into a joint one;[3] inserting a waiver of the appraisement laws;[4] adding the words "and the said Ellen A. Brown makes this note a charge upon her separate estate";[5] adding "& Co." to the maker's name;[6] detaching a stub on which is written a condition for the maker's benefit.[7]

These have been held immaterial alterations, viz.: Adding the words "in gold" to a note;[8] adding to a note, where no time of payment was expressed, the words "on demand";[9] adding the words "or order";[10] adding or erasing the name of a surety;[11] adding words which have been omitted by inadvertence, and which the law would read as if there;[12] altering the body of the note to make it correspond with the margin, where the latter was the correct sum;[13] altering the figures to make them correspond with the amount payable in the body;[14] adding the word "agent" to the name of the maker;[15] adding another maker to a note signed in blank;[16] altering a note from "I promise" to "we promise";[17] adding the words "or either of us," in a note executed by two persons;[18] altering the date or the names of the parties, to make it correspond

[1] Laub *v.* Paine, 46 Iowa, 550; 26 Am. Rep. 163.

[2] Vaughan *v.* Fowler, 14 S. C. 335; 37 Am. Rep. 731; Morrison *v.* Welty, 18 Md. 169.

[3] Humphreys *v.* Guillow, 13 N. H. 385; 38 Am. Dec. 499.

[4] Holland *v.* Hatch, 11 Ind. 497; 71 Am. Dec. 363.

[5] Reeves *v.* Pierson, 23 Hun, 185.

[6] Haskell *v.* Champion, 30 Mo. 136.

[7] Stephens *v.* Davis, 85 Tenn. 271.

[8] Bridges *v.* Winters, 42 Miss. 135; 2 Am. Rep. 598.

[9] Aldous *v.* Cornwell, L. R. 3 Q. B. 573.

[10] Kershaw *v.* Cox, 3 Esp. 246.

[11] Miller *v.* Finley, 26 Mich. 249; 12 Am. Rep. 306; People *v.* Call, 1 Denio, 120. *Contra*, Bowers *v.* Briggs, 20 Ind. 139; McVean *v.* Scott, 46 Barb. 379.

[12] As the word "months," in a bill payable "twenty-four after date": Conner *v.* Routh, 7 How. (Miss.) 176; 40 Am. Dec. 59; or the word "year": Hunt *v.* Adams, 6 Mass. 519; or the words "hundred dollars": Boyd *v.* Brotherson, 10 Wend. 93.

[13] Clute *v.* Small, 17 Wend. 237; Williamson *v.* Walker, 1 Cold. 1; 78 Am. Dec. 478.

[14] Smith *v.* Smith, 1 R. I. 398; 53 Am. Dec. 652.

[15] Manufacturers' Bank *v.* Follett, 11 R. I. 92; 23 Am. Rep. 418.

[16] Bank *v.* McChord, 4 Dana, 191; 29 Am. Dec. 398.

[17] Eddy *v.* Bond, 19 Me. 461; 36 Am. Dec. 767.

[18] Miller *v.* Reed, 27 Pa. St. 244; 67 Am. Dec. 459.

with the date or the parties intended;[1] inserting the word "and" between the signatures of two parties to a note;[2] adding the residences of the indorsers after their names;[3] erasing the words "trustees, etc.";[4] obtaining by the principal of the signature of a surety to a promissory note before delivery to the payee;[5] a memorandum made on the back of a note by the holder, in pursuance of an agreement with the maker, but without the knowledge of a surety, to the effect that the rate of interest after a specified day will be less than that provided in the note;[6] the addition of the word "annually" to the interest clause of a note payable in less than two years;[7] the indorsement on the back of a note of an agreement for extension;[8] a payee's writing on the face of the note before maturity an extension to a later day certain.[9] Where affixing the name of an attesting witness to a promissory note does not change its legal effect, it is not a material alteration.[10]

§ 2477. In Insurance Policies. — In policies of insurance these have been held material alterations, viz.: Adding a new or more specific object of insurance;[11] altering the port of destination.[12] But where a policy of insurance on a voyage was made with the condition "to stay at any place to sell, barter, load, and unload goods, etc.," and the insured afterwards added the words "and to trade," it was held an immaterial alteration.[13] A policy

[1] Ames *v.* Colburn, 11 Gray, 390; 71 Am. Dec. 723; Cole *v.* Hills, 44 N. H. 227; Duker *v.* Franz, 7 Bush, 273; 3 Am. Rep. 314; Derby *v.* Thrall, 44 Vt. 413; 8 Am. Rep. 389.

[2] Martin *v.* Good, 14 Md. 398; 74 Am. Dec. 545.

[3] Struthers *v.* Kendall, 41 Pa. St. 214; 80 Am. Dec. 610.

[4] Hayes *v.* Matthews, 63 Ind. 412; 30 Am. Rep. 226; Burlingame *v.* Brewster, 79 Ill. 515; 22 Am. Rep. 177.

[5] Ward *v.* Hackett, 30 Minn. 150; 44 Am. Rep. 187.

[6] Cambridge Savings Bank *v.* Hyde, 131 Mass. 77; 41 Am. Rep. 193.

[7] Leonard *v.* Phillips, 39 Mich. 182; 33 Am. Rep. 370.

[8] Moore *v.* Macon Savings Bank, 22 Mo. App. 684.

[9] Drexler *v.* Smith, 30 Fed. Rep. 754.

[10] Fuller *v.* Green, 64 Wis. 159; 54 Am. Rep. 600; Church *v.* Fowle, 142 Mass. 12.

[11] Leake on Contracts, 808.

[12] Campbell *v.* Christie, 2 Stark. 64.

[13] Sanderson *v.* Symonds, 1 Ball & B. 426.

of insurance and indorsements thereon, constituting a contract of insurance with the assured, will not be avoided by even a material alteration of a contract between the company and another party indorsed on the same policy.[1]

§ 2478. **Filling Blanks in Instruments — Negligence of Maker.** — Where a person, intending to enter into an obligation, signs the paper wholly in blank, or blank in certain particulars, he impliedly gives authority to the holder to fill the blanks in accordance with the general character of the instrument.[2] Where the date in a bill of exchange is left blank, this gives authority to fill it.[3] So as to the time of payment,[4] or the place of payment.[5] Where a note with blanks is delivered by the maker to an agent, with express authority to fill one of the blanks, or to fill them on certain conditions, there is no implied authority to fill the others, or to fill them without the happening of the conditions.[6] But such a note is valid in the possession of a *bona fide* holder.[7] Where writing is intrusted to another with blanks to be filled, he has no authority so to fill them as to vary or pervert the scope or meaning of the words previously written or printed, nor to strike out any of the written or printed words and replace them with others of a substantially different signification.[8]

It seems to be well settled that a paper intended for a

[1] Robinson *v.* Phœnix Ins. Co., 25 Iowa, 430.

[2] Bank *v.* McChord, 4 Dana, 119; Bank *v.* Curry, 2 Dana, 142; Page *v.* Morrell, 3 Abb. App. 433; Spitler *v.* James, 32 Ind. 202; 2 Am. Rep. 334; Van Duzen *v.* Howe, 21 N. Y. 531; Redlich *v.* Doll, 54 N. Y. 234; 13 Am. Rep. 573; Gillaspie *v.* Kelley, 41 Ind. 158; 13 Am. Rep. 318; Garrard *v.* Haddan, 67 Pa. St. 82; 5 Am. Rep. 412; Visher *v.* Webster, 8 Cal. 100; Angle *v.* Ins. Co., 92 U. S. 330; Abbott *v.* Rose, 62 Me. 194; 16 Am. Rep. 427; Witte *v.* Williams, 8 S. C. 290; 28 Am. Rep. 294; Caborn *v.* Nebb, 56 Ind. 96; 24 Am. Rep. 15; Johnson Harvester Co. *v.* McLean, 57 Wis. 258; 46 Am. Rep. 39.

[3] Mitchell *v.* Culver, 7 Cow. 336; Page *v.* Morrell, 3 Abb. App. 433. *Contra*, Stout *v.* Cloud, 5 Litt. 205.

[4] Wilson *v.* Henderson, 9 Smedes & M. 375; 48 Am. Dec. 716.

[5] Redlich *v.* Doll, 54 N. Y. 234; 13 Am. Rep. 573.

[6] Toomer *v.* Rutland, 57 Ala. 379; 29 Am. Rep. 722.

[7] Spitler *v.* James, 32 Ind. 202; 2 Am. Rep. 334; Overton *v.* Matthews, 35 Ark. 146; 37 Am. Rep. 9.

[8] Harris *v.* Bank of Jacksonville, 22 Fla. 501; 1 Am. St. Rep. 201.

deed which has nothing but the signatures and the seals cannot, after its delivery, be filled up so as to make it a good deed.[1] But where the deed is substantially made, and it is put in the hands of an agent with certain blanks left for him to fill out, it has been held in a large number of cases that the instrument is valid and binding after the blanks have been so filled.[2]

"If the maker of a bill, note, or check issues it in such a state that it may easily be altered [as, for instance, by filling the blank with a larger amount than was intended, etc.] without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity."[3]

§ 2479. Presumptions as to Alterations — Burden of Proof. — Alterations, erasures, and interlineations appearing on the face of writings, whether under seal or not, are presumed to have been made before their execu-

[1] United States *v.* Nelson, 2 Brock. 64; Ayres *v.* Harness, 1 Ohio, 173; Gilbert *v.* Anthony, 1 Yerg. 69; 24 Am. Dec. 439; Perminter *v.* McDaniel, 1 Hill (S. C.), 267; 26 Am. Dec. 179; Lockhart *v.* Roberts, 3 Bibb, 361; Sigfried *v.* Leran, 6 Serg. & R. 308; 9 Am. Dec. 427; Duncan *v.* Hodges, 4 McCord, 239; 17 Am. Dec. 734; Burns *v.* Lynde, 6 Allen, 405. But see Pierce *v.* Arbuckle, 22 Minn. 417, where such an instrument was sustained.

[2] Duncan *v.* Hodges, 4 McCord, 239; 17 Am. Dec. 734; Texeira *v.* Evans, cited in Master *v.* Miller, 1 Anstr. 228; Ex parte Kerwin, 8 Cow. 118; Field *v.* Stagg, 52 Mo. 356; 14 Am. Rep. 435; Inhabitants of South Berwick *v.* Huntress, 53 Me. 89; 87 Am. Dec. 535; Van Etta *v.* Everson, 28 Wis. 37; 9 Am. Rep. 486; Vliet *v.* Camp, 13 Wis. 198; Owen *v.* Perry, 25 Iowa, 412; 96 Am. Dec. 49; Devin *v.* Himer, 29 Iowa, 299; Clark *v.* Allen, 34 Iowa, 190; Swartz *v.* Ballou, 47 Iowa, 188; 29 Am. Rep. 470; McNabe *v.* Young, 81 Ill. 11. *Contra*, Burns *v.* Lynde, 6 Allen, 405; Upton *v.* Archer, 41 Cal. 85; 10 Am. Rep. 266; Chase *v.* Palmer, 29 Ill. 309; Hibblewaite *v.* McMorine, 6 Mees. & W. 200; Ingram *v.* Little, 14 Ga. 173; 58 Am. Dec. 549; Harrison *v.* Tiernan, 4 Rand. 177; Cross *v.* State Bank, 5 Ark. 525; Bell *v.* Quick, 13 N. J. L. 312; Moore *v.* Bickham, 4 Binn. 1; Powell *v.* Sheriff of Middlesex, 3 Camp. 181; Markham *v.* Gonaston, 1 Croke, 626; Week *v.* Maillardet, 14 East, 568; Boyd *v.* Boyd, 2 Nott & McC. 125.

[3] Brown *v.* Reed, 70 Pa. St. 370; 21 Am. Rep. 75; Rainbolt *v.* Eddy, 34 Iowa, 440; 11 Am. Rep. 152; Yocum *v.* Smith, 63 Ill. 321; 14 Am. Rep. 120; Hall *v.* Bank, 5 Dana, 258; 30 Am. Dec. 685; Leas *v.* Walls, 101 Pa. St. 57; 47 Am. Rep. 699; Scotland Co. Bank *v.* O'Connel, 23 Mo. App. 165. *Contra*, Washington Savings Bank *v.* Ekey, 51 Mo. 272; Holmes *v.* Trumper, 22 Mich. 427; 7 Am. Rep. 661; Knoxville National Bank *v.* Clarke, 51 Iowa, 264; 33 Am. Rep. 129; Greenfield Savings Bank *v.* Stowell, 123 Mass. 196; 25 Am. Rep. 67.

tion or completion.[1] But where the alteration is in a different handwriting from the rest of the instrument, or in a different ink, or is in the interest of the party setting it up, or is suspicious on its face, or the execution of the instrument is denied under oath, the burden of proof rests on the party producing the instrument to explain it to the satisfaction of the tribunal.[2] There is no apparent alteration of paper where there is no interlineation, erasure, difference in handwriting, change of figures or words, nor any irregularity on the face of the paper calculated to arouse suspicion.[3]

§ 2480. Recovery upon Original Consideration. — If the alteration was made honestly, under a mistake of right, the plaintiff, as a rule, may recover on the original cause of action for which the instrument was given.[4] If the alteration is not fraudulent, although the identity of the instrument may be destroyed, it will not operate to cancel the debt of which the instrument is merely evidence.[5] Where a note is altered without fraudulent intention, the payee may resort to the original indebtedness, if that was independent of the note, and has not been discharged by its execution.[6] The altered note must be produced and surrendered.[7]

But in these cases there can be no recovery on the original consideration, viz.: 1. Where an instrument is fraudulently altered by one claiming under it;[8] 2. Where

[1] Lawson on Presumptive Evidence, rule 84, and cases cited; Wikoff's Appeal, 15 Pa. St. 281; 53 Am. Dec. 597.

[2] Lawson on Presumptive Evidence, rule 85, and cases cited; Harris v. Bank of Jacksonville, 22 Fla. 501; 1 Am. St. Rep. 202.

[3] Harris v. Bank of Jacksonville, 22 Fla. 501; 1 Am. St. Rep. 202.

[4] Merrick v. Boury, 4 Ohio St. 60.

[5] Vogle v. Ripper, 34 Ill. 100; 95 Am. Dec. 298.

[6] Booth v. Powers, 56 N. Y. 22; Merrick v. Boury, 4 Ohio St. 60; Lewis v. Schenck, 18 N. J. Eq. 459; 90 Am. Dec. 631; Matteson v. Ellsworth, 33 Wis. 488; 14 Am. Rep. 766; State Savings Bank v. Shaffer, 9 Neb. 1; 31 Am. Rep. 394.

[7] Booth v. Powers, 56 N. Y. 22.

[8] Kennedy v. Crandall, 3 Lans. 1; Smith v. Mace, 44 N. H. 553; Blade v. Noland, 12 Wend. 173; 27 Am. Dec. 126; Trow v. Glen Cove Starch Co., 1 Daly, 280; Wallace v. Wallace, 8 Ill. App. 69; Newell v. Mayberry, 3 Leigh, 250; 26 Am. Dec. 261.

the alteration was honestly made, but the rights of third parties will be prejudiced if the plaintiff be permitted to withdraw from the position assumed by such alteration;[1] 3. Where the original consideration of the contract between the parties, upon which it is sought to recover, has been merged in the consideration of the instrument altered, in consequence of the fact that the latter was under seal.[2]

§ 2481. **Effect of an Alteration upon Sureties.** — Sureties to a note or to a contract of any kind are discharged by a material alteration.[3]

§ 2482. **Release of Principal Discharges Surety.** — Where two persons are respectively liable to the creditor for the same debt, one as principal and the other as surety, an absolute release of the principal discharges the debt and releases the surety.[4] The surety is discharged by the creditor's surrender of collateral securities held for the same debt, *pro tanto* or entirely, according to the value of the security.[5] The release of property of the principal on an execution against principal and surety will discharge the latter;[6] and so as to any property of the principal in his hands.[7] If a creditor, without the surety's consent, accepts a part of his debt from the principal's receiver, and gives a receipt for the whole, the surety is

[1] Alderson *v.* Langdale, 3 Barn. & Adol. 660.

[2] Whitmer *v.* Frye, 10 Mo. 348; Waring *v.* Smith, 2 Barb. Ch. 119; Mills *v.* Starr, 2 Bail. 359.

[3] See cases *ante* as to what is a material alteration; Weir Plow Co. *v.* Walmsley, 110 Ind. 242; Whelan *v.* Boyd, 114 Pa. St. 228; Roberts *v.* Donovan, 70 Cal. 108.

[4] Cragoe *v.* Jones, L. R. 8 Ex. 81; Webb *v.* Hewitt, 3 Kay & J. 438; Baird *v.* Rice, 1 Call, 18; 1 Am. Dec. 497; Tremper *v.* Hemphill, 8 Leigh, 623; 31 Am. Dec. 673; Bowers *v.* Cobb, 31 Fed. Rep. 678. See also Title Negotiable Instruments.

[5] N. H. Sav. Bank *v.* Colcord, 15 N. H. 119; 41 Am. Dec. 685; Robeson *v.* Roberts, 20 Ind. 155; 83 Am. Dec. 308; Blydenburgh *v.* Bingham, 38 N. Y. 371; 98 Am. Dec. 49; Nelson *v.* Murch, 28 Minn. 314; Sample *v.* Cochran, 84 Ind. 594.

[6] Dixon *v.* Ewing, 3 Ohio, 280; 17 Am. Dec. 590; Cooper *v.* Wilcox, 2 Dev. & B. Eq. 90; 32 Am. Dec. 695; Bank *v.* Fordyce, 9 Pa. St. 275; 49 Am. Dec. 561; Springer *v.* Toothaker, 43 Me. 381; 69 Am. Dec. 66; Bank *v.* Matson, 26 Mo. 243; 72 Am. Dec. 208; McKenzie *v.* Wiley, 27 W. Va. 658.

[7] Baker *v.* Briggs, 8 Pick. 121; 19 Am. Dec. 311.

discharged.[1] But the release may be given with an express reservation of the right of the creditor against the surety; in such case the surety is not discharged, and the principal debtor, consenting to accept a release in such form, is discharged as against the creditor only, but as against the surety he is not discharged; and the latter, if called upon to pay, may have his recourse against the principal debtor.[2]

§ 2483. **Discharge by New Agreement — Other Cases.** — If a third party has guaranteed as surety the due performance of the original contract, he is discharged from that liability, and is not affected with any liability in respect of a substituted contract, unless with full knowledge of all the circumstances he consent to continue surety under it.[3] Any dealing by the creditor with the principal debtor which amounts to a variation from the contract by which the surety is to be bound, and which by possibility might vary or enlarge the latter's liability without his consent, operates as a discharge of such surety.[4] Thus the surety has been discharged where by a new contract the creditor has extended the time of payment of the debt,[5] or discharged another of the sure-

[1] Heitz *v.* Atlee, 67 Iowa, 483.

[2] Kearsley *v.* Cole, 16 Mees. & W. 135, the court saying: "The reserve of remedies has that effect, upon this principle: 1. That it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and 2. That it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him."

[3] Witcher *v.* Hall, 5 Barn. & C. 269; Smith *v.* Tunno, 1 McCord Ch. 443; 16 Am. Dec. 617.

[4] Mayhew *v.* Boyd, 5 Md. 102; 59 Am. Dec. 101; Bailey *v.* Boyd, 75 Ind. 125; Weir Plow Co. *v.* Walmsley, 110 Ind. 242.

[5] Rees *v.* Barrington, 2 Ves. Jr. 540. The enlargement of the time of payment of an obligation for a definite period by a valid contract, founded upon a valuable consideration, without the consent of a surety, known at the time to be such, is such a material alteration of the contract as will discharge the surety, without regard to whether he is prejudiced by the extension or not: Post *v.* Losey, 111 Ind. 75; 60 Am. Rep. 677; Butler *v.* Hamilton, 2 Desaus. 226; 2 Am. Dec. 692; Kennebec Bank *v.* Tuckerman, 5 Me. 130; 17 Am. Dec. 209;

ties;[1] or if the creditor, having the means of satisfaction actually or potentially in his hands, refuses to retain it.[2] The surety is discharged by an informal tender by the debtor while insolvent, if not accepted by the creditor;[3] by positive and willful interference by a creditor embarrassing the recovery of the claim against the principal;[4] by a settlement under an assignment for the benefit of creditors;[5] by an arrangement between the principal and the creditor, without the privity of the surety, whereby the principal is not to be sued by the creditor;[6] by the creditor's agreement to take land from the principal debtor for the whole or a part of the debt.[7] A surety on a note is exonerated by its delivery without his assent by the principal in payment of an antecedent debt to another, where it shows on its face the fact of suretyship, and that it was made payable to a particular bank.[8] So the surety may be discharged by the laches of the creditor, as where he omits to do any act which he is by law bound to do in the interest of the surety.[9] If the surety is told by the creditor that the debt is paid, and thereby loses an opportunity of securing himself, he is discharged, although the debt was not paid, and the creditor acted under a mistake.[10]

Brown v. Wright, 7 T. B. Mon. 396; 18 Am. Dec. 190; Grafton Bank v. Woodward, 5 N. H. 99; 20 Am. Dec. 566; Bank v. Dixon, 4 Vt. 587; 24 Am. Dec. 640; Everett v. U. S., 6 Port. 166; 30 Am. Dec. 585; Bangs v. Strong, 7 Hill, 250; 42 Am. Dec. 64; King v. State Bank, 9 Ark. 185; 47 Am. Dec. 739; Lime Rock Bank v. Mallett, 34 Me. 547; 56 Am. Dec. 673; Dickerson v. Ripley Co., 6 Ind. 128; 63 Am. Dec. 373; Place v. McIlvain, 38 N. Y. 96; 97 Am. Dec. 777; Back v. Zimmerman, 106 Ind. 495; Williams v. Scott, 83 Ind. 405; Glenn v. Morgan, 23 W. Va. 467; Orndorff v. Union Bank, 31 Md. 126; 1 Am. Rep. 31.

[1] Mayhew v. Crickett, 2 Swanst. 193. A release of one of two sureties is a release of the other from one half of the debt: Gordon v. Moore, 44 [illegible] 349; 51 Am. Rep. 606.

[2] Lichtenthaler v. Thompson, 3 Serg. & R. 157; 15 Am. Dec. 56.

[3] Life Ass'n v. Neville, 72 [illegible] 517.

[4] Bank of Manchester v. Barnes, 13 Vt. 315; 37 Am. Dec. 594.

[5] Ordinary v. Dean, 44 N. J. [illegible]

[6] Farnsworth v. Coots, 46 M[illegible]

[7] Bangs v. Strong, 7 Hill, [illegible] Am. Dec. 64.

[8] Russell v. Ballard, 16 B. Mon. 63 Am. Dec. 526.

[9] King v. Baldwin, 17 Johns. [illegible] Am. Dec. 415; Atlantic etc. [illegible] v. Barnes, 64 N. Y. 385; 21 [illegible] 621; Hempstead v. Watkins, [illegible] 317; 42 Am. Dec. 697.

[10] Baker v. Briggs, 8 Pick. [illegible] Am. Dec. 311.

§ 2484. **Guaranty of Performance of Duties.** — Where a surety guarantees the due performance of an office or employment or agency, any material alteration in the duties stipulated for, without consent of the surety, discharges him from liability.[1] In like manner, sureties on a builder's indemnity bond are discharged by a material change in the building contract without their consent.[2] The substitution of a new agreement as to the mode of remuneration for the duties and services discharges the surety.[3] And if the engagement be determinable in a stipulated manner, the substitution of a new mode of determining it discharges the surety.[4] But the undertaking of an additional office or other duties, unless materially affecting or altering the former, does not affect the guarantee, unless the surety has stipulated against it.[5] If the obligee knew, when receiving a bond given to secure the faithful performance of the duties of an agent, that the agent was a defaulter, and concealed the fact from the sureties, it is a fraud upon them, and discharges them from liability.[6] So if the principal continues to employ the agent after knowledge that he has misappropriated money coming into his hands as agent.[7]

§ 2485. **When Surety not Discharged.** — The indulgence granted to a principal which will discharge a

[1] Lord Arlington *v.* Menicke, 2 Wm. Saund. 414; Pybus *v.* Gibb, 6 El. & B. 902; Mumford *v.* R. R. Co., 2 Lea, 393; 31 Am. Rep. 616; Manuf. Nat. Bank *v.* Dickerson, 41 N. J. L. 448; 23 Am. Rep. 237; Home Sav. Bank *v.* Traube, 75 Mo. 199; 42 Am. Rep. 402; City of Lafayette *v.* James, 92 Ind. 240; 47 Am. Rep. 140; Mayor *v.* Kelly, 98 N. Y. 467; 50 Am. Rep. 699; Singer Mfg. Co. *v.* Hibbs, 21 Mo. App. 574; Victor Sewing Machine Co. *v.* Langham, 9 Biss. 183; Roberts *v.* Donovan, 70 Cal. 108.

[2] Whelen *v.* Boyd, 114 Pa. St. 228; Ryan *v.* Morton, 65 Tex. 258.

[3] North Western R. R. Co. *v.* Whinray, 10 Ex. 77.

[4] Sanderson *v.* Aston, L. R. 8 Ex. 73.

[5] Bonar *v.* Macdonald, 3 H. L. Cas. 226; Skillett *v.* Fletcher, L. R. 2 Com. P. 469; Malling Union *v.* Graham, L. R. 5 Com. P. 201; Rollstone Bank *v.* Careton, 136 Mass. 226; Lane's Appeal, 112 Pa. St. 499.

[6] Guardian Assurance Co. *v.* Thompson, 68 Cal. 208. The sureties on the bond of an officer of a corporation are not relieved from liability by the fact that the officer was already a defaulter when the bond was given, and that the other officers were negligent in not discovering the fact: Bennett *v.* S. A. R. E. B. & L. Ass'n, 57 Tex. 72.

[7] Roberts *v.* Donovan, 70 Cal. 108; Conn. Mut. Ins. Co. *v.* Scott, 81 Ky. 540.

surety from his engagement must be of that kind whereby the nature of the contract is changed, or whereby the creditor, without the consent of the surety, and by his own act, puts it out of his power to enforce the payment of the debt by the principal.[1] A surety is not released by any act or conduct of the creditor which does not place him in a worse position than he would otherwise have been.[2] The acceptance of more collateral or additional security by the creditor will not discharge the surety;[3] nor when, though the creditor extends the time, he fully indemnifies the surety,[4] or the surety has ample security from the principal;[5] nor by the mere omission or forbearance of the creditor to sue the principal;[6] nor, in most states, even where the surety has requested the creditor to sue the principal;[7] nor by a mere voluntary revocable indulgence given by the creditor to the principal,[8] or a mere verbal assent to an extension of time,

[1] Buchanan v. Bordley, 4 Har. & McH. 41; 1 Am. Dec. 387.

[2] Driskell v. Mateer, 31 Mo. 325; 80 Am. Dec. 105.

[3] Brengle v. Bushey, 40 Md. 141; 17 Am. Rep. 586; Burke v. Cruger, 8 Tex. 66; 58 Am. Dec. 102.

[4] Chilton v. Robbins, 4 Ala. 223; 37 Am. Dec. 741.

[5] Smith v. Steele, 25 Vt. 427; 60 Am. Dec. 276.

[6] Cope v. Smith, 8 Serg. & R. 110; 11 Am. Dec. 582; Hunt v. Bridgman, 2 Pick. 581; 13 Am. Dec. 458; Sneed v. White, 3 J. J. Marsh. 525; 20 Am. Dec. 175; U. S. v. Simpson, 3 Penr. & W. 437; 24 Am. Dec. 331; Com. Bank v. French, 21 Pick. 486; 32 Am. Dec. 280; Cooper v. Wilcox, 4 Dev. & B. Eq. 90; 32 Am. Dec. 695; Blanford v. Barger, 9 Dana, 22; 33 Am. Dec. 519; Johnson v. Planters' Bank, 4 Smedes & M. 165; 43 Am. Dec. 480; Carter v. Jones, 5 Ired. Eq. 196; 49 Am. Dec. 425; Burke v. Cruger, 8 Tex. 66; 58 Am. Dec. 102; Minter v. Bank, 23 Ala. 762; 58 Am. Dec. 315; Wright v. Yell, 13 Ark. 503; 58 Am. Dec. 337; Cook v. Southwick, 9 Tex. 615; 60 Am. Dec. 181; Ashby v. Johnston, 23 Ark. 163; 79 Am. Dec. 102; Wasson v. Hodshire, 108 Ind. 26; Banks v. State, 62 Md. 88; Updike v. Lane, 78 Va. 132; McKechnie v. Ward, 58 N. Y. 541; 17 Am. Rep. 281.

[7] Brandt on Suretyship and Guaranty, 208; Taylor v. Beck, 13 Ill. 376; Inksler v. Bank, 30 Mich. 143; Dane v. Cordnan, 24 Cal. 157; 85 Am. Dec. 53; Baker v. Marshall, 16 Vt. 522; 43 Am. Dec. 528; Bull v. Allen, 19 Conn. 101; Dillon v. Russell, 5 Neb. 484; Smith v. Tunno, 1 McCord Ch. 443; 16 Am. Dec. 618; Caston v. Dunlap, Rich. Eq. 77; 23 Am. Dec. 194; Bank v. Dixon, 4 Vt. 587; 24 Am. Dec. 640; Bates v. Bank, 7 Ark. 394; 46 Am. Dec. 293; Pintard v. Davis, 21 N. J. L. 632; 47 Am. Dec. 172; Ingels v. Sutliff, 36 Kan. 444; Smith v. Freyler, 4 Mont. 489; 47 Am. Rep. 358. *Contra*, Cope v. Smith, 8 Serg. & R. 110; 11 Am. Dec. 582; Marberger v. Pott, 16 Pa. St. 9; 55 Am. Dec. 479.

[8] Newell v. Hamer, 4 How. (Miss.) 684; 35 Am. Dec. 415; Cates v. Thayer, 93 Ind. 16.

without consideration;[1] nor where a promissory note provides for an extension of time, if required;[2] nor where the surety assents to the extension;[3] nor by the creditor's declaring to him that the debt is paid, if such surety does not, in consequence, change his situation or otherwise suffer loss;[4] nor by an agreement to suspend execution, where no positively defined period was agreed upon for the suspension;[5] nor by the creditor's discontinuing proceedings against the principal, where there is no abandonment of any absolute lien or security;[6] nor because an incomplete tender made by his principal was rejected by the creditor;[7] nor by the omission by the holder of a promissory note to present it to the assignee (for benefit of creditors) of the principal;[8] nor by the fact that the lease which he had guaranteed has been assigned with consent of the lessor, if the right to assign was implied in the lease;[9] nor by taking the principal's note for a debt past due, payable one day after date, and a mortgage to secure the same;[10] nor by the holding up by a creditor of an execution which creates no lien on the property of the debtor, except in pursuance of a valid agreement with the debtor;[11] nor by a nugatory attempt to alter the contract between the obligee and the principal;[12] nor by the coverture of the principal;[13] nor by the discharge in bankruptcy of the principal;[14] nor by the act of the creditor in parting with security of the principal

[1] Brinagar *v.* Phillips, 1 B. Mon. 283; 36 Am. Dec. 575; Martin *v.* Pope, 6 Ala. 532; 41 Am. Dec. 66; Rucker *v.* Robinson, 38 Mo. 154; 90 Am. Dec. 413; Brown *v.* Kirk, 20 Mo. App. 524; Byers *v.* Harris, 67 Iowa, 685.

[2] Miller *v.* Spain, 41 Ohio St. 376.

[3] Wolf *v.* Fink, 1 Pa. St. 435; 44 Am. Dec. 141.

[4] Driskell *v.* Mateer, 31 Mo. 325; 80 Am. Dec. 105.

[5] McGee *v.* Metcalf, 12 Smedes & M. 535; 51 Am. Dec. 122.

[6] Springer *v.* Toothaker, 43 Me. 381; 69 Am. Dec. 66.

[7] Hiller *v.* Howell, 74 Ga. 174.

[8] Dye *v.* Dye, 21 Ohio St. 86; 8 Am. Rep. 40.

[9] Stein *v.* Jones, 18 Ill. App. 543.

[10] Mobile etc. R. R. Co. *v.* Brewer, 76 Ala. 135.

[11] Brown *v.* Chambers, 63 Tex. 131.

[12] Steele *v.* Mills, 68 Iowa, 406.

[13] Smyley *v.* Head, 2 Rich. 590; 45 Am. Dec. 750.

[14] Commercial Bank *v.* Simpson, 90 N. C. 467; Cilley *v.* Colby, 61 N. H. 63.

debtor, where he does so for the purpose of securing other property of greater value, which would be otherwise unavailable;[1] nor by the creditor's releasing an attachment levied on the principal's goods, and returning the goods to the principal, where the attachment suit was not commenced on request of the surety.[2] The dismissal of a suit and the release of an attachment sued out by the payees against the principal on a promissory note is not a discharge of the surety.[3] A surety on notes given for the purchase-money is not discharged by a subsequent conveyance of the land in pursuance of the contract, nor by failure, through fraud of the principal, to record a mortgage given at the time of the conveyance, whereby intermediate claims acquired precedence.[4] Where the holder of a note gives to the principal an extension of time, a surety is not discharged if the holder of the note did not know that there was a surety.[5]

[1] Young v. Cleveland, 33 Mo. 126; 82 Am. Dec. 155.

[2] Baker v. Marshall, 16 Vt. 522; 42 Am. Dec. 528.

[3] Bank of Montpelier v. Dixon, 4 Vt. 578; 24 Am. Dec. 640.

[4] Coombs v. Parker, 17 Ohio, 289; 49 Am. Dec. 459.

[5] Lamson v. Vevay Bank, 82 Ind. 21.

CHAPTER CXVIII.

PERFORMANCE OF CONTRACT.

§ 2486. Performance — Must be according to terms of contract.
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§ 2513. Contracts not entirely performed — When party may recover for part.
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§ 2515. Contract rescinded after part performance.

§ 2486. Performance — Must be According to Terms of Contract. — Neither party to a contract can recover against the other for a breach thereof, or put the other in default, without a tender of performance upon his part, or showing a willingness and ability to perform, and that actual performance was prevented or expressly waived by

the other.[1] So by the common-law rule, to discharge a promise by performance, the performance must be in strict accordance with the terms of the contract.[2] Where the contract is to convey to a third person, an undertaking is implied that the stranger will accept, and an offer to convey is not equivalent to an actual performance.[3] Whatever is necessary to be done in order to accomplish the work specifically set forth in a contract as agreed to be performed is parcel of the contract, though not specified.[4] If goods are ordered of a manufacturer, and are not made substantially according to the order, or if work is done on them not ordered, though increasing the value, the person ordering them may refuse to receive them.[5] So when goods are to be delivered within a certain time, and at a certain place, they must all be delivered within the time and at the place; a delivery of part within the time, and part afterwards, will not be sufficient.[6]

ILLUSTRATIONS. — A maker of machines agreed with a newspaper advertising agent that the latter should insert the former's advertisement in such papers as would take their pay in machines. The agent, instead of so doing, placed the advertisement in papers in which he owned space. *Held*, a non-compliance with the agreement, which precluded a recovery: *Allen* v. *Pierpont*, 22 Fed. Rep. 582. Plaintiff contracted to do advertising for defendant in 1,075 newspapers, the advertisement to be set up in a certain style, under the head of new advertisements. The advertisement was inserted in 1,022 papers; in 233 the directions as to style and type were not complied with; in 291

[1] Nelson *v.* Plimpton Fire-proof etc. Co., 55 N. Y. 480.

[2] Farrar *v.* Nightingale, 2 Esp. 639; Duffell *v.* Wilson, 1 Camp. 407; Hill *v.* School Dist., 17 Me. 316; Norris *v.* School Dist., 12 Me. 293; 28 Am. Dec. 182; Allen *v.* Cooper, 22 Mo. 136; Smith *v.* Davis, 1 Wis. 447; 60 Am. Dec. 391; Leonard *v.* Dyer, 26 Conn. 172; 68 Am. Dec. 382; Superintendent *v.* Bennett, 27 N. J. L. 513; 72 Am. Dec. 373; Dula *v.* Cowles, 7 Jones, 290; 75 Am. Dec. 463; Derrickson *v.* Edwards, 29 N. J. L. 468; 80 Am. Dec. 220; Leopold *v.* Salkey, 89 Ill. 412; 31 Am. Rep. 93.

[3] Davis *v.* Parish, Litt. Sel. Cas. 153; 12 Am. Dec. 287.

[4] Currier *v.* R. R. Co., 34 N. H. 498. But one is not bound to do acts not contracted for merely because he knew that the other party expected and understood he would perform them: Johnson *v.* Sellers, 33 Ala. 265.

[5] Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395; Lowdry *v.* Cooper, 21 Ind. 269.

[6] Davenport *v.* Wheeler, 7 Cow. 231; King Philip Mills *v.* Slater, 12 R. I. 82; 34 Am. Rep. 603; Filley *v.* Pope, 115 U. S. 213; Cunningham *v.* Hudson, 30 Hun, 63.

only partly so; in half the papers the insertion was not under the head of new advertisements. It appeared that the style and position were of importance. *Held*, that plaintiff had not complied with his contract, and that it was immaterial that the position given to the advertisement was better than that agreed upon: *Dauchey* v. *Drake*, 85 N. Y. 407; 9 Daly, 31. See *Sheffield* v. *Balmer*, 1 Mo. App. 176.

§ 2487. Substantial Performance, when Permitted.— In equity, on the other hand, it has always been held that, where the contract is substantially performed, the party may recover as for a complete performance, less such damages as the other party may have been put to by reason of the matters not performed.[1] The equity rule has been generally adopted in the United States, particularly in the code states.[2] Thus in New York, it is laid down that, in building contracts, "where the builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage, on account of such defects. . . . . There must be no willful or intentional departure, and the defects must not pervade the whole, or be so essential as that the object which the parties intended to accomplish—to have a specified amount of work performed in a particular manner—is not accomplished. This is a question of fact."[3] One who agrees to make a carriage just like a certain model carries out his contract by making a carriage substantially like the model.[4] A contract to perform work

[1] Halsey *v.* Grant, 13 Ves. 77; Davis *v.* Howe, 2 Schoales & L. 347; Green *v.* Low, 22 Beav. 625; Lord *v.* Stephens, 1 Younge & C. 222; Stewart *v.* Metcalf, 68 Ill. 109; Page *v.* Greeley, 75 Ill. 400; Foley *v.* Crow, 37 Md. 51.

[2] Goldsmith *v.* Hand, 26 Ohio St. 101; Cullen *v.* Blum, 37 Ohio St. 236; Nolan *v.* Whitney, 88 N. Y. 648; Wolfe *v.* Howes, 20 N. Y. 197; 75 Am. Dec. 388; Hayward *v.* Leonard, 7 Pick. 181; 29 Am. Dec. 269; Porter *v.* Woods, 3 Humph. 56; 39 Am. Dec. 153; Gleason *v.* Smith, 9 Cush. 484; 57 Am. Dec. 62; Hovey *v.* Pitcher, 13 Mo. 191; Chambers *v.* Jaynes, 4 Pa. St. 39; Rees *v.* Smith, 1 Ohio, 124; 13 Am. Dec. 599.

[3] Phillip *v.* Gallant, 62 N. Y. 264; Nolan *v.* Whitney, 88 N. Y. 648; Johnson *v.* De Peyster, 50 N. Y. 666; Glacius *v.* Black, 50 N. Y. 145; 10 Am. Rep. 449.

[4] Meincke *v.* Falk, 61 Wis. 623; 50 Am. Rep. 157.

"under his own personal and immediate superintendence, and not by subcontract," binds the contractor to give it his personal attention, but does not require his perpetual presence, nor preclude his employing assistants.[1] So it has been held that a person may recover for work done under a contract, though not strictly according to it, where the work was beneficial to the other party, and the parties cannot be placed *in statu quo*.[2]

ILLUSTRATIONS.—The defendant agreed to buy all the fruit raised by the plaintiff and delivered at its works, at a uniform price per pound. As it ripened, the plaintiff delivered, and the defendant accepted, quantities from time to time, but declined to pay for any until the whole was delivered. The plaintiff discontinued delivering, and sued for the price of that delivered. *Held*, that the action was maintainable: *Veerkamp* v. *Hulburd Canning etc. Co.*, 58 Cal. 229; 41 Am. Rep. 265.

§ 2488. Performance as to "Quantity" on Sale of Goods or Property. — In contracts for the sale of goods, the seller must deliver the exact quantity contracted for.[3] A contract to deliver 250 barrels is not fulfilled by delivering 260 barrels, and the vendee may refuse the whole, on account of the excess delivered.[4] A contract to build a mill fifty by one hundred and fifty feet is not complied with by building one that is seventy-eight by one hundred feet.[5] A contract to deliver "all my crop," "to be in good merchantable order," is satisfied by the delivery of such part as is well ripened, though it be but a few bushels.[6] A contract, "we have sold to W. all the ginseng we have on hand and shall collect this season or fall, amounting to from five to eight thousand pounds, as near

[1] Reed *v.* Conway, 26 Mo. 13.

[2] Gilman *v.* Hall, 11 Vt. 510; 34 Am. Dec. 700; Chance *v.* Comm'rs, 5 Blackf. 441; 35 Am. Dec. 131; Davis *v.* Fish, 1 G. Greene, 406; 48 Am. Dec. 387.

[3] Leake on Contracts, 823; Waddington *v.* Oliver, 2 Bos. & P. N. R. 61; Hoare *v.* Rennie, 5 Hurl. & N. 19; Dennitt *v.* Shortt, 7 Greenl. 150; 20 Am. Dec. 356; Roberts *v.* Beatty, 2 Penr. & W. 63; 21 Am. Dec. 410; Stevenson *v.* Bingin, 49 Pa. St. 36. But a substantial compliance is permitted in some states: Patterson *v.* Judd, 27 Mo. 563; Houston *v.* Meyer, 5 Blackf. 89.

[4] Downer *v.* Thompson, 2 Hill, 137.

[5] Swain *v.* Seamens, 9 Wall. 254.

[6] Hamilton *v.* Ganyard, 34 Barb. 204.

as we can estimate, including all we shall get," binds the seller to deliver no particular quantity, but only so much as was on hand and might be gathered in.[1] An agreement to deliver specific articles worth a certain sum is fulfilled by the payment of the money in place of the articles.[2] A contract to pay in notes of a specific bank must be paid in such notes or their numerical value. Their market value cannot be substituted.[3] Where a contract is made to pay in "hemp and tobacco," an equal quantity of each ought to be paid.[4]

§ 2489. **"About" — "More or Less," etc.** — The quantity of goods to be delivered may be expressed with the additions of "about," "more or less," etc., giving to the seller some reasonable limits of allowance in the performance of his contract, according to the circumstances of each case.[5] Four hundred and seventy-three thousand feet of lumber is enough to satisfy a call for five hundred thousand, "more or less."[6] So a contract for the delivery of five hundred bundles of gunny bags, more or less, is substantially complied with, although there is a deficiency of five per cent in the number delivered.[7] But "about" sixty-five acres is not satisfied by thirty or thirty-six acres.[8] And "more or less," in a contract for the sale of twenty-three thousand feet of lumber, does not allow a variation of seven thousand feet.[9]

[1] Herren *v.* Gaines, 63 N. C. 72.

[2] Sims *v.* Cox, 40 Ga. 76; 2 Am. Rep. 560.

[3] Edwards *v.* Morris, 1 Ohio, 524.

[4] Bond *v.* Jackson, Cooke, 500.

[5] Cross *v.* Eglin, 2 Barn. & Adol. 106; Brume *v.* Seymour, 16 Com. B. 337; Cockerell *v.* Ancompte, 2 Com. B., N. S., 440; Day *v.* Cross, 59 Tex. 595; Swepson *v.* Summery, 64 N. C. 293. In an English case the expression "say not less than" a certain quantity, in a contract of sale, was construed to import an absolute undertaking to deliver at least that quantity: Leming *v.* Smith, 16 Q. B. 275. A contract to pay "a claim of S. D., of about one hundred and fifty dollars," is a contract to pay the whole amount of the debt of S. D., although it amounts to fifty dollars more than the sum mentioned: Turner *v.* Whidden, 22 Me. 121.

[6] Holland *v.* Rea, 48 Mich. 218.

[7] Cabot *v.* Winsor, 1 Allen, 546.

[8] Baltimore etc. Soc. *v.* Smith, 54 Md. 187; 39 Am. Rep. 374.

[9] Creighton *v.* Comstock, 27 Ohio St. 548.

§ 2490. Performance as to Quality of Goods. — A contract of sale of a specific chattel is performed by the delivery of the chattel sold, whatever may be the defects in it. The seller is not responsible for defects in the chattel, unless he has fraudulently concealed them, or has warranted against them.[1]

§ 2491. Delivery of Goods. — The seller is bound to deliver the goods in the mode specified in the contract.[2] Goods may be, according to the buyer's directions, delivered to a common carrier for him. In such cases the seller, in general, acts merely as agent for the buyer, as being the owner of the goods, in the engagement of the carrier; and the subsequent risk and the remedy against the carrier for loss or damage of the goods rests with the buyer only.[3] But the seller may expressly contract with the carrier to retain the possession and carry the goods on his account, as upon delivering them to the master of a ship under a bill of lading expressing that they are shipped on his account, and to be delivered to his order, and then there is no delivery to the buyer.[4] And where one orders goods, saying nothing as to the manner of delivery, and no usage is shown to make delivery in this way, giving them to a carrier to transfer to the buyer is no delivery.[5] So where a seller contracts to ship goods by one route, and he ships them by another route, they are at his own risk of loss.[6] On a sale by sample, delivery of goods to a carrier will not constitute delivery to the consignee so as to pass title and make the consignee liable for them if they do not correspond in quality and quantity with the

[1] *Ante*, Warranties and Representations, Chapter CXII.

[2] Benjamin on Sales, 497.

[3] Dawes *v.* Peck, 8 Term Rep. 330; Jones *v.* Sims, 6 Port. 138; Bogy *v.* Rhodes, 4 G. Greene, 133; Foster *v.* Rockwell, 104 Mass. 167; Davis *v.* Jones, 3 Houst. 68; Ward *v.* Taylor, 56 Ill. 494; Hyde *v.* Lathrup, 2 Abb. App. 436; Magruder *v.* Gage, 33 Md. 344; 3 Am. Rep. 177; Krudler *v.* Ellison, 47 N. Y. 36; 7 Am. Rep. 402; Strong *v.* Dodds, 47 Vt. 348; Gardner *v.* Howland, 2 Pick. 599; Pembroke Iron Co. *v.* Parsons, 5 Gray, 589.

[4] Wait *v.* Barker, 2 Ex. 1.

[5] Loyd *v.* Wight, 20 Ga. 574; 65 Am. Dec. 636.

[6] Fleming *v.* Mills, 5 Mich. 420.

order.[1] There is no "acceptance," although the goods may have been delivered to a carrier, so long as the buyer has the right to object to the quantity or quality.[2]

To place articles sold at the buyer's risk, delivery and acceptance must be such that nothing remains to be done by either party in respect to them; and where the sale is of a quantity of things by count, measure, or weight, their number, quantity, or weight must be determined before the sale is perfect, in the absence of an express intention to the contrary.[3] On sale of a part of a quantity of goods of the same kind, no title passes without separation or particular designation.[4] Thus there is no delivery so long as wheat sold remains to be measured out and separated from the bulk;[5] or on a sale of a portion of bricks in a kiln, by the thousand, until those sold are separated in some mode from the general mass.[6] An agreement to deliver a certain quantity of oats of a specified quality on the cars when demanded, accompanied by present payment, but the identity of the oats not being ascertained, does not vest title to the oats in the purchaser.[7] On the other hand, if the delivery is complete, the article is at the buyer's risk, even though it continues to remain, by mutual consent, in the possession of the seller.[8] A de-

[1] Barton *v.* Kane, 17 Wis. 38; 84 Am. Dec. 728.

[2] Lloyd *v.* Wright, 25 Ga. 215.

[3] Prescott *v.* Locke, 51 N. H. 94; 12 Am. Rep. 55; Haldman *v.* Duncan, 51 Pa. St. 66; Waldo *v.* Belcher, 11 Ired. 609; Dixon *v.* Myers, 7 Gratt. 240; Hunter *v.* Hutchinson, 7 Pa. St. 140; Cobb *v.* Haskell, 14 Me. 303; 31 Am. Dec. 56; Ockington *v.* Richey, 41 N. H. 275; McClung *v.* Keely, 21 Iowa, 505; Courtright *v.* Leonard, 11 Iowa, 32; May *v.* Hoaglee, 9 Bush, 171; Hahn *v.* Fredericks, 30 Mich. 223; 18 Am. Rep. 119; Hudson *v.* Weir, 29 Ala. 294; Beller *v.* Block, 19 Ark. 566; Moffatt *v.* Green, 9 Ind. 198; Houdlette *v.* Tallman, 14 Me. 400; Devane *v.* Finnell, 2 Ired. 36; Stone *v.* Peacock, 35 Me. 385; Riddle *v.* Varnum, 20 Pick. 280; Martin *v.* Hurlburt, 9 Minn. 142; Cunningham *v.* Ashbrook, 20 Mo. 553; Davis *v.* Hill, 3 N. H. 382; Fuller *v.* Bean, 34 N. H. 290; Gilman *v.* Hill, 36 N. H. 311; Rapalye *v.* Mackie, 6 Cow. 250; Andrew *v.* Dieterick, 14 Wend. 31; Lester *v.* McDowell, 18 Pa. St. 91.

[4] Commercial National Bank *v.* Gillette, 90 Ind. 268; 46 Am. Rep. 222.

[5] Cook *v.* Logan, 7 Iowa, 142.

[6] Dunlap *v.* Berry, 5 Ill. 327; 39 Am. Dec. 413; Gardiner *v.* Suydam, 7 N. Y. 357; Cleveland *v.* Williams, 29 Tex. 204; 94 Am. Dec. 274.

[7] Hubler *v.* Gaston, 9 Or. 66; 42 Am. Rep. 794.

[8] Smith *v.* Nevitt, 1 Miss. 370; 12 Am. Dec. 715; Magee *v.* Billingsley, 3 Ala. 679; Barrett *v.* Stoddard, 3 Ma.

livery of chattels sold may be proved by acts of ownership on the part of the purchaser, although remaining on storage in care of the vendor.[1] The title passes by delivery, although there remains something to be done to ascertain the value at the agreed rates, unless by the terms of the contract of sale this was to be done before delivery.[2]

Where the thing sold cannot be actually delivered, a symbolical delivery is sufficient.[3] A sale of goods without an actual delivery to or possession by the vendee of the goods sold will vest the property in the vendee, if the property be of such a nature and in such a situation that a personal possession of it is impracticable or inconvenient.[4] So an actual removal of an entire mass of a cumbrous article, such as a heap of grain, is not necessary to constitute a delivery.[5] So of a pile of logs and boards;[6] or cattle running at large;[7] or a building.[8] A contract that all the colts to be foaled by certain mares sold by A to B, and kept in A's stables under B's care, were to belong to B, is a valid contract of sale, and not void as against creditors for want of delivery.[9] Delivery of the key of a building in which personal property is stored, by the vendor to the vendee, with intent to surrender possession of the property, is a sufficient delivery.[10] The prop-

son, 107; Glasgow *v.* Nicholson, 25 Mo. 29; Russell *v.* Carrington, 42 N. Y. 118; 1 Am. Rep. 498; Bertelson *v.* Power, 81 Ind. 512; Stamper *v.* Bush, 8 Miss. 255; Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334; Barney *v.* Brown, 2 Vt. 374; 19 Am. Dec. 720.

[1] Ingalls *v.* Herrick, 108 Mass. 351; 11 Am. Rep. 360.

[2] Burrows *v.* Whitaker, 71 N. Y. 291; 27 Am. Rep. 42.

[3] Cocke *v.* Chapman, 7 Ark. 197; Atwell *v.* Miller, 6 Md. 10; 61 Am. Dec. 294; Jordan *v.* James, 5 Ohio, 88; Pleasants *v.* Pendleton, 6 Rand. 473; 18 Am. Dec. 726.

[4] Jewett *v.* Warren, 12 Mass. 300; 7 Am. Dec. 74; Rice *v.* Austin, 17 Mass. 197; Badlam *v.* Tucker, 1 Pick. 389.

[5] May *v.* Tallman, 20 Ill. 443; Hart *v.* Wing, 44 Ill. 141.

[6] Boynton *v.* Veazie, 24 Me. 286; Brewster *v.* Leith, 1 Minn. 56.

[7] Cockrel *v.* Warner, 14 Ark. 345; Walden *v.* Murdock, 23 Cal. 540; 83 Am. Dec. 135.

[8] Vining *v.* Gilbreth, 39 Me. 496.

[9] Hull *v.* Hull, 48 Conn. 250; 40 Am. Rep. 165.

[10] Packard *v.* Dunsmore, 11 Cush. 282; Wilkes *v.* Ferris, 5 Johns. 335; 4 Am. Dec. 364; Gray *v.* Davis, 10 N. Y. 285; Benford *v.* Schell, 55 Pa. St. 393.

erty in goods described in a bill of lading is by the owner's indorsement of the bill vested in the indorsee.[1] So the property passes by an order on the depositary of goods sold, given by the vendor to the vendee.[2] Leaving personal property in the hands of a third party, by consent, to be delivered upon the payment of the price, vests the property in the vendee.[3] The delivery of a bill of sale to the vendee of itself transfers the title from the vendor to the vendee.[4]

Where a contract is made for the sale and delivery of specified articles of personal property, under circumstances where the title does not vest in the vendee, and the property is destroyed by an accident before delivery, without the fault of the vendor, the latter is not liable upon the contract for damages sustained by the vendee.[5]

Under a sale by description of kind and quality, or by sample, the seller must deliver the goods in a manner to give the buyer an opportunity of inspecting whether they answer to the contract or to the sample; a tender of the goods without allowing a comparison of the bulk with the sample, or, in covered cases, without allowing them to be opened, is not sufficient.[6] The buyer is entitled to a reasonable time and opportunity for ascertaining whether the goods delivered answer to the contract; and he may refuse to accept them upon discovering that they do not. In such case he may return the goods, but is not bound

[1] Law *v.* Hatcher, 4 Blackf. 364; Wardwell *v.* Patrick, 1 Bosw. 406; Jordan *v.* James, 5 Ohio, 88; Ezell *v.* English, 6 Port. 311.

[2] Sigerson *v.* Harker, 15 Mo. 101; McCormick *v.* Hadden, 37 Ill. 370; Horr *v.* Barker, 8 Cal. 603; 11 Cal. 393; 70 Am. Dec. 791; Cushing *v.* Breed, 14 Allen, 376; 92 Am. Dec. 777; Anthony *v.* Wheatons, 7 R. I. 490.

[3] Wright *v.* Maxwell, 9 Ind. 192; Stapp *v.* Anderson, 1 A. K. Marsh. 539; Bickham *v.* Irwin, 3 Yeates, 66; Wing *v.* Clark, 24 Me. 366.

[4] Trieber *v.* Anderson, 31 Ark. 163; Morgan *v.* Smith, 29 Ala. 283; Thomason *v.* Dill, 30 Ala. 444; Clary *v.* Frayer, 8 Gill & J. 398; Prime *v.* Yates, 2 Tread. Const. 770; Younge *v.* Moore, 1 Strob. 48; Jaggers *v.* Estes, 2 Strob. Eq. 343; 49 Am. Dec. 674.

[5] Dexter *v.* Norton, 47 N. Y. 62; 7 Am. Rep. 415.

[6] Lorymer *v.* Smith, 1 Barn. & C. 1; Isherwood *v.* Whitmore, 11 Mees. & W. 347.

to do so; it is sufficient to give clear notice that the goods are not accepted, and remain at the risk of the seller.[1]

ILLUSTRATIONS.—DELIVERY HELD SUFFICIENT.—A, the owner of certain goods, deposited them with a warehouseman in the name of B, who was A's broker, and afterwards sold them to B, gave him a receipted bill of parcels, and took his note for the price: *In re Batchelder*, 2 Low. 245. Y. contracted with J. to sell to the latter a quantity of cotton lying at the gin of S., at an agreed price per pound, the cotton to be weighed after it was ginned. J. paid to Y. a sum in part payment, and the parties agreed upon terms for the balance, and Y. directed S. to deliver the cotton to J. Afterwards, before the cotton was weighed, it was attached in a suit against Y.: *Jordan* v. *Harris*, 31 Miss. 257. S. bought of K. twenty-six head of cattle, which were at the time in a stock-yard, and paid him twenty dollars on the bargain, S. agreeing to call the following morning and take away the cattle, and pay the balance of the purchase-money. During the night the cattle broke out of the yard, and thirteen were lost. S. received and paid for those which did not make their escape, but refused to pay for those which were not found: *Sigerson* v. *Kahmann*, 39 Mo. 206. It was orally agreed between a farmer and his laborer that the latter should accept certain hogs in payment for his services. They were pointed out, but were to remain in the pasture with other hogs until an opportunity should be found for selling them: *Webster* v. *Anderson*, 42 Mich. 554; 36 Am. Rep. 452. Failing debtors delivered to a heavy creditor a bill of sale of twelve thousand bushels of charcoal, in pits on the vendor's land. The vendees, a few days afterwards sent a person who marked the pits with their name. This person remained in charge of the pits a few days, and after him a neighbor was requested to look after the pits, and visited them every day: *Tognini* v. *Kyle*, 17 Nev. 209; 45 Am. Rep. 442. A quantity of pig-iron on the bank of a canal in Frederic County, under the care of one agent of the owner, was sold by another of his agents in Baltimore, who gave his receipt to the purchaser for the purchase-money. The purchaser wrote to the agent in Frederic to ship the iron to his agent at another place: *Van Brunt* v. *Pike*, 4 Gill, 270; 45 Am. Dec. 126. The plaintiffs purchased a number of cattle from A, and received an order from him to his agent for their delivery. The agent pointed out the cattle to the plaintiffs as they were grazing in

[1] Heilbutt *v.* Hickson, L. R. 7 Com. P. 438; Lucy *v.* Mouflet, 5 Hurl. & N. 233; Grimoldby *v.* Wells, L. R. 10 Com. P. 391; Warren *v.* Buckminster, 24 N. H. 336; Ganson *v.* Madigan, 15 Wis. 144; 82 Am. Dec. 659; Pittsburgh etc. R. R. Co. *v.* Keck, 50 Ind. 303; 19 Am. Rep. 713.

view, and told them he delivered them possession, and then accepted an offer of employment from plaintiffs to take charge of the cattle on their account, and did remain in charge of them until they were seized by the defendant: *Montgomery* v. *Hunt*, 5 Cal. 366.

ILLUSTRATIONS (CONTINUED).—DELIVERY HELD NOT SUFFICIENT.—H. purchased of O. four barge-loads of oil at a certain rate per barrel. The barges were furnished by H., and when partially filled, the barges and oil were destroyed by fire: *Rochester etc. Oil Co.* v. *Hughey*, 56 Pa. St. 322. S. agreed in writing to buy of L. five bales of cotton weighing four hundred and eighty pounds each, at eleven cents a pound. At the time the cotton was in bulk on L.'s premises, and he was to haul it to M.'s gin, and after it was ginned and packed, to haul the bales to Canton. He hauled a portion to the gin, and it was ginned and packed, but before it was hauled to Canton it was attached by a creditor of L.: *Smith* v. *Sparkman*, 55 Miss. 649; 30 Am. Rep. 537. A contracted for the sale of a certain amount of oats of a particular quality by B, and paid for them, B agreeing to deliver oats of that quality and amount on cars when called for by A, and no particular oats were identified: *Hubler* v. *Gaston*, 9 Or. 66; 42 Am. Rep. 794. Defendant, in the employment of M. on his farm, agreed to buy of M. a horse then on the farm, and apply his wages to the payment. Two years afterwards M. sold and delivered the horse to him, taking his receipt in full of wages earned in payment. The defendant continued in M.'s employment on the farm, the horse remained in M.'s stable, the defendant taking care of it, breaking it, and shoeing it, paying M. for the feed: *Hull* v. *Sigsworth*, 48 Conn. 258; 40 Am. Rep. 167.

§ 2492. Stoppage in Transitu — Who may Exercise Right. — Stoppage *in transitu* is the right which a vendor of goods upon credit has to retake them upon the discovery of the insolvency of the vendee at any time before they have been delivered to him, or before any third person has acquired a *bona fide* right to them.[1] Though the seller has delivered the goods to a carrier on behalf of the buyer, he retains the right to stop them *in transitu*, and to recover the possession at any time before they have been delivered, in the event of the buyer becoming bankrupt or insolvent.[2]

[1] Jones *v.* Earl, 37 Cal. 630; 99 Am. Dec. 338.

[2] Leake on Contracts, 1274; Calahan *v.* Babcock, 21 Ohio St. 281; 8 Am.

This right of stoppage *in transitu* does not proceed upon the ground of rescinding the contract, but as a case of equitable lien. It assumes the existence and continuance of the contract.[1] It is a right favored by the law.[2] The right may be exercised by the vendor or his general agent,[3] or by a factor,[4] or by one who has paid the price for the purchaser, and taken an assignment of the bill of lading as security for the advances.[5] So an insolvent vendee may refuse to take possession, and thus leave unimpaired the right of stoppage *in transitu*.[6] But mere lien-holders have no right of stoppage in transit,[7] nor a mere surety for the price of the goods,[8] nor a vendor who takes notes or bills in absolute payment;[9] nor does the right apply to a consignment to a creditor to whom the consignor is indebted to the full value of the goods.[10]

§ 2493. Grounds for — "Insolvency" Defined. — It is well settled that the only ground upon which the right to stop *in transitu* can be exercised is where the purchaser becomes insolvent.[11] The term "insolvency," used in this connection, does not mean a technical legal insolvency, but generally, mere inability or failure to pay.[12] This

Rep. 63; Cabeen *v.* Campbell, 30 Pa. St. 254; Inslee *v.* Lane, 57 N. H. 454; Chapman *v.* Lathrop, 9 Cow. 110; 16 Am. Dec. 433; Newhall *v.* Vargas, 15 Me. 314; 33 Am. Dec. 617; Sawyer *v.* Joslin, 20 Vt. 172; 49 Am. Dec. 768; Blum *v.* Marks, 21 La. Ann. 268; 99 Am. Dec. 725; Pattison *v.* Culton, 33 Ind. 240; 5 Am. Rep. 199.

[1] Patten's Appeal, 45 Pa. St. 151; 84 Am. Dec. 479.

[2] Tufts *v.* Sylvester, 79 Me. 213; 1 Am. St. Rep. 303.

[3] Reynolds *v.* R. R. Co., 43 N. H. 580; Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188.

[4] Frise *v.* Wray, 3 East, 93; Seymour *v.* Newton, 105 Mass. 272; Newhall *v.* Vargas, 13 Me. 93; 29 Am. Dec. 489.

[5] Gossler *v.* Schepeler, 5 Daly, 476.

[6] Tufts *v.* Sylvester, 79 Me. 213; 1 Am. St. Rep. 303.

[7] Kinloch *v.* Craig, 3 Term Rep. 119; Sweet *v.* Pym, 1 East, 4.

[8] Siffken *v.* Wray, 6 East, 371.

[9] Eaton *v.* Cook, 32 Vt. 58; Sweet *v.* Pym, 1 East, 4.

[10] Clark *v.* Mauran, 3 Paige, 373; Wood *v.* Roach, 1 Yeates, 177.

[11] Benjamin on Sales, 828; The Constantia, 6 Rob. 621; Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262. If, in fact, there was no insolvency, the right of stoppage *in transitu* does not exist: Walsh *v.* Blakely, 6 Mont. 194; See, *contra*, Wood *v.* Roach, 2 Dall. 180, 1 Am. Dec. 276, holding that failure of consideration is a ground, and Fitzsimmons *v.* Joslin, 21 Vt. 129; holding that false representations on the part of the buyer are a ground.

[12] Deragy etc. Co. *v.* O'Brien, 123 Mass. 12; Benedict *v.* Schaettle, 12 Ohio St. 115; Hays *v.* Monille, 14 Pa. St. 48; Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188. See Rogers *v.* Thomas, 20 Conn. 53.

may be evidenced by stopping payment or refusing payment.[1] If the insolvency existed at the time of the sale, unknown to the seller, he may exercise the right when he discovers it.[2] The right is waived if the vendor, at the time of the sale, knew of the insolvency of the vendee.[3]

§ 2494. Right Continues only during Transit. — The right to stop commences when the goods are placed in the hands of a middle-man to carry to the purchaser, and ends when they are delivered by him to the purchaser.[4] The right continues, where goods are transmitted by water, after the arrival of the vessel, until the consignee takes possession of them.[5] The employment of a carrier by a seller of goods on credit constitutes all middle-men into whose custody they pass agents of the seller for their transportation and delivery, and the goods are deemed in transit until the complete performance of the carrier's whole duty.[6] Depositing goods at an intermediate point with the vendee's agent to be forwarded does not determine the right of stoppage.[7] The seller may retake the goods from a warehouse of the carrier, they being there under the purchaser's order.[8] But the right ceases where goods are delivered on board a vessel chartered by the

[1] Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188; Inslee *v.* Lane, 57 N. H. 454; O'Brien *v.* Norris, 16 Md. 122; 77 Am. Dec. 284; Masters *v.* Bareda, 18 How. 489; Bell *v.* Moss, 5 Whart. 189.

[2] O'Brien *v.* Norris, 16 Md. 122; 77 Am. Dec. 284; Reynolds *v.* R. R. Co., 43 N. H. 580; Blum *v.* Marks, 21 La. Ann. 268; 99 Am. Dec. 725; Buckley *v.* Furniss, 15 Wend. 137; Benedict *v.* Schaettle, 12 Ohio St. 115; Loeb *v.* Peters, 63 Ala. 243; 35 Am. Rep. 17. *Contra*, Rogers *v.* Thomas, 20 Conn. 53.

[3] Buckley *v.* Furniss, 15 Wend. 137; O'Brien *v.* Norris, 16 Md. 122; 77 Am. Dec. 284; Conyers *v.* Ennis, 2 Mason, 236.

[4] Calahan *v.* Babcock, 21 Ohio St. 281; 8 Am. Rep. 63; Guilford *v.* Smith, 30 Vt. 49; Reynolds *v.* R. R. Co., 43 N. H. 591; Haris *v.* Pratt, 17 N. Y. 249; Newhall *v.* Vargas, 13 Me. 93; 29 Am. Dec. 489; Parker *v.* McIver, 1 Desaus. 274; 1 Am. Dec. 656; Hollingsworth *v.* Napier, 3 Caines, 182; 2 Am. Dec. 268; Stubbs *v.* Lund, 7 Mass. 453; 5 Am. Dec. 63; Ilsley *v.* Stubbs, 9 Mass. 65; 6 Am. Dec. 29; Howatt *v.* Davis, 5 Munf. 34; 7 Am. Dec. 681; Rowley *v.* Bigelow, 12 Pick. 307; 23 Am. Dec. 607; The Natchez, 31 Fed. Rep. 615; Mason *v.* Wilson, 43 Ark. 172; Mohr *v.* R. R. Co., 106 Mass. 67; Kitchen *v.* Spear, 30 Vt. 545; Sangslaff *v.* Stix, 64 Miss. 171; 60 Am. Rep. 49.

[5] Naylor *v.* Dennie, 8 Pick. 198; 19 Am. Dec. 319.

[6] Calahan *v.* Babcock, 21 Ohio St. 281; 8 Am. Rep. 63.

[7] Markwald *v.* Creditors, 7 Cal. 213.

[8] Powell *v.* McKechnie, 4 Dak. 319.

buyer;[1] or after goods have been sold by the vendee to a third person in good faith, and by the carrier delivered to the vendee, who has delivered them to his vendee;[2] or if goods are sent to a forwarding merchant to await in his hands the instructions of the purchaser respecting any further transit.[3]

§ 2495. What will and will not Defeat the Right.— The vendee's assignment of the bill of lading to a purchaser for value before the goods have been stopped defeats the vendor's right to stoppage in transit;[4] so does the entry of goods in a bonded warehouse.[5] So if the vendee intercepts the goods on their passage to him, and takes possession as owner, the delivery is complete, and the right of stoppage gone.[6]

A levy of execution upon the goods will not defeat the right;[7] nor their attachment by another creditor;[8] nor an assignment for the benefit of creditors;[9] nor the com-

[1] Thompson *v.* Stewart, 7 Phil. 187.

[2] U. S. Engine etc. Co. *v.* Oliver, 16 Neb. 612.

[3] Biggs *v.* Barry, 2 Curt. 259; Hays *v.* Monille, 14 Pa. St. 48; Guilford *v.* Smith, 30 Vt. 49.

[4] Ryberg *v.* Snell, 2 Wash. C. C. 413; Stubbs *v.* Lund, 7 Mass. 453; 5 Am. Dec. 63; Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188; Walter *v.* Ross, 2 Wash. 283; Rawls *v.* Deshler, 4 Abb. App. 12; Audenried *v.* Randall, 3 Cliff. 99; Loeb *v.* Peters, 63 Ala. 243; 35 Am. Rep. 17; Oakford *v.* Drake, 2 Fost. & F. 493; Dixon *v.* Yates, 5 Barn. & Adol. 345; Lee *v.* Kimball, 45 Me. 172; Hollingsworth *v.* Napier, 3 Cal. 182; 2 Am. Dec. 268; Dows *v.* Greene, 32 Barb. 490; Curry *v.* Roulstone, 2 Over. 110; Boyd *v.* Mosely, 2 Swan, 661. But not a transfer by the vendors and shippers of goods of the bill of lading for them as a mere collateral to pre-existing obligations, nothing being advanced, given up, or lost on the part of the transferee: Lesassier *v.* The Southwestern, 2 Woods, 35.

[5] Cartwright *v.* Wilmerding, 24 N. Y. 521; Fraschieris *v.* Henriques, 6 Abb. Pr., N. S., 251.

[6] Secomb *v.* Nutt, 14 B. Mon. 324.

[7] Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188; Buckley *v.* Furniss, 15 Wend. 137; Converse *v.* Litchford, 14 La. Ann. 89.

[8] Clark *v.* Lynch, 4 Daly, 83; Buckley *v.* Furniss, 15 Wend. 137; Benedict *v.* Schaettle, 12 Ohio St. 515; Wood *v.* Yeatman, 15 B. Mon. 270; Woodruff *v.* Noyes, 15 Conn. 335; O'Brien *v.* Norris, 16 Md. 122; 77 Am. Dec. 284; Hays *v.* Mouille, 14 Pa. St. 48; Blackman *v.* Pierce, 23 Cal. 508; Aguine *v.* Parmalee, 22 Conn. 473; Blum *v.* Marks, 21 La. Ann. 268; 99 Am. Dec. 725; Hepp *v.* Glover, 15 La. 461; 35 Am. Dec. 206; Calahan *v.* Babcock, 21 Ohio St. 281; 8 Am. Rep. 63; Rucker *v.* Donovan, 13 Kan. 251; 19 Am. Rep. 84; Norris *v.* Shryock, 50 Miss. 590; Seymour *v.* Newton, 105 Mass. 272; Smith *v.* Goss, 1 Camp. 282; Hause *v.* Judson, 4 Dana, 7; 29 Am. Dec. 377; Naylor *v.* Dennie, 8 Pick. 198; 19 Am. Dec. 319; Sawyer *v.* Joslin, 20 Vt. 172; 49 Am. Dec. 769; Steiman *v.* Ragee, 55 Wis. 346.

[9] Chandler *v.* Fulton, 10 Tex. 2; 60 Am. Dec. 188; Bell *v.* Moss, 5 Whart. 189.

mencement of an action against a purchaser by the attorney of the seller for the price of goods sold on credit, without the knowledge of the seller, and before either was apprised that the transit was not terminated;[1] nor the bringing of suit by the seller, and levy of attachment to secure the price, the ground of attachment being that the sale was induced by the buyer's fraud.[2] A messenger appointed for an insolvent vendee cannot receive goods so as to terminate the right of stoppage *in transitu*. He acts in a passive capacity merely as custodian, until an assignee is appointed, and has no more authority *ex officio* than a carrier or middle-man. While the goods are in his hands the right of stoppage may be exercised.[3]

Partial payment for the goods will not divest the right to stop.[4] Neither will a conditional payment by bills of exchange or other securities.[5] If by order of the purchaser a part of the goods are sold on the way, the remainder may be stopped.[6] The death of a vendee, insolvent, after the goods are transmitted to him, but before the receipt of them, does not revest the goods in the vendor, unless he intercepts them before they come to the possession of the vendee's representatives.[7]

§ 2496. Time of Performance of Contract. — Performance must be within the time fixed by the contract; performance made after that time, and accepted by the other party, is not performance in the eye of the law, but is satis-

[1] Calahan *v.* Babcock, 21 Ohio, 281; 8 Am. Rep. 63.

[2] Allyn *v.* Willis, 65 Tex. 65.

[3] Tufts *v.* Sylvester, 79 Me. 213; 1 Am. St. Rep. 304.

[4] Hodgson *v.* Levy, 7 Term Rep. 440; Feise *v.* Wray, 3 East, 93; Edwards *v.* Brewer, 2 Mees. & W. 375; Newhall *v.* Vargas, 13 Me. 93; 29 Am. Dec. 489; Van Casteel *v.* Booker, 2 Ex. 702.

[5] Feise *v.* Wray, 3 East, 93; Dixon *v.* Yates, 5 Barn. & Adol. 345; Edwards *v.* Brewer, 2 Mees. & W. 375; Patten *v.* Thompson, 5 Maule & S. 350; Miles *v.* Gorton, 2 Car. & M. 504; Bell *v.* Moss, 5 Whart. 189; Donoth *v.* Broomhead, 7 Pa. St. 301; Lewis *v.* Mason, 36 U. C. Q. B. 590; Arnold *v.* Delano, 4 Cush. 33; 50 Am. Dec. 754; Stubbs *v.* Lund, 7 Mass. 453; 5 Am. Dec. 63; Hays *v.* Mouille, 14 Pa. St. 48.

[6] Secomb *v.* Nutt, 14 B. Mon. 261.

[7] Mactier *v.* Frith, 6 Wend. 103; 21 Am. Dec. 262.

faction for the breach which has taken place.[1] But unless the contract so stipulates, time is not deemed to be of its essence.[2] But generally, in a contract for certain work, the specified time is as much the essence of the contract as is the manner of the performance.[3] But a slight delay in finishing work, contracted to be done by a certain day, does not, ordinarily, destroy altogether the right to compensation.[4]

Where the performance is to be on a certain day, the party has the whole of that day to do it in.[5] So where it is to be within a specified time, the party bound has until the last moment of the last day.[6] Under a contract to deliver a thousand tons of bark per year for five years, a party has the whole of each year in which to deliver the thousand tons.[7]

Where a place is fixed for the performance on a certain day, requiring the attendance of both parties there to complete it, in order to avoid an unnecessary attendance of either party, the law appoints the last convenient time of the day for both to attend for the purpose, and the promisor may protect himself from default by being then present at the place, prepared to pay or perform his contract, even if the promisee is not there; but it is also sufficient for him to tender the payment or performance

[1] Leake on Contracts, 834; Dermott *v.* Jones, 23 How. 220.

[2] Kirchoff *v.* Voss, 67 Tex. 320; Watson *v.* Walker, 67 Tex. 651.

[3] Nesbitt *v.* Pearson, 33 Ala. 668; Warren *v.* Bean, 6 Wis. 120; Rouse *v.* Lewis, 4 Abb. App. 121.

[4] Homan *v.* Steele, 18 Neb. 652.

[5] Leake on Contracts, 834.

[6] Curtis *v.* Blair, 26 Miss. 309; 59 Am. Dec. 257. In Startup *v.* Macdonald, 6 Man. & G. 593, the court say: "The general rule is, that wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have to the last minute of the last day to perform their obligation. The only qualification is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act at such a period before the end of the last day as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed."

[7] Curtiss *v.* Howell, 39 N. Y. 211.

at the place, if the promisee should happen to be there, at any time upon the day appointed.[1] If a place is fixed, but the performance may be at any time, it is for the promisor to give notice to the promisee of the time when he intends to pay or perform his contract.[2] Where a contract is made for the payment of specific articles, such as the payee should select, at a place designated, but no time is fixed for the payment, such articles are payable on demand.[3] In contracts for the delivery of goods or performance of labor, where no time or place is designated for the delivery or performance, a demand by the promisee upon the promisor is necessary to fix default upon the latter; but if both time and place be designated, no such demand is necessary.[4]

Where there is no time fixed by the contract, the law implies that the performance is to take place within a reasonable time.[5] Thus where no time is fixed for the delivery

[1] Leake on Contracts, 835; Case *v.* Green, 5 Watts, 262; 30 Am. Dec. 311.

[2] Leake on Contracts, 835.

[3] Russell *v.* Ormsbee, 10 Vt. 274.

[4] Morey *v.* Enke, 5 Minn. 392; Smith *v.* Tiffany, 36 Barb. 23.

[5] Warren *v.* Wheeler, 8 Met. 97; Wiswall *v.* McGowan, 1 Hoff. Ch. 125; 125; Roberts *v.* Beatty, 2 Pa. St. 63; 21 Am. Dec. 410; Butler *v.* O'Hear, 1 Desaus. 382; 1 Am. Dec. 671; Atwood *v.* Cobb, 16 Pick. 297; 26 Am. Dec. 657; Philips *v.* Morrison, 3 Bibb, 105; 6 Am. Dec. 638; Ellis *v.* Thompson, 3 Mees. & W. 445; Clark *v.* Remington, 11 Met. 361; Startup *v.* Macdonald, 6 Man. & G. 593; Hales *v.* R. R. Co., 4 Best & S. 66; Graves *v.* Ashlin, 3 Camp. 426; Adams *v.* Adams, 26 Ala. 272; Luckhart *v.* Ogden, 30 Cal. 547; Wright *v.* Maxwell, 9 Ind. 192; Waterman *v.* Dutton, 6 Wis. 265; Cocker *v.* Franklin, 3 Sum. 530; Watts *v.* Sheppard, 2 Ala. 425; Sawyer *v.* Hammatt, 15 Me. 40; Little *v.* Hobbs, 34 Me. 357; Howe *v.* Huntington, 15 Me. 350; Atkinson *v.* Brown, 20 Me. 67; Lindsey *v.* Police Jury, 16 La. Ann. 389; Atwood *v.* Clark, 2 Me. 249; Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372; Minn. Gas Light Co. *v.* Mfg. Co., 122 U. S. 200; Palmer *v.* Breen, 34 Minn. 39. In Philips *v.* Morrison, 3 Bibb, 105, 6 Am. Dec. 638, the court said: "Where there is no time fixed for the performance, if the thing to be done be local, the party who has contracted the obligation to perform it will have during his life to do it in, unless hastened by request; but if it be transitory, he will be bound to perform it in a convenient and reasonable time; and if he fail in the performance, although there may have been no special request, he will be liable for a breach of his contract. This distinction is abundantly established by English authorities, and was recognized by this court in the case of Clay *v.* Huston, 1 Bibb, 461. A thing contracted to be done may be local in its nature, or may be made so by the stipulation of the parties; but the duty which is covenanted to be performed in this case is neither in its nature local (for it might be done anywhere), nor is it made local by the covenant of the parties. It results, therefore, that the

of goods sold, the law makes them deliverable in a reasonable time.[1] A delivery within such time after the sale as is reasonable, in view of the bulk and character of the article sold, is sufficient.[2] So when a party agrees to pay money after his return from a particular place, he is entitled to a reasonable time after his return within which to make the payment.[3] Where it is stipulated that one party shall do the work, the other finding materials, there is an implied agreement that the materials shall be seasonably furnished.[4] Upon a contract to deliver merchandise at a future day, if the day mentioned is Sunday, the day of delivery is Saturday.[5] A sale of goods made without any stipulation as to the time of payment therefor is a sale without credit, and payment is due immediately.[6]

The question as to what is a reasonable time in a particular case is sometimes one of fact for the jury and sometimes one of law for the court.[7] In deciding whether an undertaking has been performed within reasonable time, the difficulty and danger attending it, and the dili-

covenantor was bound to proceed immediately to the execution of the duty which he had covenanted to perform, and to complete the performance of it in a convenient and reasonable time."

[1] Blydenburgh *v.* Welch, 1 Bald. 331; Henkle *v.* Smith, 21 Ill. 238; Jones *v.* Fowler, 37 How. Pr. 104; Danforth *v.* Walker, 40 Vt. 257.

[2] Chaffin *v.* Doub, 14 Cal. 384.

[3] Abbott *v.* Wilmot, 22 Vt. 437.

[4] Smith *v.* R. R. Co., 36 N. H. 458.

[5] Kilgour *v.* Miles, 6 Gill & J. 268.

[6] Brehen *v.* O'Donnell, 34 N. J. L. 408; Thompson *v.* Ketcham, 8 Johns. 190; 5 Am. Dec. 332; Bank of Columbia *v.* Hagner, 1 Pet. 455; Bailey *v.* Clay, 4 Rand. 346.

[7] Howe *v.* Huntington, 15 Me. 350; Spoor *v.* Spooner, 12 Met. 284; Hill *v.* Hobart, 16 Me. 164; Luckhart *v.* Ogden, 30 Cal. 547, the court saying: "The term 'reasonable time' is a technical and legal expression, which, in the abstract, involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is a matter of law. . . . . When the law itself prescribes what shall be considered to be a reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. When, on the other hand, the law does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable in point of facts. In such cases the legal conclusion follows the inference of facts; in other words, the question of reasonable time, etc., is one of fact, and the time is reasonable or unreasonable, in point of law, according to the finding of the jury in point of fact."

gence used, must be considered.[1] In the following cases the question was held one for the court, viz.: As to the time allowed a tenant at will to remove his family and goods;[2] as to the time allowed a patentee to file a disclaimer of an improvement included in his patent, of which he does not claim to be the author;[3] whether one entitled to claim letters of administration had lost precedence by delay;[4] whether the executor of a lessee for life had a reasonable time after his death to remove his goods;[5] where the maker of a note deposited goods with the holder to be sold to pay it, whether a sale several years afterwards was within a reasonable time;[6] what was a reasonable time in which to terminate a lease and take possession;[7] whether the purchaser of a crate of crockery had furnished a list of broken articles within a reasonable time;[8] as to what is a reasonable time within which a proposal must be accepted to constitute a contract.[9] And in the following cases the question of reasonable time has been left to the jury, viz.: Whether the vendee of goods sold by sample had returned them within a reasonable time after discovering that they did not correspond with the sample;[10] whether tithe corn was left on the premises a reasonable time for comparison with the whole corn;[11] the time in which to sell goods after distress;[12] and in defense of an action brought for carrying away the plaintiff, against his will, on the defendant's vessel, whether he had delayed his departure from the vessel an unreasonable time after being warned that she was about to sail.[13] A bond not stating a day of payment is payable on the day of its date;[14] a bill or note not expressing any time

[1] Goodall *v.* Streeter, 16 N. H. 97.
[2] Ellis *v.* Paige, 1 Pick. 43.
[3] O'Reilly *v.* Morse, 15 How. 62; Seymour *v.* McCormick, 19 How. 96.
[4] Hughes *v.* Pipkin, Phill. (N. C.) 4.
[5] Stodden *v.* Harvey, Cro. Jac. 204.
[6] Porter *v.* Blood, 5 Pick. 54.
[7] Doe *v.* Smith, 2 Term Rep. 436.
[8] Attwood *v.* Clark, 2 Me. 249.
[9] Morse *v.* Bellows, 7 N. H. 549; 28 Am. Dec. 372.
[10] Parker *v.* Palmer, 4 Barn. & Ald. 387.
[11] Facey *v.* Hendom, 3 Barn. & C. 213.
[12] Pitt *v.* Shew, 4 Barn. & Ald. 208.
[13] Spoor *v.* Spooner, 12 Met. 285.
[14] Farquar *v.* Morris, 7 Term Rep. 124.

for payment is payable on demand;[1] a promise to pay money, no time being fixed, is a promise to pay on demand.[2]

A contract by a manufacturer to execute an order for goods "as soon as possible" means as soon as he reasonably could, having regard to his means of making them and his orders already on hand, but without regard to the means of getting them elsewhere.[3] The words "at," or "by," or "on," or "upon" a certain time or event, or like expressions in relation to time, may be construed to mean before, or simultaneously with, or after the act or event referred to, according as the reasonable construction of the context requires.[4] An act to be done "on demand" must be done in a reasonable time after demand.[5] "Directly" means something different from "within a reasonable time."[6] "Forthwith," in a contract, does not mean "immediately," so as not to call for the performance of a condition precedent by the other party.[7] It means in a reasonable time.[8] Where a thing is to be done a certain time "from" or "after" a certain act, the day of the act is to be excluded, and the last day of the given time included.[9] "Immediately," in a contract to deliver the possession of premises, does not necessarily mean "as soon as can practically be done."[10] A covenant in a bill of sale to pay the sum secured "immediately on demand" was construed to mean within a reasonable time after de-

[1] Whitlock *v.* Underwood, 2 Barn. & C. 157.

[2] 2 Parsons on Contracts, 551.

[3] Atwood *v.* Emery, 1 Com. B., N. S., 110. See Waddell *v.* Reddick, 2 Ired. 424. As to the phrase "as soon as," etc., see Snodgrass *v.* Wolf, 11 W. Va. 158; Felter *v.* Weybright, 8 Ohio, 167; McCarthy *v.* Howell, 24 Ill. 341; Ubsdell *v.* Cunningham, 22 Mo. 124.

[4] Leake on Contracts, 842; Ferguson *v.* Coleman, 3 Rich. 99; 45 Am. Dec. 761.

[5] Blackwell *v.* Fosters, 1 Met. (Ky.) 88. As to payment of money, see Pullen *v.* Chase, 4 Ark. 210.

[6] Duncan *v.* Topham, 8 Com. B. 225.

[7] Roberts *v.* Brett, 20 Com. B., N. S., 148; Staunton *v.* Wood, 16 Q. B. 638.

[8] Pennsylvania R. R. Co. *v.* Reichert, 58 Md. 261; Ex parte Sullivan, 36 L. T. 1.

[9] Lester *v.* Garland, 15 Ves. 257; Wilkinson *v.* Gaston, 9 Q. B. 137.

[10] Streeter *v.* Streeter, 43 Ill. 155. But see Rommel *v.* Wingate, 103 Mass. 327.

mand, to be allowed for the debtor to get the money in hand, and to seek the creditor or some one authorized to receive it.[1] "Month," in a contract, means, by statute of most of the states, a calendar month.[2] "On or before" a certain day gives the promisor a right to perform the act at any time before that day.[3] Where the purchaser of merchandise for cash agreed to call at the seller's office "before nine o'clock in the evening" to pay a balance, it was held that a tender made a few minutes after nine would have been good.[4]

ILLUSTRATIONS.—A promised B to pay him a certain sum if he, B, married and had issue. No time within which B was to marry was named. *Held*, that B had his whole lifetime in which to perform: *Gurvin* v. *Cromartie*, 11 Ired. 174; 53 Am. Dec. 406. A, in Boston, was in correspondence with B, in New Orleans, in reference to the chartering of a ship to B to carry freight from New Orleans to Europe, and represented that the ship would sail from Boston for New Orleans on a certain day. The ship did not sail for two days after the time fixed. *Held*, that B was not bound: *Deshon* v. *Fosdick*, 1 Woods, 286. A agreed to deliver goods to B, or his agent, at C, and B was to pay the price stipulated on A's presenting receipts for the goods. *Held*, that if the plaintiff himself was at C at the time of the delivery, the payment was to be made at the delivery: *Porter* v. *Rose*, 12 Johns. 209; 7 Am. Dec. 306. A agreed to build a wall for B, and B to pay A when he should build upon the land or sell the same. *Held*, that A could not recover for building the wall until a reasonable time allowed for B to build and sell, and that what was a reasonable time depended upon the circumstances of the case: *Bryant* v. *Saling*, 4 Mo. 522. There was a contract for the sale of land for which the vendee was "to pay one thousand dollars when an act of Congress confirming the title shall be passed," "provided the said act shall be passed" during the next session. *Held*, that if the act did not then pass, the contract was to be at an end, and neither could enforce it against the other: *Clark* v. *Langworthy*, 3 Iowa, 563. A and B signed a subscription paper, agreeing to pay the defendant the sums written against their

[1] Toms *v.* Wilson, 4 Best & S. 455. See Decorah Bank *v.* Haug, 52 Iowa, 538.

[2] 1 Stimson's American Statute Law, 1023.

[3] Wall *v.* Simpson, 6 J. J. Marsh. 155; 22 Am. Dec. 72. Under a contract to put a person in possession "on or before" December 25th, a demand therefor on December 17th held too early: Perry *v.* Watts, 67 Ga. 602.

[4] Furlong *v.* Barnes, 8 R. I. 226.

names, provided he should cause an institution for the education of teachers for schools to be established in the town where the subscribers lived. A few days afterwards, A and B paid their whole subscription to the defendant, who gave a receipt, stating that the money was received of A and B in payment of a subscription by them made to encourage the establishment of a seminary, etc. *Held*, that, as no time was fixed for establishing the seminary, a reasonable time only would be allowed, after which A and B could severally recover the sum paid by them as money had and received: *Carter* v. *Carter*, 14 Pick. 424.

§ 2497. Time not of Essence of Contract in Equity. — In case of mere delay in performance which would operate as a breach of the contract at law and disentitle the party in default from further asserting his rights, a court of equity will, in general, relieve against the legal consequences, and decree specific performance, notwithstanding the delay, upon equitable terms, if the matter of the contract admits of that form of remedy; in such cases it is said that in equity time is not considered to be of the essence of the contract.[1] And at law it is held that where

[1] Leake on Contracts, 846, where it is said: "The construction is, and must be, in equity the same as in a court of law. A court of equity will, indeed, relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for steps towards completion, if it can do justice between the parties. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract": See Andrews *v.* Sullivan, 2 Gilm. 327; 42 Am. Dec. 53; Steele *v.* Branch, 40 Cal. 3; Bullock *v.* Adams, 20 N. J. Eq. 367; Edgerton *v.* Peckham, 11 Paige, 352; Taylor *v.* Baldwin, 27 Ga. 438; 73 Am. Dec. 736; Walker *v.* Owens, 25 Mo. App. 587; Coleman *v.* Applegarth, 68 Md. 21; 6 Am. St. Rep. 417. In Jones *v.* Robbins, 29 Me. 351, 50 Am. Dec. 593, it is said: "Courts of equity have frequently decreed the specific performance of contracts for the conveyance of estates, when there had been a failure to comply with the terms of the contract in point of time. That is not considered to be of the essence of the contract, unless the parties have expresly agreed that it should be so regarded, or unless it follows from the nature of and purposes of the contract. A reasonable regard is to be had to the convenience of man, and to the accidents and infirmities incident to all the transactions of business. The effect of neglect to make punctual payment upon a contract for the purchase of lands was considered by this court in the case of Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635, and it has found no occasion to change the opinions then expressed. In the ordinary cases of sales of estates, the general object being to make a sale for an agreed sum, the time of payment is regarded in equity as formal, and as meaning only that the purchase shall be completed within a reasonable time, and substantially according to the contract, regard being had to all the circumstances."

time admits of compensation, as where money is not paid at the day appointed, it is not of the essence of the contract.'[1] In the case of mortgages, for example, equity, regarding the substance of the contract to consist in the pledge of the estate for the debt, considers the time appointed for repayment as not of the essence of the contract, and grants relief against the forfeiture of the estate at law by allowing redemption, upon repayment of the debt and interest, at any time.[2]

But where by express agreement the parties have made time of the essence of the contract, there can be no relief in equity from the consequences of a default.[3] So when

[1] De Camp *v.* Feay, 5 Serg. & R. 323; 9 Am. Dec. 372.

[2] Seton *v.* Slade, 7 Ves. 273.

[3] Leake on Contracts, 847; Wells *v.* Smith, 7 Paige, 22; 31 Am. Dec. 274; Shinn *v.* Roberts, 20 N. J. L. 435; 43 Am. Dec. 636; Missouri etc. R. R. Co. *v.* Brinckley, 21 Kan. 275; Kimball *v.* Toole, 70 Ill. 553; Reynolds *v.* R. R. Co., 11 Neb. 186; Knott *v.* Stephens, 5 Or. 235; Kirby *v.* Harrison, 2 Ohio St. 326; 59 Am. Dec. 677; Davis *v.* Stevens, 3 Iowa, 158; Mason Payne, 47 Mo. 517; Jennisons *v.* Leonard, 21 Wall. 303; Phelps *v.* R. R. Co., 63 Ill. 468; Grey *v.* Tubbs, 43 Cal. 359; Barnard *v.* Lee, 97 Mass. 92, the court saying: "The doctrine that time is not of the essence of a contract is generally applied in equity to stipulations for the payment of money upon an agreement for the sale and purchase of real estate. The principal grounds of the doctrine are, that the rule of the common law requiring performance of every contract at the appointed day is often harsh and unjust in its operation; that although some time of performance by each party is usually named in any agreement for the sale of land, it is often not regarded by the parties as one of the essential terms of their contract; and that a court of chancery has the power of molding the remedy according to the circumstances of each case, and of making due compensation for delay, without punishing it by a forfeiture of all right to relief. This equitable doctrine was formerly carried to an unreasonable extent, and the specific performance of contracts enforced after such a lapse of time and change of circumstances as to produce as much injustice as it avoided. In modern times, the doctrine has been more guardedly applied, and it is now held that time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by change in the value of the land or other circumstances which would make a decree for the specific performance inequitable. . . . . Although the parties may make time of the essence of their contract by express stipulations to that effect, it is not sufficient that they should name the time of performance in the contract, and thus manifest their intention distinctly enough for the purposes of a court of law. But it must appear that they really intended to make such time an essential element of their agreement; in the words of Lord Erskine, in 13 Ves. 289, 'a material object to which they looked in the first conception of it'; or as Baron Alderson, in 1 Younge & C. 415, stated the result of the previous authorities, 'A court of equity is to be governed by this principle: it is to examine the contract, not merely as a court of law does, to ascertain what the parties

the terms of the contract or the nature and circumstances of the transaction clearly show that it was the intention of the parties to secure a right to an exact performance in respect to time, equity will enforce the right.[1] The nature of the property sold or other subject of contract may impliedly make the time of completion essential.[2] Time becomes material in an agreement where delay diminishes the value of the thing contracted for.[3] Where time was not originally considered as of the essence of the contract, or where the condition of time has been waived, it may be afterwards made essential, as regards the claim to specific performance, by either of the parties requiring completion within a given time, and giving due notice to that effect.[4] The notice must give a reasonable time for completion, having regard to the circumstances;[5] and it must express unequivocally the intention of abandoning the contract, if not completed within the given time.[6] The notice may be waived by continuing the transaction after the expiration of the time given.[7]

§ 2498. Waiver of Non-performance.—A party may waive a delay in performance.[8] A parol extension of the

have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect.' The mere circumstance therefore that the instrument is in the ordinary form of a bond, concluding with the clause that it shall be void in case of a breach of the condition, otherwise remain in full force, does not necessarily make time of the essence of the contract: Malloy v. Egan, 7 I. R. Eq. 592; Jones v. Robbins, 29 Me. 351; 50 Am. Dec. 593."

[1] King v. Ruckman, 20 N. J. Eq. 316; Bullock v. Adams, 20 N. J. Eq. 307; Prince v. Griffin, 27 Iowa, 514; Steele v. Branch, 40 Cal. 3.

[2] Leake on Contracts, 848; Garrettson v. Vanloon, 3 G. Greene, 128; 54 Am. Dec. 492; Kirby v. Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

[3] Bellas v. Hays, 5 Serg. & R. 427; 9 Am. Dec. 385.

[4] Taylor v. Brown, 2 Beav. 190; Benson v. Lamb, 9 Beav. 502; Parkin v. Thorold, 16 Beav. 59; 22 L. J. Ch. 170; King v. Ruckman, 20 N. J. Eq. 316; Remmington v. Kelley, 7 Ohio 432; Kirby v. Harrison, 2 Ohio St. 326; 59 Am. Dec. 677.

[5] Pegg v. Wisden, 16 Beav. 239; Nott v. Riccard, 22 Beav. 307; Wells v. Maxwell, 32 Beav. 408; 33 L. J. Ch. 44; McMurray v. Spicer, L. R. 5 Eq. 527; 37 L. J. Ch. 505; Webb v. Hughes, L. R. 10 Eq. 281; 39 L. J. Ch. 606; Thomas v. Dulles, 5 Rich. Eq. 370; Wiswall v. McGowan, Hoff. Ch. 125.

[6] Reynolds v. Nelson, 6 Madd. 18.

[7] King v. Wilson, 6 Beav. 124.

[8] Leake on Contracts, 850; Baker v. Whitesides, Breese, 174; 12 Am. Dec. 168.

time of performance fixed by a contract not under seal is valid.[1] Where the time of performance fixed by a contract is extended, the failure of either party to attend at the time fixed discharges the other, whether he made a tender at the time and place or not, and the fact that he gives a false reason for his subsequent refusal is immaterial.[2]

And the other party may waive the strict performance in any respect, and accept a substituted performance of any kind.[3] The failure of a party to a building contract to complete the same within the time limited therein will not prevent a recovery upon a performance of the agreement after the time specified, if the delay was assented to by the other party; and such assent need not be in writing or established by positive testimony, but may be inferred from circumstances.[4] Under a contract to finish a house on a specified day, permitting the contractor to continue work on it after that day, and accepting it when completed without objecting to the delay, is a waiver of the stipulation as to time, but does not do away with other stipulations.[5] Where one, by contract, was to have delivered to another an article of machinery at an agreed time and place, but delivered it at another time and place, when and where it was received without objection, the right to exact strict performance was held waived.[6] A temporary waiver continues until clearly recalled by a distinct demand of strict performance.[7]

ILLUSTRATIONS.—A agreed to deliver to B ore containing twenty-six per cent of oxide of zinc. This he did. Three years afterwards, B first objected that the zinc contained moisture. *Held*, that the objection was without weight: *Trotter* v. *Heckscher*,

[1] Friess *v.* Rider, 24 N. Y. 367; 82 Am. Dec. 308. The time of performance of a contract to convey land cannot be extended by parol: Blood *v.* Goodrich, 9 Wend. 68; 24 Am. Dec. 121.

[2] Friess *v.* Rider, 24 N. Y. 367; 82 Am. Dec. 308.

[3] Cuff *v.* Penn, 1 Maule & S. 21; Morford *v.* Mastin, 6 T. B. Mon. 609; 17 Am. Dec. 168; Gould *v.* Banks, 8 Wend. 562; 24 Am. Dec. 90.

[4] Smith *v.* Gugerty, 4 Barb. 614.

[5] Nibbe *v.* Brauhn, 24 Ill. 268.

[6] Baldwin *v.* Farnsworth, 10 Me. 414; 25 Am. Dec. 252.

[7] Boutwell *v.* O'Keefe, 32 Barb. 434.

42 N. J. Eq. 251. Plaintiff contracted to finish a building within a time specified. The day before this time arrived, a change in the front was agreed on, and other changes in the plan were also made. When completed, the defendant paid two thousand three hundred dollars on the agreement, making no objection as to time. *Held*, in a suit for the balance due, that the defendant could not offset a claim for loss of rent by reason of the non-completion of the contract at the time first fixed upon, this provision of the contract having been waived: *McGinley* v. *Hardy*, 18 Cal. 115.

§ 2499. Place of Performance of Contract. — The performance must be made or tendered at the place appointed in the contract.[1] Where articles are to be delivered at a particular place, a delivery at such place must be proved, to sustain an action for the price.[2] A delivery at a place near the one specified is not sufficient.[3] If no certain place be appointed in the contract for performance, and it require the presence of the promisee, it must, in general, be made or tendered to him wherever he may be within the country.[4] A demand made at the dwelling-house of a person who has contracted to deliver certain articles is sufficient, though made in his absence.[5] Where a person contracts to furnish support for another, no place being designated, the support must be provided where the person to be supported elects to receive it, without occasioning unnecessary expense.[6] But tender of performance need not be made outside the state.[7] The presumption is that a contract was intended to be per-

[1] Leake on Contracts, 851.

[2] Savage Mfg. Co. *v.* Armstrong, 19 Me. 147. A contract was to deliver at any house in M. designated by the vendee. Held, that a designation by his assignee was good: Mewherter *v.* Price, 11 Ind. 199.

[3] Clark *v.* Cuson, 3 Head, 55.

[4] Currier *v.* Currier, 2 N. H. 75; 9 Am. Dec. 43; Hunter *v.* Spurlock, 3 La. 97; 22 Am. Dec. 165; Hoys *v.* Tuttle, 8 Ark. 124; 46 Am. Dec. 309; Schuessler *v.* Watson, 37 Ala. 98; 76 Am. Dec. 348. But in Patterson *v.* Jones, 13 Ark. 69, 56 Dec. Am. 296, it is said: "The defendant covenanted to pay two hundred cords of ash-wood, or its equivalent, on a given day. As no place of payment is mentioned in the contract, the law fixed that at the residence of the party by whom the payment was to be made."

[5] Remick *v.* Atkinson, 11 N. H. 256; 35 Am. Dec. 493.

[6] Norton *v.* Webb, 36 Me. 270; 58 Am. Dec. 745.

[7] Allshouse *v.* Ramsay, 6 Whart. 331; 37 Am. Dec. 417.

formed where it was made.[1] A covenant to perform any act, no place being appointed in the covenant, is to be performed wherever the obligee shall appoint in the state.[2] Under a contract of sale of goods to be delivered on a future day in a certain city, the vendee has a right to fix the place of delivery in such city.[3] But under a contract to deliver goods, not appointing a place for delivery, the promisor is not bound to carry and deliver the goods to the promisee wherever he may happen to be; he may require the promisee to appoint a proper place or mode of delivery, and he will be discharged by a delivery according to his instructions.[4] Where the parties to a contract for the purchase and delivery of cumbrous articles have omitted to designate the place of delivery, and nothing is known of their situation and employment, it is the duty of the party agreeing to deliver the articles to obtain from him who is to receive the same an appointment of the place of delivery.[5] A person who, by contract, engages to draw logs to a stream may draw them to any point on the stream most convenient to him.[6] Where the place in which goods are to be delivered is in the option of the seller, he is bound to give the vendee notice where he intends to deliver them.[7] The voluntary absence of one party from the place assigned for the performance of a contract is equivalent to a refusal to perform on his part, and excuses the other party in suspending preparations for performance on his part, whenever such suspension would be the natural effect of just and reasonable inferences drawn by the latter from such absence and its attendant circumstances.[8]

[1] Speed *v.* May, 17 Pa. St. 91; 55 Am. Dec. 540; Jones *v.* Perkins, 29 Miss. 139; 64 Am. Dec. 136; Barker *v.* Jones, 8 N. H. 413; Janney *v.* Sleeper, 30 Minn. 473.

[2] Trabue *v.* Kay, 4 Bibb, 226; Norton *v.* Webb, 36 Me. 270; 58 Am. Dec. 745.

[3] Stillwell *v.* Bowling, 36 Mo. 310.

[4] Leake on Contracts, 854; Currier *v.* Currier, 2 N. H. 75; 9 Am. Dec. 43.

[5] Mallory *v.* Grant, 4 Chand. 143.

[6] Palmer *v.* Fogg, 35 Me. 368; 58 Am. Dec. 708.

[7] Rogers *v.* Van Hoesen, 12 Johns. 221.

[8] Smith *v.* Lewis, 24 Conn. 624; 63 Am. Dec. 180.

ILLUSTRATIONS. — A agreed with B to deliver him a boat-load of corn at Louisville in sacks, as soon as his boat could be brought there. *Held*, that the place of delivery was at A's boat, when moored at Louisville: *Applegate* v. *Hogan*, 9 B. Mon. 69. A promised B, in consideration of a wagon delivered to him by B, at the time of the contract, to break up for B sixteen acres of new ground on or before a certain day. *Held*, that the piece of ground to be broken up, if not specified in the contract, might be designated by B: *Ellison* v. *Dove*, 8 Blackf. 571. Tobacco was contracted for to be delivered in C., no particular place being designated. *Held*, that the place of delivery must depend on the understanding of the parties or the usage of the trade, and that the delivery at a warehouse where the vendee usually had his tobacco delivered was sufficient: *Williams* v. *Adams*, 3 Sneed, 359. A carpenter executed work for a butcher, to be paid for in fresh meat, no time, place, or kind of meat for payment being specified. After the work was done, the carpenter received, at divers times, at the butcher's stall, such meat as he then needed. *Held*, that the meat was payable at the butcher's stall, in such quantities as the carpenter might need, and the butcher have on hand: *Kraft* v. *Hurtz*, 11 Mo. 109.

§ 2500. Conditional Promises — Promise upon Condition Precedent. — A promise may be conditional, i. e., where the performance is not due immediately, but becomes so only after the lapse of time or the happening of a future event. In such cases the condition precedent must be exactly performed before the promise can be enforced.[1] But until a party is put in default he may perform a condition for which the contract fixes no time.[2] When the performance of an agreement depends on an act to be done by the plaintiff, the doing of such act is a condition precedent; and the court will not inquire whether the doing of it be beneficial to the defendant.[3] So whenever the entire consideration of the demand claimed is stipulated to be performed at or previous to

[1] Eldridge *v.* Rave, 2 Gilm. 91; 42 Am. Dec. 41; Oakley *v.* Morton, 11 N. Y. 25; 62 Am. Dec. 49; Wayne etc. Institute *v.* Smith, 36 Barb. 576; Galt *v.* Swain, 9 Gratt. 633; 60 Am. Dec. 311; Bruce *v.* Snow, 20 N. H. 484; Vanhorne *v.* Dorrance, 2 Dall. 317; Baltimore etc. R. R. Co. *v.* Polly, 14 Gratt. 447.

[2] Hall *v.* Lorente, 3 La. Ann. 274.

[3] Jarvis *v.* Rogers, 3 Vt. 339; Willington *v.* West Boylston, 4 Pick. 101; Hunt *v.* Livermore, 5 Pick. 395.

the performance of the demand, the performance of the consideration becomes a condition precedent.[1]

§ 2501. **Conditional upon Expiration of Time.**—A contract may be conditioned to be executed, or a debt may be made payable, at a future time, and here the specified time must elapse before the performance of the contract or the debt becomes absolutely due.[2]

§ 2502. **Upon Happening of Future Event.**—Contracts may be conditional upon the happening of some event, the happening of which is certain, but the time of happening of which is uncertain. So contracts may be conditional upon the happening of some event or contingency which is altogether uncertain;[3] as of a contract to pay money when a certain residuary share of an estate comes to the hands of the payee, so that the amount thereof can be ascertained;[4] or a contract to purchase, "provided titles can be procured and made";[5] or a subscription to a purpose, provided a certain further sum is subscribed;[6] or a sale of goods at auction, to be paid for in an approved note at six months.[7]

§ 2503. **Payment out of Specified Fund.**—A contract or promise to pay may be restricted to a particular fund, so as to make the raising or the sufficiency of the fund a condition precedent to the liability; as a covenant to pay money, if the capital and funds of a company are sufficient, or out of the calls upon the shares of the company;[8] or a promise to pay out of the rents of a certain building.[9]

[1] Barry *v.* Alsbury, 6 Litt. 151.

[2] Leake on Contracts, 634; Cleveland *v.* Sterrett, 70 Pa. St. 204. Where the vendee is allowed until the end of the year to determine whether a conditional sale shall become absolute, he may make his election at any time before the expiration of the year, and is not confined to the last day of the year only: Reese *v.* Beck, 24 Ala. 651.

[3] Leake on Contracts, 635.

[4] Rogers *v.* Law, 1 Black, 253.

[5] Lacy *v.* Hall, 37 Pa. St. 360.

[6] New York etc. Co. *v.* De Wolf, 31 N. Y. 273.

[7] Corlies *v.* Gardner, 2 Hall, 345.

[8] Leake on Contracts, 636; citing Sunderland Marine Ins. Co. *v.* Kearney, 16 Q. B. 925.

[9] Staats *v.* Hodges, Hill & D. 211.

§ 2504. Act or Will of Third Person. — A promise may be conditional upon the act or will of a third party.[1] Where a building contract provides that payment shall only be made on the certificate of approval of the architect, no claim for payment can be made unless the certificate be given.[2] In the absence of fraud, or such gross mistake as is equivalent to bad faith, or a failure to exercise an honest judgment in refusing the certificate, the refusal is conclusive against the builder's right to claim the stipulated compensation.[3] A suit will not lie on a building contract for money payable upon an architect's certificate without its production, or evidence of waiver thereof.[4] But it has been held that where the architect's refusal was unreasonable, and in bad faith, a recovery might be had;[5] and where a contract for macadamizing a street provided that payment should be made when the work was accepted by the board of public works, it was held that the contractor might recover, although a majority of the board neglected or refused to examine or accept the work.[6] So where a building contract requires a certificate that the work has been well done as a prerequisite to payment, and this certificate is withheld by order of the owner, and not because the work has not been well done, the builder may maintain an action against the owner without such certificate.[7] If the discretion of approval has been once exercised by the party, such discretion is thereby exhausted and ended; and he cannot capriciously withdraw an approval once given.[8] The production of the certificate of the architect entitles the builder to receive the payment, unless obtained through

[1] Culley *v.* Hardenberg, 1 Denio, 508.

[2] Morgan *v.* Birnie, 9 Bing. 672; Clarke *v.* Watson, 18 Com. B., N. S., 278; Smith *v.* Brady, 17 N. Y. 173; 72 Am. Dec. 442. Such a condition is for the benefit of the owners of the building, and they may waive it and accept other proofs: Blethen *v.* Blake, 44 Cal. 117.

[3] Sweeney *v.* United States, 109 U. S. 618.

[4] Byrne *v.* St. Elizabeth Sisters of Charity, 45 N. J. L. 213.

[5] Thomas *v.* Fleury, 26 N. Y. 26.

[6] Neenan *v.* Donoghue, 50 Mo. 493.

[7] Whelen *v.* Boyd, 114 Pa. St. 228.

[8] Wilder *v.* United States, 5 Ct. of Cl. 468.

fraud or mistake; and where no specific form is prescribed, a certificate that "the last payment is due as per contract" is sufficient.[1] The architect's approval will be presumed from his presence at the completion of the work, and making no objections.[2]

So where quantity or price or quality, it is agreed by the parties, is to be left to the opinion and determination of a third person, his judgment or estimate is binding, in the absense of fraud or mistake;[3] but it is otherwise where it is based on wrong views of the contract;[4] or where he cannot freely exercise his judgment.[5]

ILLUSTRATIONS.—A town voted to allow one of two persons having claims against it, growing out of the same transaction, seven hundred dollars, provided the other would accept two hundred dollars. *Held*, on the second refusing to accept two hundred dollars, that the first could not maintain an action against the town for the seven hundred: *Morrell* v. *Dixfield*, 30 Me. 157. A policy of fire insurance was conditioned that the minister of the parish should give a certificate as to the character of the insured and the *bona fide* nature of the loss. *Held*, that the insured could not recover without such certificate, although the minister unreasonably refused to give it: *Worsley* v. *Wood*, 6 Term Rep. 710. An agreement was made to do work at a measurement price, to be settled by a person named in the agreement. *Held*, that the settlement of the price was a condition precedent by which the parties were bound: *Mills* v. *Bayley*, 2 Hurl. & C. 36; 32 L. J. Ex. 179. A contract was made for the sale of a horse at the price of one shilling, but with the condition that if the horse should trot eighteen miles in an hour to the satisfaction of a person appointed as judge of the performance, the buyer should pay the price of two hundred pounds; the judge refused to attend, without any default in the buyer. *Held*, that the seller was bound to deliver the horse at the price of one shilling: *Brogden* v. *Marriott*, 2 Bing. N. C. 473.

[1] Wyckoff *v.* Meyers, 44 N. Y. 143.

[2] Kane *v.* Sone Co., 39 Ohio St. 1.

[3] Keeble *v.* Black, 4 Tex. 69; Baasen *v.* Blake, 7 Wis. 576; Nofsinger *v.* Ring, 71 Mo. 149; 36 Am. Rep. 456; O'Reilly *v.* Kerns, 52 Pa. St. 214; Crane *v.* Roberts, 5 Me. 419; Dustan *v.* Andrew, 44 N. Y. 72; Vaughan *v.* Howe, 20 Wis. 497. Where the measurement of work done for a city was to be made by the city engineer, it was held that his assistant might make it: Palmer *v.* Clark, 106 Mass. 373. And see Leonard *v.* Davis, 1 Black, 476.

[4] Alton R. R. Co. *v.* Northbott, 15 Ill. 49; McAvoy *v.* Long, 13 Ill. 147.

[5] Vanderwerker *v.* R. R. Co., 27 Vt. 130.

Plaintiff sold fruit on the trees, agreeing that the vendee should gather it without molestation; the vendee found that those in possession would let him gather part, but that he could not get the rest without a fight. *Held*, that the contract was indivisible, and that he might refuse to take any, and recover damages as for a total breach: *Dabovich* v. *Emeric*, 12 Cal. 171. A corporation agreed with plaintiff to purchase from him large quantities of coal, to be delivered daily, of a quality to be satisfactory to the master of transportation and master of machinery of the corporation. *Held*, that plaintiff was entitled to require the exercise of an honest, fair, and just judgment before the coal could be rejected, and that it could not be condemned once for all, plaintiff having the right to tender it each day: *Baltimore etc. R. R. Co.* v. *Brydon*, 65 Md. 198; 57 Am. Rep. 318.

§ 2505. **Act or Will of Promisor.** — The promise cannot be conditional on the mere will of the promisor; for by promising to do a thing only in case it please himself, he is not bound at all. Thus agreements for service, where the remuneration is left to the discretion of the employer, create no binding contract.[1] A covenant by a person to build such a house as he should think fit binds him to nothing; and a grant of land made in consideration of such a covenant was held to be purely voluntary.[2] So where the defendant agreed to furnish lumber in such quantities as he should "deem fit and advisable," it was held that he could cease furnishing the lumber whenever he pleased.[3] Contracts may be made to pay for work upon condition of the work being done to the satisfaction or approval of the promisor.[4] In such cases, the right of approval on which the contract is dependent must, in general, be exercised in a reasonable, and not in an arbitrary or capricious, manner.[5] But the contract may mean that

[1] Leake on Contracts, 637; Tolmie *v.* Dean, 1 Wash. 57.

[2] Rosher *v.* Williams, L. R. 20 Eq. 210.

[3] Loughery *v.* McIlvain, 1 Leg. Gaz. 239. And see Savage Mfg. Co. *v.* Armstrong, 19 Me. 147.

[4] Moffatt *v.* Dickson, 13 Com. B. 543; 22 L. J. Com. P. 265; Moffatt *v.* Laurie, 15 Com. B. 583; 24 L. J. Com. P. 56; Phelps *v.* Willard, 16 Pick. 29.

[5] Dallman *v.* King, 4 Bing. N. C. 105; Parsons *v.* Sexton, 4 Com. B. 899; Pope *v.* Iron Co., 14 Mo. App. 502; McClure *v.* Briggs, 58 Vt. 82; Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387; 54 Am. Rep. 709; Hartford etc. Mfg. Co. *v.* Brush, 43 Vt. 528.

the satisfaction or approval shall be quite arbitrary; and then the only restriction upon the approval is that it must be exercised in good faith, and not merely for the purpose of defeating the contract, however unreasonably or capriciously.[1] Where machinery is guaranteed to do certain work in a satisfactory manner, and is not to be paid for until satisfactory to the purchaser, if it is, in good faith, unsatisfactory to him, and he so notifies the seller within a reasonable time, there is no sale.[2] Where an artist agrees to make a crayon portrait which shall be satisfactory to the person ordering it, neither the artist nor the jury can decide that the person ordering the portrait ought to be satisfied with that made.[3] Where a harvesting-machine was sold to a man who insisted on a stipulation that the sale should be inoperative if the machine did not work to the buyer's satisfaction, it was held that he had an absolute right to reject the machine, and that his reasons for doing so could not be investigated.[4] So where A proposed to B to put an elevator into B's building, "warranted satisfactory in every respect," it was held not enough that the elevator was reasonably fit for its purposes, and that B ought to have been satisfied with it, but that, while he could not reject it for mere caprice, he could reject it for a *bona fide* objection to its working, after it was so far completed that he could understand how it would operate.[5] But if A agrees to polish and varnish the wood-work of B's house "in the best workmanlike manner," and to B's satisfaction, if the work is done in the best workmanlike manner, B is bound to be satisfied.[6]

[1] Andrews *v.* Belfield, 2 Com. B., N. S., 779; Stadhard *v.* Lee, 3 Best & S. 364; Harden *v.* Comm'rs, 97 Ind. 455; Goodrich *v.* Van Nortwick, 43 Ill. 445; McCarren *v.* McNulty, 7 Gray, 139.

[2] Exhaust Ventilator Co. *v.* R. R. Co., 66 Wis. 218; 54 Am. Rep. 717, note.

[3] Moore *v.* Goodwin, 43 Hun, 534.

[4] Walter A. Wood Reaping etc. Machine Co. *v.* Smith, 50 Mich. 565; 45 Am. Rep. 57.

[5] Singerly *v.* Thayer, 108 Pa. St. 291; 54 Am. Rep. 715, note.

[6] Doll *v.* Noble, 18 Abb. N. C. 45; 116 N. Y. 230.

ILLUSTRATIONS. — Two citizens of Maine agreed, by a written memorandum, the one to deliver, and the other to receive, at Philadelphia, "from one thousand to three thousand bushels of potatoes." *Held*, that the seller had the right to deliver any quantity he chose within the terms of the contract, and that he was not bound to make his election till they arrived at the place of delivery, though requested by the other party after the shipment was made: *Small* v. *Quincy*, 4 Me. 497. The terms of an auction sale provided that if the purchaser, upon examination, should not be satisfied with the title, he need not take the property. *Held*, that if the purchaser, in good faith, was not satisfied with the title, he would not be compelled by the court to take the property, though the court of appeals pronounced the title good: *Averett* v. *Lipscombe*, 76 Va. 404. An agent, to solicit orders for a sculptor, made an agreement with C. that a plaster bust of her deceased husband should be made, but that she should not be bound to take it unless she should be satisfied with it. When the bust was finished, she was not satisfied with it, and refused to accept it. The bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and it accurately portrayed the features of its subject, and the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection in the work, but by the nature of the material. *Held*, that the plaintiff was not entitled to recover. It was not enough that her dissatisfaction was unreasonable: *Zaleski* v. *Clark*, 44 Conn. 218; 26 Am. Rep. 446.

§ 2506. Conditional upon Request or Demand. — A contract may be conditional upon a request or demand of performance; the making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract, must be alleged and proved.[1] An action is not sustainable upon a note, payable in specific articles, on demand, without proof of a special demand.[2] On a promise to deliver goods, no time

[1] Leake on Contracts, 642; West v. Murph, 3 Hill, 284; Baker v. Stoughton, 1 Or. 227. In Walton v. Mascall, 13 Mees. & W. 548, it is said: "A request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due." A provision in a contract that a payment shall be made by a party "on reasonable request" imports an agreement to pay within a reasonable time after request: Illinois Land etc. Co. v. Beem, 2 Ill. App. 390.

[2] Smith v. Leavensworth, 1 Root, 209; Dean v. Woodbridge, 1 Root, 191; Thaxton v. Edwards, 1 Stew. 524;

being mentioned, a demand is necessary before beginning suit.[1] Unless the contract so provides, the demand need not be in writing.[2]

§ 2507. **Conditional upon Notice.** — A contract may be conditional upon notice of some matter being given; and notice must be given accordingly, in order to render the promise absolute, and must be alleged and proved in an action brought upon it. A party contracting to do an act upon the happening of some event is not, in general, entitled to notice of that event as a condition precedent, unless he has expressly stipulated for it; but in some cases it is necessarily implied from the nature of the transaction that notice should be given, although not expressly stipulated for.[3] No notice is necessary to be given to a defendant of the happening of a contingency, if, by the contract, he has provided himself with the means of ascertaining the fact.[4] If there is a mutual departure from the terms of a contract, and afterwards one of the parties concludes henceforth to stand on the letter of the contract, he must notify the other.[5] Where it is provided that a contract may be terminated by a written notice for thirty days, the notice, if given, may be recalled within that time.[6]

Cobb *v.* Read, 2 Stew. 444; Johnson *v.* Baird, 3 Blackf. 153; Stevens *v.* Adams, 45 Me. 611; Greenwood *v.* Curtis, 6 Mass. 358; 4 Am. Dec. 145; Lobdell *v.* Hopkins, 5 Cow. 516; Seely *v.* Bisbee, 2 Vt. 105. Demand of payment of a note payable in specific articles may be made at any reasonable hour, at the place of payment, though neither the maker nor any person in his behalf is present: Dunn *v.* Marston, 34 Me. 379.

[1] Benners *v.* Howard, Tayl. 149; 1 Am. Dec. 583; Mitchell *v.* Gregory, 1 Bibb, 449; 4 Am. Dec. 655.

[2] Colby *v.* Reed, 99 U. S. 560.

[3] Vyse *v.* Wakefield, 6 Mees. & W. 453; Quarles *v.* George, 23 Pick. 400; Johnson *v.* Moore, 1 Blackf. 253; Nathan *v.* Lewis, 1 Handy, 239. "Where a party contracts to do a thing in a certain specific event with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is an event which lies within the peculiar knowledge of the opposite party, then notice ought to be given him": Vyse *v.* Wakefield, 6 Mees. & W. 453. "The reason of the rule is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary": Per Bramwell, B., in Makin *v.* Watkinson, L. R. 6 Ex. 25; Birdseye *v.* Davis, 2 McCord, 296.

[4] Keys *v.* Powell, 2 A. K. Marsh. 254.

[5] Eaves *v.* Cherokee Iron Co., 73 Ga. 459.

[6] Patrick *v.* R. R. Co., 93 N. C. 422.

§ 2508. Mutual Conditions Precedent — When Dependent and when Independent of Each Other. — In contracts containing executory considerations or mutual promises, that is to say, in which a promise on the one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration, strictly so called; and the obligation of the one promise may be quite independent of the performance of the other. But if the obligation of the one promise is expressly or impliedly conditional upon the due performance of the other, then the performance of the promise constituting the executory consideration is a condition precedent to the liability to perform the other promise.[1] No precise rule, it is said, can be laid down for the solution of the question whether a contract is entire or separable; it must be solved by considering both the language and the subject-matter of the contract.[2] Courts are disinclined to construe the stipulations in a contract to do certain things within a given time in consideration of the payment of money by the other party as conditions precedent, unless compelled to do so by the express language of the contract.[3] If there is no connection in the matter of the promises, and the performance on the one side is quite independent of the performance on the other, the promises are, in general, independent, and not conditional.[4] Where by the terms of the contract the time to perform the covenant on the one side is to happen, or may happen, before the time for the performance of the covenant on the other side, the former is not dependent on the latter.[5] So where one party contracts to do a job of work, and another to pay a stipulated price for the same,

[1] Leake on Contracts, 648; Dey *v.* Dox, 9 Wend. 129; 24 Am. Dec. 137; Stansbury *v.* Fringer, 11 Gill & J. 149. See *ante*, Chapter CVIII.; *post*, Title Landlord and Tenant.

[2] More *v.* Bonnet, 40 Cal. 251.

[3] Front St. etc. R. R. Co. *v.* Butler, 50 Cal. 574.

[4] Leake on Contracts, 650; Gould *v.* Banks, 8 Wend. 562; 24 Am. Dec. 90; Dey *v.* Dox, 9 Wend. 129; 24 Am. Dec. 137; Gould *v.* Brown, 6 Ohio St. 538; Logan *v.* Hodges, 6 Ala. 699; Clough *v.* Baker, 48 N. H. 254; Gillum *v.* Dennis, 4 Ind. 417.

[5] State *v.* R. R. Co., 21 Minn. 472.

and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and a full performance not as a condition precedent to any right of action, unless it is expressly so stipulated or is strongly implied.[1] But where acts are to be performed by each party at the same time, neither party can maintain an action against the other without performance or tender of performance on his part.[2] So where a party sues on a special contract to recover compensation due on its performance, he must show performance on his part, or a legal excuse.[3]

In contracts for the sale of land, the conveyance of the estate and the payment of the purchase-money are, in general, concurrent acts and dependent promises, whether a particular day be appointed for completion or not; and readiness and willingness to complete on either side is a condition precedent to liability to complete on the other.[4] Under such contracts an actual conveyance of the land is a condition precedent to the claim for the whole amount of the stipulated purchase-money; so that if the purchaser refuse to complete, and take a conveyance, the vendor, though he may claim damages for not completing, cannot claim the purchase-money so long as he retains the property in the land.[5] In executing contracts for the sale of goods, the delivery of the goods and payment of the price are presumptively intended to be concurrent acts; and readiness and willingness on both sides, at the proper time for completion, to perform their respective parts of

[1] Booth *v.* Tyson, 15 Vt. 515.

[2] Brown *v.* Gammon, 14 Me. 276; Dana *v.* King, 2 Pick. 155; Green *v.* Reynolds, 2 Johns. 207; Hardin *v.* Kretsinger, 17 Johns. 293; Robb *v.* Montgomery, 20 Johns. 15; Northrup *v.* Northrup, 6 Cow. 296; Meriwether *v.* Carr, 1 Blackf. 413; Bailey *v.* Clay, 4 Rand. 346; Frickett *v.* Brice, 22 How. Pr. 194; Paige *v.* Hammond, 26 Vt. 375; Kelly *v.* Webb, 27 Tex. 368; Clark *v.* Weis, 87 Ill. 438; 29 Am. Rep. 60; Nipp *v.* Diskey, 81 Ind. 214; 42 Am. Rep. 124; Bruce *v.* Crews, 39 Ga. 544; 99 Am. Dec. 467; Powell *v.* R. R. Co., 14 Or. 356.

[3] Marsh *v.* Richards, 29 Mo. 99.

[4] Heard *v.* Wadham, 1 East, 619; Laird *v.* Pim, 7 Mees. & W. 474; Manby *v.* Cremonini, 6 Ex. 808; Marsden *v.* Moore, 4 Hurl. & N. 500; 28 L. J. Ex. 288; Runkle *v.* Johnson, 30 Ill. 328; 83 Am. Dec. 191; Frey *v.* Johnson, 22 How. Pr. 316.

[5] Laird *v.* Pim, 7 Mees. & W. 474.

the contract, are mutual conditions precedent.[1] It is not necessary that the buyer should actually tender the money, or that the seller should tender the goods, in order to satisfy the condition of readiness and willingness to complete.[2] But if the contract expressly provides that the payment is to be after delivery, an actual delivery, and not mere readiness and willingness to deliver, unless such delivery be waived or refused, is a condition precedent.[3] But the promises are independent, where, on the one hand, an article of merchandise is sold, and agreed to be delivered on demand, and on the other, payment is deferred until five months after the date of the contract.[4]

§ 2509. Part Performance of Conditions Precedent.— A part performance or a defective performance of a condition precedent is generally not sufficient.[5] But after the one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability; in such case he must perform the contract on his part, and must rely upon his claim for damages in respect of the defective performance.[6] And where one who has agreed to perform certain work performs part of it, and is prevented

[1] Callonel v. Briggs, 1 Salk. 112; Morton v. Lamb, 7 Term Rep. 125. See Field v. Leiean, 6 Hurl. & N. 617; 30 L. J. Ex. 168; Sargent v. Adams, 3 Gray, 72; 63 Am. Dec. 718; Grandy v. McCleesa, 2 Jones, 142; 64 Am. Dec. 374; Draper v. Jones, 11 Barb. 263.

[2] Rawson v. Johnson, 1 East, 203; Waternouse v. Skinner, 2 Bos. & P. 447; Jackson v. Allaway, 6 Man. & G. 942; Boyd v. Lett, 1 Com. B. 222.

[3] Ripley v. McClure, 4 Ex. 345.

[4] Dox v. Dey, 3 Wend. 356; Goodwin v. Holbrook, 4 Wend. 377; Lewis v. Weldon, 3 Rand. 71.

[5] Noble v. Ratcliff, 15 Q. B. 916; Oakley v. Morton, 11 N. Y. 25; 62 Am. Dec. 49; Roberts v. Opdyke, 40 N. Y. 264; Crane v. Kimbel, 2 Jones & S. 455; Jenkins v. Wheeler, 3 Keyes, 655; Patteidge v. Gildermeister, 1 Keyes, 99; Bersch v. Sander, 37 Mo. 104; United States v. Clarke, 1 Hemp. 315; Malbon v. Birney, 11 Wis. 107.

[6] Leake on Contracts, 664, citing 1 Wms. Saund. 320 e, adopted by the court in Ellen v. Topp, 6 Ex. 441; Graves v. Legg, 9 Ex. 717; 23 L. J. Ex. 231; Kehn v. Burness, 2 Best & S. 755; 32 L. J. Ex. 206. And see Oxford v. Provand, L. R. 2 P. C. 156; White v. Beeton, 7 Hurl. & N. 42; 30 L. J. Ex. 373; Carter v. Scargill, L. R. 10 Q. B. 564.

from performing the residue without the fault of either party, he is entitled to pay in proportion, at the rate agreed upon for the whole.[1]

§ 2510. When Performance of Conditions Precedent Waived or Discharged.—The performance of a condition precedent may be discharged or excused, and the conditional promise made an absolute one, in certain cases, viz.:—

1. Where the promisor himself prevents the complete performance, by refusing to accept it when offered, or otherwise waives the performance.[2] Either party may waive any part of a contract, either expressly or by acts or declarations indicating a relinquishment of any provision, or part of a provision, and without the performance of which, unless relinquished or waived, a recovery could not be had.[3] So although there may have been repeated violations of a contract by either party, yet, if either elects to consider it unbroken, and proceeds under it, the other cannot be considered as having been in default.[4]

Thus the following have been declared to constitute a waiver in each instance, viz.: A request to go on with the work, together with partial payments, after the workman's failure to complete a building within the time stipulated in the contract;[5] payments made to the contractor and acceptance of the work by the owner, though the contract stipulated for payment in installments as the work progressed, provided that in each case a certificate should be obtained, signed by a certain architect;[6] where A contracted with B for two hundred pork-barrels of the ordi-

[1] Hargrave *v.* Conroy, 19 N. J. Eq. 281.

[2] Leake on Contracts, 666; Davis *v.* Crawford, 2 Mill (S. C.) 401; 12 Am. Dec. 682; Rankin *v.* Darnell, 11 B. Mon. 30; 52 Am. Dec. 557; Garrison *v.* Dingham, 56 Ill. 150; Brigham *v.* Carlisle, 78 Ala. 243; 56 Am. Rep. 28; Fallon *v.* Lawler, 102 N. Y. 228; Cook *v.* Brandeis, 3 Met. (Ky.) 555; Allen *v.* Robinson, 2 Barb. 341.

[3] Shaw *v.* Lewiston Turnp. Co., 2 Pen. & W. 454.

[4] McCord *v.* West Feliciana Co., 3 La. Ann. 285.

[5] Eyster *v.* Parrott, 83 Ill. 517.

[6] Haden *v.* Coleman, 73 N. Y. 567; Smith *v.* Alker, 102 N. Y. 87.

nary size and quality, and A afterwards received of B that number of barrels, but not of the size and quality contracted for;[1] where a contract required A to deliver ties to a railroad company, subject to the inspection and acceptance of its chief engineer, but the company directed another of its officers to make such inspection;[2] where a person made a subscription upon certain conditions towards the erection of a church edifice, but during the erection of it frequently told those in charge of it to go on and finish it, and he would pay his subscription;[3] where, in a written contract for putting up furnaces, the plaintiff agreed to put in a cold-air register face, which he omitted to do, but the furnace was used for three months, and no complaint made of the omission;[4] where a party purchased and had shipped to him certain barrels of apples, and upon receiving them a portion were found worthless, and he did not return, or offer to return, them, or notify the vendor that he would not receive them, and that they were subject to the vendor's order, but paid the vendor for those he considered good;[5] where a party to a contract for the construction of a steam-engine, to be delivered on or before a specified time, consented to receive it after that time;[6] where a party entered into possession of a completed house, not built according to contract;[7] where the owner of a steamboat was present when a boiler containing forty-eight instead of forty-four flues, as contracted for, was being made and put into the boat.[8]

But in the following cases it was held that there was no waiver, viz.: Where a contract bound A to pay B for each wagon-load as delivered, but B delivered several wagon-loads without requiring payment for each;[9] where defendant agreed with plaintiff to deliver to him on or

[1] Murray v. Farthing, 6 Mo. 251.
[2] Hobart v. Beers, 26 Kan. 329.
[3] Reformed Church v. Brown, 29 Barb. 335; 4 Abb. App. 31.
[4] Bristol v. Tracy, 21 Barb. 236.
[5] Weaver v. Wisner, 51 Barb. 638.
[6] Moore v. Detroit etc. Works, 14 Mich. 266.
[7] Taylor v. Williams, 6 Wis. 363.
[8] Waters v. Harvey, 3 Houst. 430.
[9] Gardner v. Clark, 21 N. Y. 399.

before a fixed time, and at a certain place, twelve thousand feet of clapboards, and sent to the place a smaller quantity, part according to contract and part not, but the plaintiff neglected, within a reasonable time after he was informed that the clapboards were at the place, to notify the defendant that he would not accept them;[1] where A contracted to deliver to B one hundred fish-stands of a certain description, and upon his tendering them, B received fifty, but refused to receive the other fifty, because they were not made according to the contract;[2] where a contract that an actor should appear at least seven times a week, and be paid one hundred dollars for each appearance, was violated by the manager's failure to provide employment for three weeks, but the actor subsequently appeared under the contract and received pay pursuant thereto.[3] Payment or part payment for work done is not, of itself, and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work.[4] To constitute a waiver, the acts or circumstances relied on to constitute it must have been performed or have transpired after the party against whom the waiver is urged knew, or should have known, the facts constituting the breach.[5] The receiving of articles contracted for, and putting them to use, will not estop a party from claiming damage if they shall prove defective.[6] A person not knowing anything about machinery was held not to have accepted water-wheels contracted to be well built, etc., by looking at and giving his note for them immediately after they were finished.[7]

2. Where the promisor disables himself from perform-

[1] Hale *v.* Taylor, 45 N. H. 405. And see Ketchum *v.* Wells, 19 Wis. 25.

[2] Freeman *v.* Skinner, 9 Ired. 32.

[3] Coghlan *v.* Stetson, 19 Fed. Rep. 727.

[4] Moulton *v.* McOwen, 103 Mass. 587; Morrison *v.* Cummings, 26 Vt. 486.

[5] Dodge *v.* Minn. etc. Roofing Co., 14 Minn. 49.

[6] Strawn *v.* Cogswell, 28 Ill. 457; Veazie *v.* Bangor, 51 Me. 509; Van Buskirk *v.* Murden, 22 Ill. 446; 74 Am. Dec. 163; Monroe etc. University *v.* Broadfield, 30 Ga. 1; Mitchell *v.* Wiscotta etc. Co., 3 Iowa, 209.

[7] Robinson *v.* Brinson, 20 Tex. 438.

ing the contract on his part, here he excuses the performance of all conditions precedent to his liability.[1]

Upon an executory contract for the sale of goods to be manufactured and delivered, if the buyer afterwards give notice to the seller that he no longer wants the goods, and will refuse to accept or pay for them, the seller is thenceforth discharged from the condition precedent of manufacturing or delivering them, and without doing so, may claim damages for non-completion of the contract by the buyer.[2] An employer may be liable for a breach of contract in not allowing the other party to do the work, who may then claim damages without completion.[3]

ILLUSTRATIONS.—A agrees to lease land to B upon tender to him of a certain amount of money. Before the time arrives, A conveys the property to a third person. A becomes at once liable to B: *Lovelock* v. *Franklyn*, 8 Q. B. 371. A contract was made for the sale of a stack of hay, to be delivered upon the request of the buyer as he might want it. The seller afterwards sold and disposed of the hay to another person. *Held*, that a request was no longer necessary as a condition precedent to charging the seller for not delivering, because he had disabled himself from delivering it: *Bowdell* v. *Parsons*, 10 East, 359. A man promises to marry one person, and afterwards marries another. *Held*, that he thereby disables himself from performing the promise, and therefore dispenses with a request to perform it, or the lapse of the time appointed, or any other conditions: *Short* v. *Stone*, 8 Q. B. 358. By agreement between plaintiff and defendant, the former was to give a deed of conveyance to the latter, who was to pay a certain sum therefor, and procure a sheriff's deed of the property sold for unpaid taxes to be made to plaintiff. *Held*, that plaintiff could not recover the consideration agreed, without offering the deed to defendant, although the latter had taken the sheriff's deed in his own name, and had not conveyed to plaintiff: *Dearth* v. *Williamson*, 2 Serg. & R. 493; 7 Am. Dec. 652. A instituted suit to have a certain contract rescinded, and agreed for a consideration to pay B a certain sum when such rescission was obtained. A afterwards compromised the suit, and prevented the rescission of the contract. *Held*, that he was liable to B: *Jones* v. *Walker*, 13 B. Mon. 163; 56 Am. Dec. 557.

[1] Leake on Contracts, 668; Williams v. Bank, 2 Pet. 102. And a demand is unnecessary: Delamater v. Miller, 1 Cow. 75; 13 Am. Dec. 512.

[2] Cort v. R. R. Co., 17 Q. B. 127; 20 L. J. Q. B. 460.

[3] Pontifex v. Wilkinson, 1 Com. B. 75.

§ 2511. Conditions Subsequent — Contracts Terminable upon. — A contract may provide, either expressly or impliedly, that upon the happening of some event or contingency it shall cease and be discharged.[1] Thus leases are commonly made determinable by notice. Leases are also commonly made subject to conditions of forfeiture upon default of the tenant, as for non-payment of rent, not repairing, or other breach of covenant. A contract of sale of goods may be made upon the express condition that in case of a breach of warranty of the goods sold, the buyer may rescind the contract, and return the goods and recover the price paid. Contracts of hire of personal services are commonly made determinable by notice to be given by either party to put an end to the engagement; and in many kinds of hiring and service certain notices for determining the contract are impliedly imported by usage or rules of law, in the absence of express stipulation to that effect.[2] Whether conditions are precedent or subsequent is to be determined by the intent of the parties, as collected from the contract, etc., whatever may be the order in which they are placed, or the manner in which they are expressed.[3] The question whether an agreement is void for breach of condition subsequent is proper for a court of law; and until the

[1] In an English case (Llanelly R. R. Co. *v.* R. R. Co., L. R. 8 Ch. 949), a contract was made between two railroad companies for giving to one of them running power over the lines of the other, and making permanent provisions for the exercise of the power, but without mentioning any limit of time or any mode of terminating the power; it was held that, considering the perpetuity of the legal personalty of the contracting parties and of the subject-matter, the contract must have an indefinite duration, according to the *prima facie* construction of its terms, and that there was no implied condition to terminate it by notice or otherwise. "*Prima facie*," said the court, "every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination."

[2] Leake on Contracts, 670–673.

[3] Gardiner *v.* Corson, 15 Mass. 500; Tileston *v.* Newall, 13 Mass. 406; Finlay *v.* King, 3 Pet. 374; Barruso *v.* Madan, 2 Johns. 145; Johnson *v.* Reed, 9 Mass. 83; 6 Am. Dec. 36; Barry *v.* Alsbury, 6 Litt. 151.

question is so determined, equity will not restrain the parties from acting under the agreement.[1] The performance of a condition subsequent is excused where it is impossible by the act of God.[2]

§ 2512. **Alternative Promises—Election.**—A promise may be alternative, i. e., to perform one of two or more different acts, either at the election of the promisor or of the promisee. If the promisor have the election, he can be charged with a breach only when he refuses to perform both. As a rule, the person who is to perform the contract has a right to elect which one of the alternative promises he will perform;[3] but the election may be expressly given to the promisee.[4] If the promisee have the election, he must generally give notice of his election to the promisor before he can charge him.[5] If the promisor has a right to do one of two things by a given day, his right of election is lost if that day passes without his electing.[6] A promise to pay a certain amount of money on a given day, with a stipulation following that it may be discharged in some other commodity, becomes an absolute promise to pay money, if that other commodity is not paid on the day.[7] If a person receives specific articles of another, and promises to return them within a certain time or pay a fixed price, it is the duty of the promisor to ascertain from the promisee the place where he will receive the articles.[8] An election once made is final and irrevocable.[9]

[1] Livingston *v.* Tompkins, 4 Johns. Ch. 415; 8 Am. Dec. 598.

[2] People *v.* Kingston Turnp. Co., 23 Wend. 193; 35 Am. Dec. 551. See next chapter, Impossibility of Performance.

[3] Metz *v.* Albrecht, 52 Ill. 491; Norris *v.* Harris, 15 Cal. 226; Mayer *v.* Dwinell, 29 Vt. 298; Smith *v.* Sanborn, 11 Johns. 59; Disborough *v.* Neilson, 3 Johns. Cas. 81; Choice *v.* Moseley, 1 Bail. 136; 19 Am. Dec. 661. Provided he makes it before he is in default: Stephens *v.* Howe, 34 N. Y. Sup. Ct. 133.

[4] See Norris *v.* Harris, 15 Cal. 226.

[5] Center *v.* Center, 38 N. H. 318.

[6] Choice *v.* Moseley, 1 Bail. 136; 19 Am. Dec. 661; Roberts *v.* Beatty, 2 Penr. & W. 63; 21 Am. Dec. 410.

[7] Baker *v.* Todd, 6 Tex. 273; 55 Am. Dec. 775; Plummer *v.* Keaton, 9 Yerg. 27; Kalkman *v.* Bayles, 17 Cal. 291.

[8] White *v.* Perley, 15 Me. 470.

[9] Brown *v.* Ins. Co., 1 El. & E. 853; Gath *v.* Lees, 3 Hurl. & C. 558.

§ 2513. Contracts not Entirely Performed — When Party may Recover for Part. — Where a contract is severable, an action may be maintained on it before all its promises have been performed; as where it appears from its terms that the parties intended it to be divisible.[1] The consideration to be paid, not the subject or thing to be performed, it is said, determines whether a contract is entire or severable. A contract consisting of several distinct items, and founded on a consideration which is apportioned to each item, is severable.[2] After a part delivery of goods, the vendor, being unable to deliver the whole quantity sold, may recover the stipulated price of those actually delivered, less the damages arising from the non-delivery of the whole.[3] Contracts like the following have been held severable, and a recovery allowed for a part, viz.: A contract to repair a vessel;[4] a contract to deliver thirty tons of starch per year, for two years;[5] a contract to deliver twelve thousand carboys of oil of vitriol, of a specified quality and price, in tanks, at the factory of a party, two thousand monthly, in daily deliveries, as wanted, settlements monthly, in his paper, at four months;[6] a contract for work, consisting of separate items, the price being apportioned to each item, or left to implication of law;[7] a contract to cut and deliver at M.'s mill one million feet of merchantable logs, within the year, at four dollars and twenty-five cents per thousand feet, to be scaled and received as each one hundred thousand feet were placed in a certain creek;[8] a contract to deliver fifty thousand tons of coal in a year, in shipments at the rate of six thousand tons per month, at the buyer's option, on notices to be given on a certain day in each month for the quantity required for the succeeding

[1] Jackson *v.* Cleveland, 15 Wis. 107.
[2] Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351.
[3] Cole *v.* Swanston, 1 Cal. 51; 52 Am. Dec. 288.
[4] Baeder *v.* Carnie, 44 N. J. L. 208.
[5] Mixer *v.* Williams, 17 Vt. 457.
[6] Maryland Fertilizing etc. Co. *v.* Lorentz, 44 Md. 218.
[7] Dibol *v.* Minott, 9 Iowa, 403.
[8] Tenny *v.* Mulvaney, 8 Or. 129.

month;[1] a contract to bore five wells, at one dollar per foot, and to furnish pipe at thirty-five cents per foot, and pumps and other appliances at prices specified for each separately, it being stipulated that "in case of failure to get a good supply of water," the borer should have "no pay";[2] a contract to make four hundred thousand brick, for a certain sum per thousand, to be paid as fast as the bricks were burned.[3]

If, after part performance of the consideration by the one party, the completion be refused or prevented by the other party, the former may insist upon his rights under the contract; but he may, in some cases, have the option to treat the contract as rescinded, and to charge the other party with a new contract arising in respect of the consideration executed, as having been executed at his request, or as having been accepted by him.[4]

ILLUSTRATIONS.— A person ordered of a publisher a work to be delivered in twenty-four monthly parts. After receiving eight parts, he refused to receive more. *Held*, that, having put an end to the contract by his refusal, he might be charged upon a new contract to pay the value of the parts received: *Mavor* v. *Pyne*, 3 Bing. 285. A publisher had engaged an author to write a treatise for a periodical publication, and during the progress of the treatise, abandoned the publication. *Held*, that the author might treat the contract as rescinded, and claim the value of the work done, without completing the treatise, as he was not obliged to tender it for publication in any other form than that for which he had contracted to write it: *Planche* v. *Colburn*, 8 Bing. 14. Plaintiff contracted to sell and deliver 699 boxes of glass to defendant, delivery to be made at one time. Prior to any delivery, the defendant wrote to plaintiff, asking for immediate delivery of a small portion, and plaintiff thereupon delivered 365 boxes. The defendant received and used this quantity, and afterwards wrote that he wished the order completed in a reasonable time. A correspondence ensued as to the terms of the agreement. The plaintiff subsequently offered to complete, but defendant declined, on the ground that the time had elapsed. *Held*, that the plaintiff

[1] Scott v. Coal Co., 89 Pa. St. 231; 33 Am. Rep. 753.
[2] Spear v. Snider, 29 Minn. 463.
[3] Snook v. Fries, 19 Barb. 313.
[4] Leake on Contracts, 65; Blood v. Enos, 12 Vt. 625; 36 Am. Dec. 363.

could recover for the amount delivered: *Avery* v. *Wilson*, 81 N. Y. 341; 37 Am. Rep. 503. A contracted with the government for the manufacture of fire-arms. When the contract was partially completed, the government refused to accept the balance of the fire-arms, on account of a defect in the size of the caliber, for which the contractor was in no wise accountable. *Held*, that the contractor was not bound to complete the contract, but was entitled to recover a fair compensation for the expense he had incurred under it: *In re Lee*, 4 Ct. of Cl. 156. A agreed to make and put in place certain church-fixtures. He was to be paid on the completion and acceptance of the work. Before its completion and acceptance, the church burned down. *Held*, that A could recover for as much at he had done up to the time of the fire: *Haynes* v. *Baptist Church*, 88 Mo. 285; 57 Am. Rep. 413.

§ 2514. When Recovery cannot be had for Part Completed. — If a person contracts for the performance of work or services in consideration of a payment to be made on completion, and the further performance is prevented by some accident or event that may excuse the non-completion, yet if there be no default of the other party, he has no claim for the part performance before the prevention occurred.[1] Especially is this so where the failure to complete is the fault or willful act of the promisor.[2] Thus under an entire contract for the building of a house, if the property is destroyed before its completion, the builder can recover nothing.[3] A contract for the digging of an artesian well, which, in express terms, provides that the contractor shall be entitled to be paid for work done thereunder "only on the completion of the whole work," is an entire contract.[4] Where a contract is entire, and one

[1] Leake on Contracts, 69; Cutter *v.* Powell, 6 Term Rep. 320; 2 Smith's Lead. Cas. 1. See Title Agency — Master and Servant, where this topic is discussed at length: Sickels *v.* Pattison, 14 Wend. 257; 28 Am. Dec. 527; Bassett *v.* Child, 11 Ill. 569; Butler *v.* Butler, 77 N. Y. 472; Batre *v.* Simpson, 4 Ala. 305; Cunningham *v.* Jones, 20 N. Y. 486.

[2] Winstead *v.* Reid, Busb. 76; 57 Am. Dec. 571; Springdale Association *v.* Smith, 32 Ill. 252.

[3] Partridge *v.* Forsyth, 29 Ala. 200; Brumby *v.* Smith, 3 Ala. 123; Shanks *v.* Griffin, 14 B. Mon. 153; Newman Lumber Co. *v.* Purdam, 41 Ohio St. 373; Tompkins *v.* Dudley, 25 N. Y. 272; 82 Am. Dec. 349.

[4] Simonds *v.* Pearce, 31 Fed. Rep. 137.

party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for part performance.[1] In like manner courts will not enforce one part of a contract, not intended as a separate and independent transaction, and leave the other parts unfulfilled.[2]

Therefore contracts like the following have been held entire, and no recovery allowable for a part performance, viz.: A sale of an entire lot of growing timber, the price not being apportioned;[3] a contract for the delivery of a certain number of posts of a specified quality and size;[4] a contract to sell two bales of cotton, one at eighty cents per pound in Tennessee currency, and the other at sixty cents in greenbacks;[5] a contract by D. to peel a certain quantity of hemlock timber by a certain date, and start the bark on good roads convenient to the teams, D. to have half the bark, when so started, for his labor;[6] a contract to build a sewer for a city at a specified price per foot, to be done on a specified day.[7] On an entire contract for the sale of goods to be paid for on delivery, a delivery of part of the goods does not entitle the seller to recover.[8]

ILLUSTRATIONS.—The plaintiff contracted to erect certain machinery on the defendant's premises, the price to be paid on completion of the whole. In the course of the work, the machinery and premises were destroyed by an accidental fire. *Held*, that there was no claim for the portions of the work which were done before the fire: *Appleby* v. *Myers*, L. R. 2 Com. P. 651. A printer was engaged to print a work. The work was destroyed by fire before delivery. He cannot recover the price: *Adlard* v. *Booth*, 7 Car. & P. 108. A dentist undertook to fit and deliver a set of artificial teeth, and during the progress of the

[1] Galvin v. Prentice, 45 N. Y. 162; 6 Am. Rep. 58.
[2] Lutz v. Thompson, 87 N. C. 334; West Republic Mining Co. v. Jones, 108 Pa. St. 55.
[3] Alcott v. Hugus, 105 Pa. St. 350.
[4] Rockford etc. R. R. Co. v. Lent, 63 Ill. 288.
[5] Barker v. Reagan, 4 Heisk. 590.
[6] Hartley v. Decker, 89 Pa. St. 470.
[7] Coburn v. Hartford, 38 Conn. 290.
[8] Solomon v. Neidig, 1 Daly, 200; Dula v. Cowles, 7 Jones, 290; 75 Am. Dec. 463.

work the person who gave the order died. *Held*, that there was no claim against the executor for the work expended upon the unfinished article: *Lee* v. *Griffin*, 1 Best & S. 272. A agreed to keep twenty cows during the season for the dairying business, and sell the butter, made from said dairy of cows, to B, the time and place of delivery being specified, and the price, and B agreed to pay for the butter when delivered. At the commencement of the season, A put on twenty cows, two of which, ceasing to yield much milk, were sold about the 1st of September, and three more about the middle of October, and no substitutes were procured. *Held*, that A could not recover on the contract: *Oakley* v. *Morton*, 11 N. Y. 25; 62 Am. Dec. 49.

§ 2515. Contract Rescinded after Part Performance.— Where a contract after part performance is rescinded by the mutual agreement of the parties, the claim in respect of a consideration executed under it must be referred to the agreement for rescission; and in the absence of any express stipulation or implied understanding upon the matter, no claim can be made.[1]

[1] Leake on Contracts, 72.

CHAPTER CXIX.

IMPOSSIBILITY OF PERFORMANCE.

§ 2516. Performance of promise not excused because unreasonable or dangerous.
§ 2517. Impossibility known to both parties at time of contracting.
§ 2518. Impossibility at time of contract not known to either party.
§ 2519. Impossibility at time of contract known to one party only.
§ 2520. Subsequent impossibility of performance — Promisor not discharged.
§ 2521. Exceptions — Promisor discharged.
§ 2522. Performance rendered impossible by act of promisor.
§ 2523. Performance rendered impossible by act of promisee.
§ 2524. Performance rendered impossible by act of the law.
§ 2525. Impossibility of performance of one of alternative promises.

§ 2516. Performance of Promise not Excused because Unreasonable or Dangerous. — A contract is not invalid merely because it is unreasonable, dangerous, or burdensome.[1] One who sells goods to be delivered at a certain time cannot excuse himself by saying that he expected to buy the goods, but could not.[2] Where a party purchasing a coal mine agrees to diligently and constantly work it, he is not excused therefrom by stagnation of business and general stoppage of coal operations.[3] It is no excuse for a failure to deliver whisky according to contract that it was in war-time, and the whisky would have been likely to be seized.[4] Temporary incapacity from gross intoxication of a judge does not excuse the performance of an agreement to bring a case to trial before that judge.[5] A failure to perform a contract to dig a well will not be ex-

[1] Dewey *v.* Alpena School Dist., 43 Mich. 480; 38 Am. Rep. 206; Thourborough *v.* Whitacre, 2 Ld. Raym. 1164; Superintendent *v.* Bennett, 27 N. J. L. 513; 72 Am. Dec. 373; McDonald *v.* Gardner, 56 Wis. 35; Dermott *v.* Jones, 2 Wall. 1. In Vyse *v.* Wakefield, 6 Mees. & W. 456, the court say: "When a person enters into a contract, he is bound to perform it, whether reasonable or not. An obligation imposed by law is necessarily both reasonable and practicable; but a person may undertake by agreement to do any particular act, and if it is not reasonable, it is his own fault for entering into such a contract."

[2] Phillips *v.* Taylor, 49 N. Y. Sup. Ct. 318; Gilpins *v.* Consequa, Pet. C. C. 85; 3 Wash. 184; Youqua *v.* Nixon, Pet. C. C. 221.

[3] Anspach *v.* Bast, 52 Pa. St. 356.

[4] Elsey *v.* Stamps, 10 Lea, 709.

[5] Cobb *v.* Harmon, 23 N. Y. 148.

cused by accidents pertaining to the business,—mechanical results.[1] And non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.[2]

ILLUSTRATIONS. — School trustees agree to hire a teacher for a certain term. The subsequent outbreak of small-pox in the neighborhood makes it necessary for the trustees to close the schools. This does not discharge them from the contract: *Dewey* v. *Alpena School Dist.*, 43 Mich. 480; 38 Am. Rep. 206. To an action for breach of promise to marry, the defendant pleaded that after making the promise he became afflicted with a disease which rendered him incapable of marriage without danger to his life. *Held*, no defense: *Hall* v. *Wright*, El. B. & E. 765. Plaintiff entered into an agreement to furnish a certain number of horses to the government. Before the time that the horses were deliverable, the bureau of cavalry adopted new regulations in regard to the inspection and acceptance of horses. The plaintiff, claiming that the new rules made it impossible for him to obtain horses, abandoned his contract, without bringing or tendering any horses for inspection, and sued the government for the profits he might have made. *Held*, that he could recover nothing: *In re Smoot*, 15 Wall. 36. A, of New York, contracted with B, February 22d, for the prompt shipment of a lot of old iron from Europe. The shipment was made the next day from a German port, the river below which was frozen over, and remained closed to navigation until April. A refused to accept the iron. Similar iron could have been shipped promptly from other ports. *Held*, that A was justified in his refusal: *Tobias* v. *Lissberger*, 105 N. Y. 404; 59 Am. Rep. 509. The plaintiff contracted "to excavate and build a good, firm, and substantial sewer," specifying particularly the prices to be paid for "all the excavation, whether hard-pan, quicksand, caves, or otherwise," and "for the blasting and removing of rocks," and claimed in this suit extra payment above the contract price, which he admitted had been paid. *Held*, that no evidence was admissible to show that extra work had been done, or to show that it was rendered necessary by the discovery on the line of the sewer of a kind of rock not before known in New York, and much more difficult than those usually found of removal, and of a quality which could not possibly have been contemplated in making the contract: *Devlin* v. *Mayor etc. of New York*, 4 Duer, 337; *Sherman* v. *Mayor*, 1 N. Y. 316.

[1] Janes *v.* Scott, 59 Pa. St. 178; 98 Am. Dec. 329.

[2] Williams *v.* Vanderbilt, 28 N. Y. 217; 84 Am. Dec. 333.

§ 2517. Impossibility Known to Both Parties at Time of Contracting. — Where the impossibility is known to the parties at the time of making the agreement, there can be no intention of performing it on the one side, and no expectation of performance on the other, and therefore the essentials of a valid promise in regard to such act are wanting.[1]

ILLUSTRATIONS. — A charter-party contained a covenant that the ship should sail on or before the 12th of February. It was executed on the 15th of March. *Held*, that the covenant, being impossible at the time when the deed took effect, was wholly nugatory: *Hall* v. *Cazenove*, 4 East, 477. A lease for a certain term contained a covenant to insure during the term. It was not executed until some years after the commencement of the term. *Held*, that the lessee could not be in default for not insuring until a reasonable time had elapsed for him to insure after the execution of the lease: *Doe* v. *Ulph*, 13 Q. B. 204. A contract in writing was made as follows: "In consideration of A B entering the west half of the northeast quarter of section 35, in township 13, I bind myself that the said eighty acres of land shall sell, on or before the 1st of October next, for two hundred dollars or more, and the said A B agrees to give me one half of the amount over two hundred dollars said land may sell for, in consideration of my warranty. C D. I agree to the above contract. A B." *Held*, that the contract was void as binding C D to the performance of a legal impossibility, inasmuch as he had no power to compel the sale of the land on the day named: *Stevens* v. *Coon*, 1 Pinn. 356.

§ 2518. Impossibility at Time of Contract not Known to Either Party. — Where parties make an agreement, and they are ignorant at the time that performance of the contract is impossible, here there is no contract, if it appear, upon the construction of the agreement, that it was intended to be conditional upon the supposed possibility of performance. But if there was an absolute unconditional contract not showing any intention that the possibility of performance was an implied condition, here the parties are bound, notwithstanding that at the time the performance was impossible.[2]

[1] Leake on Contracts, 656; Stevens v. Coon, 1 Pinn. 356.

[2] Leake on Contracts, 689.

ILLUSTRATIONS. — A sells B a cargo of goods then supposed by both A and B to be at sea. It turns out that the cargo at the time had been sold by reason of sea damage. *Held*, that the contract implied that the cargo was at the time in existence, and the contract is void: *Couturier* v. *Hastie*, 9 Ex. 102; 5 H. L. Cas. 673. A sells B an annuity on the life of C. *Held*, that, C being dead at the time, unknown to A and B, the contract is void: *Strickland* v. *Turner*, 7 Ex. 208. In a lease for the working of potter's clay at a rent or royalty of so much per ton, the lessee covenanted to raise an amount of not less than one thousand tons of clay in each year of the term. *Held*, that the covenant must be construed with reference to the supposition by both parties that there existed sufficient clay for its performance, and that if there was not sufficient, the covenant did not apply: *Clifford* v. *Watts*, L. R. 5 Com. P. 577. A person entered the service of a company in consideration of a certain salary, and of being allowed to receive the dividends or profits upon a certain amount of stock during the time of his employment by the company, which was not fixed. No dividend was declared until he had left the service of the company, when a dividend was declared of nearly one hundred per cent. *Held*, that it could not be apportioned in favor of such servant: *Clapp* v. *Astor*, 2 Edw. Ch. 379. On the sale of a ship, the vendor covenanted that he had then power to sell and assign the ship to the buyer. *Held*, that the covenant was absolute, and not conditional upon the existence of the ship; and that it was broken if the ship had ceased to exist as a ship, at the time of the sale, although both parties might have been ignorant of it: *Barr* v. *Gibson*, 3 Mees. & W. 390. A contract was made for the sale and delivery of goods on the arrival of a ship. *Held*, that the seller was responsible for non-delivery, although the goods intended to be sold were not on board, as he expected, there being no condition expressed in the contract that the goods should be on board: *Hale* v. *Rawson*, 4 Com. B., N. S., 85. A lease was made of coals and minerals in which the lessee covenanted to raise a certain quantity in each year, and pay a royalty per ton upon the same, or to pay that amount of money as fixed rent, whether the coals were raised or not. *Held*, that there was no implied condition that there should be coals to that extent, and that the whole rent was payable, although the stipulated quantity could not be raised: *Marquis of Bute* v. *Thompson*, 13 Mees. & W. 487.

§ 2519. Impossibility at Time of Contract Known to One Party only. — Where the impossibility is known to the promisor at the time of making his promise, but not

known to the promisee, he must be taken to intend to make himself absolutely liable.[1] Thus a covenant to pay a sum of money, "when I collect the money on a bond on which suit is pending," is broken if there is no such bond or suit pending.[2] If the impossibility of performance were known to the promisee, though not known to the promisor, it could not be accepted by the promisee with the understanding or expectation that it would be carried out, and therefore would not be binding.[3]

ILLUSTRATIONS. — A married man promised to marry a woman who was then unaware of his being married. *Held*, that he was absolutely bound by his promise: *Wild* v. *Harris*, 7 Com. B. 999; *Milward* v. *Littlewood*, 5 Ex. 775.[4] By a charter-party the freighter undertook to load "with the usual dispatch of the port," which he knew he was then incapable of doing by reason of his previous engagements with other vessels that had precedence by the rules of the port. *Held*, that he was absolutely bound by his contract to load, and responsible for the delay: *Ashcroft* v. *Colliery Co.*, L. R. 9 Q. B. 540.

§ 2520. Subsequent Impossibility of Performance — Promisor not Discharged. — Where the performance becomes impossible subsequent to the making of the contract, the general rule is that the promisor is not therefore discharged. As said in an old case:[5] "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, there the law will excuse him; but where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[6]

[1] Leake on Contracts, 692.

[2] Bullock *v.* Pottinger, 3 J. J. Marsh. 94; 19 Am. Dec. 164.

[3] Leake on Contracts, 692.

[4] Parke, B., saying: "The promise to marry implies on his part that he is then capable of marrying, and he has broken that promise at the time of making it."

[5] Paradine *v.* Jane, Aleyn, 26.

[6] Booth *v.* Rolling Mill Co., 60 N. Y. 487; Worthington *v.* Ins. Co., 41 Conn. 401; 19 Am. Rep. 495; Tompkins *v.* Dudley, 25 N. Y. 272; 82 Am. Dec. 349; Stees *v.* Leonard, 20 Minn. 494; Boyle *v.* Agawam Canal Co., 22 Pick. 381; 33 Am. Dec. 749; Oakley *v.* Morton, 11 N. Y. 25; 62 Am. Dec. 49; School

ILLUSTRATIONS. — A agrees to provide a ship with a cargo of guano at a certain port. It is no defense that A finds it im-

Trustees *v.* Bennett, 27 N. J. L. 513; 72 Am. Dec. 373; Dermott *v.* Jones, 2 Wall. 1; Bunnby *v.* Smith, 3 Ala., N. S., 123; Stephens *v.* Vaughan, 4 J. J. Marsh. 206; 20 Am. Dec. 216; Singleton *v.* Carroll, 6 J. J. Marsh. 527; 22 Am. Dec. 95; Wells *v.* Calnan, 107 Mass. 517; 9 Am. Rep. 65; Dist. Township *v.* Smith, 39 Iowa, 11; 18 Am. Rep. 39; Bacon *v.* Cobb, 45 Ill. 53; Schwartz *v.* Saunders, 46 Ill. 22; Cassidy *v.* Clark, 7 Ark. 131; Graves *v.* Berdau, 29 Barb. 101; Cobb *v.* Harmon, 29 Barb. 476; Kein *v.* Tupper, 43 How. Pr. 451; Van Buskirk *v.* Roberts, 31 N. Y. 675. In School District *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371, the court say: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance before that time becomes unlawful. Any seeming departure from this principle of law (and there are some instances that at first view appear to be of that character) will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself; such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives the horse dies, in which case the parties are held to have contracted in view of that contingency. In these and like cases the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued, so that there would be an object and an interest in the execution of the contract. These and a few other exceptions of a similar character are to be found in the books; but they are not so much exceptions, after all, as cases where the intention of the parties is presumed or inferred, though not expressed, from their peculiar situation, or from the subject-matter itself. It is said, however, that there is one real exception to the rule, viz., where the act of God intervenes to defeat the performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case, which we will mention. The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law. It is further said that the books declare that where the condition of a bond becomes impossible by the act of God, or is prohibited by the law, the condition becomes void, and the bond is absolute; or if it be a subsequent condition for the divesting of title, that the condition becomes void, and the title remains good. Whether even this is true without some qualification, we are not quite confident, nor will we stop to consider; but if so, still the doctrine of that class of cases does not reach the present one, as the same books abundantly declare. In Platt on Covenants, page 582, it is said that the rule laid down in Paradine *v.* Jane, Aleyn, 27, has often been recognized in courts as a sound one, viz., where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenants to repair, the circumstance of the prem-

possible to obtain the guano: *Hills* v. *Sughrue*, 15 Mees. & W. 253. A ship-owner agrees to proceed to the port of lading by a certain date. He is not excused by the impossibility caused by contrary winds and bad weather, unless he has expressly excepted such events in the charter-party: *Shubrick* v. *Salmond*, 3 Burr. 1637. A agrees and covenants to pay rent for a house for a certain term. Before the end of the term the house is destroyed by fire. This does not discharge A: *Hallett* v. *Wyle*, 3 Johns. 44; 3 Am. Dec. 457. The rule is now generally different by statute. A person covenanted to build a bridge, and keep it in repair for a certain time. *Held*, that he was bound to rebuild the bridge, although it was broken down by an extraordinary flood: *Brecknock Navigation* v. *Pritchard Co.*, 6 Term Rep. 750. A bond was conditioned for the building of a bridge on a certain site, and to maintain it for seven years. *Held*, valid, and the obligee liable for damages for a breach of the condition, although the maintenance of a bridge on the site was found to be impossible: *Errington* v. *Aynesly*, 2 Brown Ch. 341. An insurance company had undertaken, having the option to do so, to reinstate the insured premises, which had been damaged by fire. *Held*, not to be excused from their contract by reason of the public authorities having subsequently taken down the premises as dangerous, although on account of defects not caused by the fire: *Brown* v. *Royal Ins. Co.*, 1 El. & E. 853; 28 L. J. Q. B. 275. A builder contracted to do certain specific works within a fixed time, including such alterations as might be ordered according to the contract, unless an extension of time were allowed for them, under penalties for delay. *Held*, that he was bound to complete within the time, or to pay the penalties; and it was held no excuse that alterations duly ordered without allowing an extension of time rendered performance impossible; nor could any condition be implied in variance of the contract for such a contingency: *Jones* v. *St. John's College*, L. R. 6 Q. B. 115. A contracts to take B into a firm of which he is a member. It is no excuse for A's failure

ises being consumed by lightning, or thrown down by an inevitable flood of water or an irresistible tornado, will not effect his discharge. But where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, as in the case of waste where the house is destroyed by a tempest. In some cases, where the act of God renders performance absolutely impossible, the covenants shall be discharged *quia impotentia excusat legem*, as, if a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest; or if one covenants to serve another for seven years, and he dies before the expiration of the seven years, the covenant is discharged, because the act of God defeats the possibility of performance. I should rather say, because it is implied that the thing shall exist or life be prolonged, or else the contract of course cannot be broken."

that he cannot obtain the consent of the other partners: *McNeil* v. *Reed*, 9 Bing. 68. A agrees to build a house for B on his land. The house, before it is finished, is burned down. A is not discharged from his contract: *Adams* v. *Nichols*, 19 Pick. 275; 31 Am. Dec. 137; *Fildew* v. *Besley*, 42 Mich. 100; 36 Am. Rep. 433. A person agrees to deliver a specified quantity of corn "as early next fall as the same will be dry enough to house, unavoidable accidents only excepted." The crop fails on account of a drought. *Held*, no excuse for non-delivery: *McGehee* v. *Hill*, 4 Port. 170; 29 Am. Dec. 277. A contract is made to deliver corn within twenty days. Performance is not excused by the freezing on the eleventh day of a river on which it is being transported: *Eugster* v. *West*, 35 La. Ann. 119; 48 Am. Rep. 232. The plaintiff bound himself to winter a certain number of cattle for the defendant, and the defendant obligated himself to pay a stipulated sum for every head delivered in the spring "in good, thrifty order and condition." *Held*, that the plaintiff could not recover for the keeping of any cattle that died, or were not delivered in good, thrifty order and condition, although their death or bad condition might not have resulted from any want of care on his part: *Stonam* v. *Waldo*, 17 Mo. 489.

§ 2521. **Exceptions — Promisor Discharged.** — But where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse the performance.[1] Thus contracts to perform personal acts are considered as made on the implied condition that the party shall be alive or shall be capable of performing the contract.[2]

[1] Dexter *v.* Norton, 47 N. Y. 62; 7 Am. Rep. 415; Singleton *v.* Carroll, 6 J. J. Marsh. 527; 22 Am. Dec. 95.

[2] In an English case it is said: "There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e. g., promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party, and therefore in such cases the contract is in terms broken if the promisor dies before fulfillment. Yet it was very early determined that if the performance is personal, the executors are not liable. In those cases the only ground on which the parties or their executors can be excused from the consequence of the breach of the contract is, that, from the nature of the contract, there is an implied condition of the continued existence of the life of the contractor": Taylor *v.* Caldwell, 3 Best & S. 835; Knight *v.* Bean, 22 Me. 531; Spalding *v.* Rosa, 71 N. Y. 40; 27 Am. Rep. 7; Yerrington *v.* Greene, 7 R. I. 589; 84 Am. Dec. 578; Stewart *v.* Loring, 5 Allen, 306; 81 Am. Dec. 747.

So where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract.[1]

ILLUSTRATIONS. — An artist agrees to perform at a concert on a certain day. When the day arrives the singer is sick and unable to perform. *Held*, a good excuse: *Robinson* v. *Davison*, L. R. 6 Ex. 269. A agrees to pay B a certain sum for tuition during a certain term. During all the term A is ill. *Held*, that A is thereby discharged: *Stewart* v. *Loring*, 5 Allen, 306; 81 Am. Dec. 747. The defendants agreed with the plaintiffs, proprietors of a theater, to furnish the Wachtel Opera Troupe, to give a number of performances in their theater, the receipts to be divided in a specified manner. Wachtel, from whom the company took its name, and by whose name it was known, was the leader and chief attraction, and his connection with the company was the inducement that led the plaintiffs to make the agreement. Wachtel became unable to sing, in consequence of illness, and the defendants consequently did not furnish the troupe. In an action for breach of agreement, *held*, that Wachtel's appearance was the principal thing contracted for, and was of the essence of the contract; that plaintiff would not have been bound to accept the services of the company without him; and that his sickness and inability to sing constituted a good excuse for non-performance of the agreement: *Spalding* v. *Rosa*, 71 N. Y. 40; 27 Am. Rep. 7. An agreement was made for giving a series of concerts at a music-hall, by which one of the parties was to let the use of the hall for a stated daily payment, and to provide certain other requirements, and the other party was to provide the performers and to take the money. Before the time arrived the hall was accidentally destroyed by fire. *Held*, that the agreement was impliedly conditional upon the continued existence of the hall, and was put an end to by its destruction, and that no claim could be made under it for not letting the hall: *Taylor* v. *Caldwell*, 3 Best & S. 838.

[1] Taylor *v.* Caldwell, 3 Best & S. 838; Dexter *v.* Norton, 47 N. Y. 62; 7 Am. Rep. 415; Walker *v.* Tucker, 70 Ill. 527; Lord *v.* Wheeler, 1 Gray, 282; Clark *v.* Franklin, 7 Leigh, 1; Greene *v.* Linton, 7 Port. 133; 31 Am. Dec. 707; Powell *v.* R. R. Co., 12 Or. 488.

A contract was made for the construction and fitting of engines upon a ship then on a voyage, to be paid for by installments from time to time, according to the certified progress of the work. The work was commenced and payments made accordingly, but before the engines were completed ready for fitting, the ship was lost at sea. *Held*, that both parties were excused from further performance of the contract: *Anglo-Egyptian Nav. Co.* v. *Rennie*, L. R. 10 Com. P. 271. A covenant was made by a debtor with his creditor to pay the premiums on a policy of insurance effected with a certain insurance company. *Held*, to be impliedly conditional upon the continued existence of the company: *Garniss* v. *Heinke*, 40 L. J. Ch. 306. A company contracted to deliver from their mines a certain quantity of coal. At the date of entering into the contract they had the necessary facilities to enable them to comply with the contract, but before the time for delivery of a large portion of the coal, a flood swept away the means of transportation, so that the company could not fulfill their contract. *Held*, that they were excused from a compliance while they were thus prevented: *Lovering* v. *Buck Mountain Coal Co.*, 54 Pa. St. 291. The defendant contracted with the plaintiff to build a bridge in accordance with certain plans and specifications, and bound himself to keep such bridge in repair for the term of three years. *Held*, that he was not liable to rebuild if the bridge was destroyed by fire: *Livingston* v. *Graves*, 32 Mo. 479.

§ 2522. Performance Rendered Impossible by Act of Promisor. — Where a promise is rendered impossible by the act of the promisor, the contract is at once broken.[1] After a party has incapacitated himself from performing his contract, a demand of performance is not necessary to give a right of action.[2]

ILLUSTRATIONS. — An incoming tenant agreed to buy the straw upon a farm at a price to be fixed by valuation, and then consumed the straw before a valuation could be made, and so rendered it impossible. *Held*, that he was liable to pay the value, to be estimated by a jury: *Clarke* v. *Westrope*, 18 Com. B. 765. The sale of a business was made to be paid for by installments dependent in amount upon the profits. *Held*, to be an implied undertaking by the buyer to carry on the business, and that by discontinuing it so as to render it impossible to ascertain the

[1] Cape Fear etc. Nav. Co. *v.* Wilcox, 7 Jones, 481; 78 Am. Dec. 260; Sutton *v.* Tyrrell, 12 Vt. 79.

[2] Smith *v.* Jordan, 13 Minn. 264; 97 Am. Dec. 232.

price, he had broken the contract: *Telegraph Dispatch Co.* v. *McLean*, L. R. 8 Ch. 658. Upon a contract for the whole produce of a dairy for the year, the seller delivered a part, and then informed the purchaser that he had sold the product for the rest of the year to another, and had delivered part thereof. *Held*, that the seller had disabled himself to perform his contract, and therefore that the buyer might recover damages without any offer of performance on his part: *Crist* v. *Armour*, 34 Barb. 378.

§ 2523. Performance Rendered Impossible by Act of Promisee. — If the performance of a promise is rendered impossible by the act of the promisee, the performance is excused.[1]

ILLUSTRATIONS. — A contractor agreed to do certain work within a certain time. The employer ordered a number of alterations which prevented completion within that time. *Held*, that the performance was excused: *Westwood* v. *Secretary*, 11 Week. Rep. 261. A publisher engaged an author to write a treatise for a periodical publication, and before completion of the treatise, abandoned the publication. *Held*, that the author was excused from further writing, as it had become impossible to publish it in the manner stipulated, and entitled to claim remuneration for the part already written: *Planche* v. *Colburn*, 8 Bing. 14. A person employed an attorney to defend him against a criminal prosecution, and gave him his note for his fee. The person committed suicide before the trial. *Held*, that the attorney could recover on the note: *Mitcherson* v. *Dozier*, 7

[1] Marshall *v.* Craig, 1 Bibb, 379; 4 Am. Dec. 647; Kennedy *v.* Kennedy, 2 Bibb, 464; 5 Am. Dec. 629; Clement *v.* Clement, 8 N. H. 218; True *v.* Bryant, 32 N. H. 241; Black *v.* Woodrow, 39 Md. 194; Tone *v.* Doelger, 6 Robt. 251; Ashcroft *v.* Allen, 4 Ired. 96; Meyer *v.* Hallock, 2 Robt. 284; Hammer *v.* Breidenbach, 31 Me. 49; Dare *v.* Spencer, 3 Blackf. 491; Taylor *v.* Risby, 28 Hun, 141; Grice *v.* Noble, 59 Mich. 514. "It is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract; and it appears sufficient if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different": Panama Tel. Co. *v.* India Rubber Tel. Works, L. R. 10 Ch. 532; Majors *v.* Hickman, 2 Bibb, 218; Williams *v.* Bank of United States, 2 Pet. 102; Marshall *v.* Craig, 1 Bibb, 380; 4 Am. Dec. 647; Carrel *v.* Collins, 2 Bibb, 431; Morford *v.* Ambrose, 3 J. J. Marsh. 690; Crump *v.* Mead, 3 Mo. 233; Miller *v.* Ward, 2 Conn. 494; Clendennen *v.* Paulsel, 3 Mo. 230; 25 Am. Dec. 435; Webster *v.* Coffin, 14 Mass. 196; Seymour *v.* Bennet, 14 Mass. 268; Clark *v.* Moody, 17 Mass. 149; Cooper *v.* Mowry, 16 Mass. 7; Jones *v.* Walker, 13 B. Mon. 163; 56 Am. Dec. 557; Dodge *v.* Rogers, 9 Minn. 223; Cape Fear etc. Co. *v.* Wilcox, 7 Jones, 481; 78 Am. Dec. 260; Camp *v.* Barker, 21 Vt. 469.

J. J. Marsh. 53; 22 Am. Dec. 116. A lime-burner contracted with the receiver of a railroad to remove the ashes, etc., for a year from an ash-pit, for the cinders and coals to be found there. Before the expiration of the year the assistant general superintendent terminated the contract, on the ground of the jealousy of other lime-burners. *Held*, that the receiver must respond in damages: *Kerr* v. *Little*, 42 N. J. Eq. 528. A agreed to sell to B, at a stipulated price per ton, all the ice on a pond. In violation of the contract, A permitted another party to remove a portion of it. B refused to take that which remained. *Held*, that he was justified in so doing: *Murphy* v. *St. Louis*, 8 Mo. App. 483. By a contract between an attorney and his client, the former agreed to defend the latter on a charge of grand larceny for five hundred dollars. Part of the service was rendered, and the attorney was able and ready to go on, but the client fled from justice, and forfeited his recognizance. *Held*, that the attorney might, in an action against the client, recover the entire fee: *Bright* v. *Taylor*, 4 Sneed, 159. A agreed to make steel rails for B, B to give directions as to the drilling. This B failed to do, finally declaring the contract off. The directions were necessary, and B might have been justified in refusing to accept the rails had they not been drilled as he wished. *Held*, that B was liable for breach of contract: *Pittsburgh Bessemer Steel Rail Co.* v. *Hinckley*, 17 Fed. Rep. 584.

§ 2524. Performance Rendered Impossible by Act of the Law.— Where the performance is rendered impossible by the act of the law, there is no breach.[1] A charter-party for the loading of a cargo at a foreign port is excused by a declaration of war with that country rendering it impossible to provide or ship the cargo without an illegal act of trading with the enemy.[2] But the performance is not excused if prevented by the laws or acts of a foreign country.[3] A contract made in contemplation

[1] Wade *v.* Mason, 12 Gray, 335; 74 Am. Dec. 597; Livingston *v.* Tompkins, 4 Johns. Ch. 416; 8 Am. Dec. 598; Baker *v.* Johnson, 42 N. Y. 126. In Atkinson *v.* Ritchie, 10 East, 534, it is said: "No contract can be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law."

[2] Esposito *v.* Bowden, 7 El. & B. 763; 27 L. J. Q. B. 17; Reid *v.* Hoskins, 6 El. & B. 253; 26 L. J. Q. B. 6.

[3] Leake on Contracts, 713; citing Splidt *v.* Heath, 2 Camp. 57; Blight *v.* Page, 3 Bos. & P. 295; Barker *v.* Hodgson, 3 Maule & S. 267, the court in the last case saying: "If the per-

of the passage of legislative acts which were essential to the object of the contract, and the passage of which was confidently expected by both parties, cannot be enforced where the legislature refuses to pass those acts, and adopts other measures, entirely defeating the object of the parties in making the contract.[1]

ILLUSTRATIONS. — A lessor covenanted that neither he nor his assigns would permit any building upon a piece of land adjoining the demised premises. *Held*, to be discharged by a railroad company subsequently taking the land under compulsory powers given them by statute, who built a railroad station upon it: *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180. A promised to pay B a certain sum, provided B should perform military duty for A for six months, and before the expiration of the six months, peace was proclaimed, and A was discharged. *Held*, that he was not entitled to recover anything: *Jewell* v. *Thompson*, 2 Litt. 52. A general agent of a life insurance company was engaged for five years at a stipulated salary. Before the expiration of the five years, the company was enjoined from doing business, and a receiver was appointed. The proceedings were instituted by the superintendent of the insurance department, and prosecuted by the attorney-general. *Held*, that the agent had no claim upon the fund in the receiver's hands for damages for an alleged breach of contract: *People* v. *Globe Mutual Life Ins. Co.*, 91 N. Y. 174. A agreed to pay B a certain price per bushel for hauling all coal sold by A to C. C's business passed into the hands of a receiver, who purchased coal of A, under order of court, and employed A to haul it. *Held*, that B could not maintain an action against A for breach of contract: *Atkinson* v. *Schoonmaker*, 12 Mo. App. 425. Pending a suit, the court placed a manager in charge of the business of delivering ore to the defendant, under the contract which gave rise to the suit, and of receiving payment for the plaintiff. A creditor of plaintiff attached, in defendant's hands, money due plaintiff, who thereupon stopped payment, and the manager accordingly stopped delivery. *Held*, that defendant could not afterwards be compelled to receive the ore thus detained, the

formance of the covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and the defendant would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a lading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused from performing it, but must answer in damages."

[1] Miles v. Stevens, 3 Pa. L. J. 434.

original contract calling for the delivery of a certain quantity each month: *Lehigh Zinc and Iron Co.* v. *Trotter*, 42 N. J. Eq. 678.

§ 2525. Impossibility of Performance of One of Alternative Promises.—If a person contract to do one of two things in the alternative, and at the time of making the contract one of them is possible and the other impossible, it seems to be a general rule that he must perform that which is possible.[1] Where both alternatives are possible at the time of making the contract, and one of them subsequently becomes impossible, the question whether the other remains binding depends upon the construction of the contract as to the intention of the parties, under the circumstances.[2] Where one contract relates to separate matters, a breach as to one matter does not excuse the other party from performance as to the other matter.[3]

[1] Leake on Contracts, 716.

[2] In Barkworth *v.* Young, 4 Drew, 25, it is said: "It is improper to lay down any universal proposition either way; but the principle to be applied in each case is, that it must depend on the intention of the parties, to be collected from the nature and circumstances of the transaction and the terms of the instruments; and that if the court is satisfied that the intention of the parties was that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of these modes becomes impossible by the act God, he is still bound to perform it in the other way." But in New Hampshire it has been laid down that the obligor is excused from the performance of a disjunctive condition, if one of the alternative things becomes impossible of performance by the act of God or the fault of the other party: Smith *v.* Durell, 16 N. H. 344; 41 Am. Dec. 732.

[3] Tucker *v.* Billing, 3 Utah, 82.

CHAPTER CXX.

TENDER.

§ 2526. Tender defined — Effect of.
§ 2527. In what actions tender may be made.
§ 2528. Who may make tender, and to whom.
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§ 2530. At what time and place tender must be made.
§ 2531. In what money must tender be made.
§ 2532. Amount of tender.
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§ 2526. Tender Defined — Effect of. — A tender is an offer by a debtor to his creditor of the amount of the debt.[1] A tender properly made and pleaded is a complete answer to an action for the debt;[2] but the debtor, notwithstanding his tender is refused, must continue ready and willing to pay on demand.[3] The plea of tender should be accompanied by a payment into court of the money tendered; and the defendant, if he can maintain the plea, will then be entitled to judgment against the plaintiff for his costs of defense.[4] A plea of tender raises a presumption of

[1] Rapalje and Lawrence's Law Dictionary. "The law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made": Startup v. Macdonald, 6 Man. & G. 610.

[2] In Dixon v. Clark, 5 Com. B. 377, the court say: "The principle of the plea of tender is, that the defendant has been always ready to perform entirely the contract on which the action is founded, and that he did perform it, as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it."

[3] Dixon v. Clark, 5 Com. B. 378; Hesketh v. Fawcett, 11 Mees. & W. 356; Pulsifer v. Shepherd, 36 Ill. 512; Webster v. Pierce, 35 Ill. 158; Mason v. Groom, 24 Ga. 211; Lockhart v. Dewees, 1 Tex. 539; Brock v. Jones, 16 Tex. 461; Cary v. Bancroft, 14 Pick. 315; 25 Am. Dec. 393; Lanier v. Trigg, 6 Smedes & M. 641; 45 Am. Dec. 293. By a subsequent demand and refusal, the benefit of the tender is lost: Rose v. Brown, Kirby, 293; 1 Am. Dec. 22; Manny v. Harris, 2 Johns. 24; 3 Am. Dec. 389.

[4] Becker v. Boon, 61 N. Y. 317; Cuelen v. Green, 5 Harr. (Del.) 17; Jarboe v. McAtee, 7 B. Mon. 279; Clark v. Mullenix, 11 Ind. 532; Brooklyn Bank v. De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Spann v. Baltzell, 1 Fla. 301; 46 Am. Dec. 346. *Contra*, Loughborough v. McNevin, 74 Cal. 250; 5 Am. St. Rep. 435. The doctrine

indebtedness to the extent of the tender; and when it is brought into court, that amount is considered as stricken from the complaint; and if more is claimed, plaintiff proceeds for the excess of his demand above the tender only.[1] Where the tender merely defeats a particular remedy, but does not discharge a debt, it is not necessary to show continued readiness to pay or to bring the money into court.[2] In equity, a formal tender and payment into court is not necessary when an account must be stated before it can be ascertained what is due.[3]

The debtor must keep the money safely, so as to be ready at any time to produce it;[4] but he may use it,[5] and he need not have the identical money ready.[6] Where the sum tendered is too large, the debtor need not keep ready the whole sum tendered.[7] But the benefit of a tender is lost by subsequent demand and refusal.[8]

In the case of chattels, the tender of them at the proper time and place passes the title, and vests the property in the creditor;[9] and the debtor, where they are refused, holds them thereafter as the bailee of the other party,[10] and the creditor has lost his right to sue on the contract.[11] A tender of the amount due on a mortgage of realty on

that a strict and unconditional tender, followed by bringing the money into court, is necessary, in order that the tender may be regarded as a payment at the time, has no application to the tender required before an action for specific performance of a contract for the sale of real estate: Fall *v.* Hazelregg, 45 Ind. 576; 15 Am. Rep. 278.

[1] Supply Ditch Co. *v.* Elliott, 10 Col. 328; 3 Am. St. Rep. 586.

[2] Kortright *v.* Cady, 21 N. Y. 343; 78 Am. Dec. 145.

[3] Kline *v.* Vogel, 90 Mo. 239.

[4] Call *v.* Scott, 4 Call, 402; Stow *v.* Russell, 36 Ill. 18.

[5] Curtiss *v.* Greenbanks, 24 Vt. 536. But see Roosevelt *v.* Bank, 45 Barb. 579; Gray *v.* Angier, 62 Ga. 596.

[6] Colby *v.* Stevens, 38 N. H. 191; Michigan etc. R. R. Co. *v.* Dunham, 30 Mich. 128.

[7] Abel *v.* Opel, 24 Ind. 250.

[8] Rose *v.* Brown, Kirby, 293; 1 Am. Dec. 22.

[9] Barney *v.* Bliss, 1 D. Chip. 399; 12 Am. Dec. 697; Dewey *v.* Washburn, 12 Vt. 580; Slingerland *v.* Morse, 8 Johns. 474; Lamb *v.* Lathrop, 13 Wend. 95; 27 Am. Dec. 174; Des Arts *v.* Leggett, 16 N. Y. 552; Bradshaw *v.* Davis, 12 Tex. 366. *Contra*, McJilton *v.* Smizer, 18 Mo. 111; Weld *v.* Hadley, 1 N. H. 295; Fleming *v.* Potter, 8 Watts, 380; Stowell *v.* Read, 16 N. H. 20; 41 Am. Dec. 714.

[10] Coit *v.* Houston, 3 Johns. Cas. 243; Garrard *v.* Zachariah, 1 Stew. 272; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Lamb *v.* Lathrop, 13 Wend. 95; 27 Am. Dec. 174; Hayden *v.* Demets, 53 N. Y. 431.

[11] Mitchell *v.* Merrill, 2 Blackf. 87; 18 Am. Dec. 128.

the day it falls due discharges the mortgage; but if made after that day, it must be kept good.[1]

A tender after suit stops the running of interest on the debt.[2] It also bars the recovery of costs accruing subsequently,[3] but it does not bar the action or extinguish the debt.[4] So a tender of specific articles only exonerates the party from responsibility for their safe-keeping. As long as he continues in possession of the goods, he will be bound to deliver them on demand.[5] It is an admission of the debt to the amount tendered.[6]

§ 2527. In What Actions Tender may be Made. — In all cases where a person has agreed to pay money or deliver goods, the tender of them to the creditor has the

[1] Crain *v.* McGoon, 86 Ill. 431; 29 Am. Rep. 37. See Kortright *v.* Cady, 21 N. Y. 343; 78 Am. Dec. 145. So of a chattel mortgage: Tompkins *v.* Batie, 11 Neb. 147; 38 Am. Rep. 361.

[2] Dent *v.* Dunn, 3 Camp. 296; Raymond *v.* Bearnard, 12 Johns. 274; 7 Am. Dec. 317; Woodruff *v.* Trapnell, 12 Ark. 646; Hayes *v.* Thom, 28 N. H. 386; Cornell *v.* Green, 10 Serg. & R. 14.

[3] Hills *v.* Place, 7 Rob. (N. Y.) 289; 48 N. Y. 520; Carpenter *v.* Welch, 40 Vt. 251; Stowell *v.* Read, 16 N. H. 20; 41 Am. Dec. 714; Murray *v.* Windley, 7 Ired. 201, 47 Am. Dec. 324, the court saying: "In Haughton *v.* Leary, 3 Dev. & B. 21, it was expressly decided that a plea of tender after suit brought is, as a plea, no bar. A plea, then, of tender and refusal, aptly pleaded, and in due time, will bar the action, and throw upon the plaintiff the costs of the suit. But though the defendant may, by his negligence, subject himself to the payment of the costs already accrued, he may protect himself from all that may subsequently be incurred. When he only disputes the amount to which the plaintiff is entitled, he is at liberty to move the court for leave to pay into the office so much as he admits is due, together with all the costs which have accrued up to the time of making the motion; upon which the court makes the order, and the amount brought in is struck from the plaintiff's declaration. If the plaintiff accepts the money as the full amount due, the action is, of course, at an end; but he may deny that it is sufficient to satisfy his demands, and go on to trial. In that case, if the jury find that more is due the plaintiff than is brought in, the latter is entitled to a verdict for the overplus, and the costs are paid by the defendant. On the contrary, if they find it sufficient, the plaintiff pays all the costs incurred since the rule obtained. In no case can the defendant, after failing to make a tender at the proper time and pleading it in a proper manner, bring money into court but upon a rule first obtained: 1 Sellon's Pr. 305."

[4] Hills *v.* Place, 7 Rob. (N. Y.) 289; 48 N. Y. 520; Spann *v.* Baltzell, 1 Fla. 301; 46 Am. Dec. 347; Mohn *v.* Stoner, 11 Iowa, 30; Haynes *v.* Thom, 28 N. H. 386; Downer *v.* Sinclair, 15 Vt. 495. In Connecticut it is a defense to the action: Tracy *v.* Strong, 2 Conn. 659.

[5] Fisk *v.* Holden, 17 Tex. 408.

[6] Fisher *v.* Moore, 19 Iowa, 84; Munroe *v.* Chaldeck, 78 Ill. 429; Funk *v.* Coe, 4 G. Greene, 555; 61 Am. Dec. 141.

same effect as the actual performance by payment or delivery.[1] Likewise tender may be made where the demand is in the nature of a debt, where the sum is certain, or may be made certain by computation,[2] or where the claim is on a *quantum meruit;*[3] but not where the demand, whether in tort or contract, is for unliquidated damages.[4]

§ 2528. Who may Make Tender, and to Whom. — Tender may be made by the debtor himself, or by his agent, or by any one professing to act on his behalf, if it be afterwards adopted and ratified by the debtor.[5] Where the tender is made by a stranger, the creditor must be informed at the time on whose behalf it is made.[6] One has no right to make tender on his own behalf of the amount due on a mortgage, where he has no interest in the mortgaged premises or in making the tender.[7] A lessor may refuse a tender of the rent by one to whom the premises have been subleased in violation of the contract.[8]

The tender must be made to the creditor, or to one authorized to receive it.[9] It is a good tender if made to an attorney in whose hands the claim has been put for collection,[10] or his clerk;[11] or a clerk in a store, for goods

[1] Startup *v.* Macdonald, 6 Man. & G. 593.

[2] Green *v.* Shurtleff, 19 Vt. 592.

[3] Cox *v.* Brain, 3 Taunt. 95; Searle *v.* Barrett, 2 Ad. & E. 82.

[4] Searle *v.* Barrett, 2 Ad. & E. 82; Green *v.* Shurtleff, 19 Vt. 592. In Illinois, Michigan, Massachusetts, and New York, tender may be made (by statute) in actions of trespass: Stimson's American Statute Law, 4176; Warren *v.* Nichols, 6 Met. 261.

[5] Leake on Contracts, 867; Brown *v.* Dysinger, 1 Rawle, 408; Kincaid *v.* School District, 11 Me. 188.

[6] Mahler *v.* Newbaur, 32 Cal. 168; 91 Am. Dec. 571.

[7] Mahler *v.* Newbaur, 32 Cal. 168; 91 Am. Dec. 571; Sinclair *v.* Learned, 51 Mich. 335.

[8] Prieur *v.* Depouilly, 8 La. Ann. 399.

[9] Hornby *v.* Cramer, 12 How. Pr. 490; King *v.* Finch, 60 Ind. 420; Hargous *v.* Lahens, 3 Sand. 213. An agent of the defendants had been notified not to receive a tender, but to refer the plaintiff to a third person named, of which the plaintiff had notice. Held, that the plaintiff might seek the person to whom he had been so referred, or the defendants, at his election, and make a proper tender to either: Hoyt *v.* Hall, 3 Bosw. 42.

[10] Jackson *v.* Crafts, 18 Johns. 110; Billiott *v.* Robinson, 13 La. Ann. 529; Crozier *v.* Pilling, 4 Barn. & C. 26; McIniffe *v.* Wheelock, 1 Gray, 600.

[11] Wilmot *v.* Smith, 3 Car. & P. 453; Oatman *v.* Walker, 33 Me. 67; Moffatt *v.* Parsons, 5 Taunt. 397.

purchased there;[1] or to one who is in fact the attorney of the creditor, although he denies his authority;[2] or to a husband as agent for his wife.[3] A tender made to one of several joint creditors is good.[4] Money due a *cestui que trust* should be tendered to the trustee.[5] A tender to an executor who has not qualified is not good.[6]

§ 2529. Mode of Making Tender. — A tender must be made in such a manner and under such circumstances that the party entitled may have an opportunity of understanding the object of the tender, and seeing that what is presented for his acceptance is really what he stipulated to have.[7] So, in order to constitute a sufficient tender of money in payment, there must be an actual production of the money.[8] But actual production of the money is not necessary, where the creditor refuses to receive it,[9] or does anything equivalent to dispensing with the production thereof.[10] Mere announcement of readiness to pay a note is not a sufficient tender.[11] Deposit of funds in a bank sufficient to meet a bill payable there is a good tender,[12] if the fund was in some way appropriated to the note.[13] The expression of a willingness to give a deed is not a sufficient tender of performance, where the agreement

[1] Hoyt v. Byrnes, 11 Me. 475.

[2] McIntire v. Wheelock, 1 Gray, 600.

[3] Conrad v. Druids' Grand Grove, 64 Wis. 258.

[4] Douglass v. Patrick, 3 Term Rep. 683; Ortman v. Walker, 33 Me. 67; Prescott v. Everts, 4 Wis. 314.

[5] Cochran v. Hollenback, 16 Serg. & R. 425; 16 Am. Dec. 587.

[6] Viele v. Parker, 1 N. J. L. 45.

[7] Potts v. Plaisted, 30 Mich. 149.

[8] Thomas v. Evans, 10 East, 101; Finch v. Brook, 1 Bing. N. C. 253; Ladd v. Patten, 1 Cranch C. C. 263; Camp v. Simon, 34 Ala. 126; Englander v. Rogers, 41 Cal. 420; Walker v. Brown, 12 La. Ann. 266; Bakeman v. Pooler, 13 Wend. 637; Sargent v. Graham, 5 N. H. 440; 22 Am. Dec. 469; Lacoumadi v. Myron Lodge, 61 Ill. 81. "It is not a legal tender to say, 'Here, I am ready'; he must have the money ready also": Murphy v. Guion, 2 Hayw. (N. C.) 162; 2 Am. Dec. 623. Nor is it sufficient that a person is present who would lend the debtor the money, unless he actually consents to loan it for the purpose: Sargent v. Graham, 5 N. H. 440; 22 Am. Dec. 469. See Harding v. Davis, 2 Car. & P. 77.

[9] Appleton v. Donaldson, 3 Pa. St. 381; Hazard v. Loring, 10 Cush. 267. But see Dunham v. Jackson, 6 Wend. 22.

[10] Guthman v. Kearn, 8 Neb. 502.

[11] Bacon v. Smith, 2 La. Ann. 441; 46 Am. Dec. 549; Hughes v. Patterson, 23 La. Ann. 680.

[12] Miller v. Bank, 5 Whart. 503; 34 Am. Dec. 571.

[13] Myars v. Byington, 34 Iowa, 205.

was to give a deed and also assign an interest in a lease.[1] An offer in writing to consent to judgment, but not signed, is not sufficient.[2]

In the case of a delivery of goods, they must be so tendered as to give time and opportunity to the creditor to examine and accept them.[3] Therefore, a tender of goods is not properly made by an offer to deliver closed casks, said to contain the goods, but the contents of which are not allowed to be seen and examined.[4]

Money is not properly tendered when locked up in a box, so that the party to whom it is offered cannot open it and examine the contents. But a tender of a large sum of money in purses or bags, being the usual manner of carrying money, and which the creditor might open, if he pleased, has been held good.[5] It is not a sufficient tender to show the money to a servant-girl at the creditor's house, he not being in, especially where the money shown includes three dollars for a satisfaction-piece of the mortgage which it is desired to pay.[6]

ILLUSTRATIONS. — Defendant, desiring to make the plaintiff a tender, said to him, as the plaintiff was passing by him in a wagon, "I want to tender you this money for labor you have done for me," at the same time holding in his hand a sum of money equal to his indebtedness to the plaintiff, but naming no sum. Plaintiff made no reply, and did not stop his team, but passed on. *Held*, not a valid tender: *Knight* v. *Abbott*, 30 Vt. 577. Plaintiff signed an agreement waiving his claim against the defendant in consideration of twenty-five per cent of his claim to be paid down, and the defendant, a day or two after the agreement was signed, called and informed the plaintiff that he had come with the money to pay him his twenty-five per cent, but did not produce the money, and the plaintiff declined to take it. *Held*, not a valid tender: *Bowen* v. *Holly*, 38 Vt. 574.

[1] Martindale *v.* Waas, 3 McCrary, 108.
[2] Ossenkop *v.* Akeson, 15 Neb. 622.
[3] Isherwood *v.* Whitmore, 10 Mees. & W. 757; Bates *v.* Bates, 1 Miss. 401; 12 Am. Dec. 572; Dewes *v.* Lockhart, 1 Tex. 535; Wyman *v.* Winslow, 11 Me. 398; 26 Am. Dec. 542; Hawley *v.* Mason, 9 Dana, 32; 33 Am. Dec. 522.
[4] Isherwood *v.* Whitmore, 10 Mees. & W. 757.
[5] Wade's Case, 5 Coke, 114 a; Behaly *v.* Hatch, 1 Miss. 369; 12 Am. Dec. 570.
[6] Jewett *v.* Earle, 53 N. Y. Sup. Ct. 349.

§ 2530. At What Time and Place Tender must be Made.—Where the debt is payable or articles are to be delivered on a certain day, the tender must be made on that day;[1] a tender made before the debt is due is of no effect.[2] Where the debt is not due at any particular time, as where the credit is indefinite, the tender may be made by the creditor at any time.[3] So where money is lent or goods sold without any specified time of payment, the tender may be made at any time while the credit continues.[4] A tender made on a debt not due at any certain time is good, if made before service of the writ.[5] A tender of the amount due on a mortgage of chattels by one who has converted the same, claiming under the mortgagor, is ineffectual after an action is commenced for the conversion, unless the costs are also tendered.[6] A tender of money at any time on the day it is due is good;[7] but a tender of property after sunset has been held bad in several cases.[8] Where a debt is due on Sunday, a tender on Monday is good.[9] Under the California code, a tender of the amount due a pledgee may be made after the debt becomes due, although demand for the payment of the debt has been before made and refused, if accompanied with an offer to pay the interest which has accrued.[10]

[1] Powe *v.* Powe, 42 Ala. 113; McClarty *v.* Gokey, 31 Iowa, 505; Roberts *v.* Beatty, 2 Penr. & W. 63; 21 Am. Dec. 410; Woodworth *v.* Morris, 56 Barb. 97. A tender in Connecticut is good after the day of payment: Tracy *v.* Strong, 2 Conn. 659. There is no distinction between the case of a tender of chattels and of the payment of a debt: Barr *v.* Myers, 3 Watts & S. 295.

[2] Saunders *v.* Frost, 5 Pick. 267; 16 Am. Dec. 394; Mitchell *v.* Cook, 29 Barb. 243; Tillou *v.* Britton, 9 N. J. L. 120. *Aliter* where the debt does not draw interest: McHord *v.* Whitcroft, 3 Har. & McH. 85.

[3] Startup *v.* Macdonald, 6 Man. & G. 593.

[4] Norton *v.* Ellam, 2 Mees. & W. 461.

[5] Randall *v.* Bacon, 49 Vt. 20; 24 Am. Rep. 100; Hull *v.* Peters, 7 Barb. 331. A tender of rent before an attachment is sued out is a defense: Davis *v.* Henry, 63 Miss. 110.

[6] Farr *v.* Smith, 9 Wend. 338; 24 Am. Dec. 162.

[7] McClarty *v.* Gokey, 31 Iowa, 505.

[8] Williams *v.* Johnson, Litt. Sel. Cas. 84; 12 Am. Dec. 275; Hall *v.* Whittier, 10 R. I. 530; Croninger *v.* Crocker, 62 N. Y. 158. In this case the reason given was that the creditor could not properly examine the goods tendered except in the daylight.

[9] Salter *v.* Burt, 20 Wend. 205; 32 Am. Dec. 530; Barrett *v.* Allen, 10 Ohio, 426; Avery *v.* Stewart, 2 Conn. 69; 7 Am. Dec. 240. *Contra*, People *v.* Luther, 1 Wend. 42.

[10] Loughborough *v.* McNevin, 74 Cal. 250; 5 Am. St. Rep. 435.

Where payment or delivery is to be made at a particular place, the tender must be made at that place.[1] But where no place is mentioned, the debtor must seek the creditor, wherever he is;[2] though he is not obliged to follow him out of the state.[3] Where property is to be delivered, but no place is mentioned, the debtor may be ready with it at his own house.[4] But if the property be portable, the tender should be made at the creditor's residence or place of business.[5] The shop of an artificer is the proper place to tender him materials on which he has contracted to do labor in the trade.[6] In the case of rent, a tender made on the land is good.[7] A court of equity will not supply a defect in a tender made to a wrong party or in a wrong place. Where the officers of a bank inadvertently took from a special deposit a note not payable in bank, and

[1] Slingerland *v.* Morse, 8 Johns. 474; Wiggin *v.* Wiggin, 43 N. H. 561; 80 Am. Dec. 192; Gilmore *v.* Holt, 4 Pick. 258; Southworth *v.* Smith, 7 Cush. 390; Grandy *v.* McCleese, 2 Jones, 142; 64 Am. Dec. 574. Though no person is there to receive it, the tender is good: Id.; Barney *v.* Bliss, 1 D. Chip. 399; 12 Am. Dec. 696.

[2] Slingerland *v.* Morse, 8 Johns. 474; King *v.* Finch, 60 Ind. 420; Bates *v.* Bates, 1 Miss. 401; 12 Am. Dec. 573.

[3] Allshouse *v.* Ramsey, 6 Whart. 331; Santee *v.* Santee, 64 Pa. St. 473; Howard *v.* Minor, 20 Me. 330; Hoys *v.* Tuttle, 8 Ark. 124; 46 Am. Dec. 309.

[4] Dandridge *v.* Harris, 1 Wash. (Va.) 326; 1 Am. Dec. 465; Grant *v.* Groshon, Hardin, 85; 3 Am. Dec. 725; Chambers *v.* Winn, Sneed, 166; 2 Am. Dec. 713, the court saying: "To this general rule, like almost all others, there will be many exceptions, arising from special contract, from the debtor not having a known place of residence in the state at the time of the contract, from afterwards changing his place of residence, or from other special circumstances or considerations, which will vary the equity of the rule. For example, when a contract is for such commodities as by law are subject to be inspected at a public warehouse, it may be implied that they are to be received by the purchaser at some warehouse where he usually receives them; or when the contract is for commodities to be consumed by the purchaser in a town, or to be exported from thence as merchandise, it may be implied that they are to be delivered there, if from the general custom of the place it ought to be expected."

[5] Miles *v.* Roberts, 34 N. H. 254; Hall *v.* Whittier, 10 R. I. 535; Barr *v.* Myers, 3 Watts & S. 295; La Farge *v.* Rickert, 5 Wend. 187; 21 Am. Dec. 209.

[6] Jacoby *v.* Schwartzwelder, 1 Bibb, 430. In New Hampshire it has been held that if the articles are bulky and cumbersome, the debtor must seek the creditor, and inquire of him where he wishes them delivered, and upon his so designating a reasonable place, the debtor must make delivery there: Miles *v.* Roberts, 34 N. H. 254. If the creditor cannot be found, or refuses to elect, the debtor may appoint a place and notify the creditor: Id. So in New York: Barns *v.* Graham, 4 Cow. 452; 15 Am. Dec. 394; Sheldon *v.* Skinner, 4 Wend. 525; 21 Am. Dec. 161.

[7] Walter *v.* Dewey, 16 Johns. 222.

notified the maker of its maturity, without claiming ownership, but afterwards declined the maker's tender of payment, it was held that the tender was invalid, and the maker was liable for interest subsequently accruing.[1]

§ 2531. In What Money must Tender be Made.—At common law, in England a tender was required to be made in the current coin of the realm. Later, by statute, silver and bronze coins were made, up to certain sums, a legal tender; also, Bank of England notes payable to bearer on demand.[2] In the United States a similar course has been pursued. The federal constitution provides that no state shall make anything but gold and silver coin a tender in payment of debts.[3] But the national government has made the national notes a legal tender, both as to debts contracted before and after the passage of the statutes.[4] But a tender of United States treasury notes will not discharge a note payable in American gold.[5] A legal tender cannot be made in cents.[6] Money which the debtor has fraudulently obtained, as by embezzlement, is not a lawful subject of tender, and the creditor is not bound to receive it.[7] Where the terms of a city ordinance expressly required payment in cash for market stalls rented at auction, it was held that a bidder could not make a sufficient tender by offering city scrip.[8] A party has a right to object that the tender is not in lawful money, although his real motive is to get rid of the contract.[9]

A tender of a specific article must be of such article in every material respect as the contract under which it is made requires.[10]

[1] King *v.* Finch, 60 Ind. 420.
[2] Leake on Contracts, 863.
[3] Art. 1, sec. 10; Thorp *v.* Wegefarth, 56 Pa. St. 82; 93 Am. Dec. 789.
[4] Knox *v.* Lee, 12 Wall. 457.
[5] McGoon *v.* Shirk, 54 Ill. 408; 5 Am. Rep. 122.
[6] McClarin *v.* Nesbit, 2 Nott & McC. 519.
[7] Reed *v.* Bank, 6 Paige, 337.
[8] Dubuque *v.* Miller, 11 Iowa, 583.
[9] Decamp *v.* Feay, 5 Serg. & R. 323; 9 Am. Dec. 372.
[10] Sharp *v.* Jones, 18 Ind. 314; 81 Am. Dec. 359.

§ 2532. Amount of Tender.—A tender may be made of a larger sum of money than the debt; and the creditor ought to accept so much of it as is due to him.[1] So where the debtor produced money to a larger amount than the debt, and requested the creditor to take what was due, it was held a good tender.[2] An unconditional offer by an execution creditor, seeking to redeem from a mortgage, of the amount of the mortgage and interest, the mortgagee not stating the expenses incurred by him, is a sufficient tender.[3] But the tender of a larger sum than is due, with a demand of change, is not a good tender, if the creditor refuse to give change, and object to take the money on that account.[4] A tender of a gross sum on several demands without designating the amount tendered upon each is sufficient.[5] A tender need not be divided to meet separate claims where they are all held by one person.[6] A tender of a smaller sum than is due, made in respect of a single entire claim, is inoperative, the creditor not being bound to accept less than his whole debt.[7] A tender of a deficient amount, though made in good faith, and after great efforts to ascertain the actual damages due, is not a valid tender.[8] A tender after the day must include interest.[9]

§ 2533. Tender Made on Condition.—A tender made on a condition which the creditor has a right to object to

[1] Wade's Case, 5 Coke, 115 a; Douglas *v.* Patrick, 3 Term Rep. 683.

[2] Bevans *v.* Rees, 5 Mees. & W. 306.

[3] Lambert *v.* Miller, 38 N. J. Eq. 117.

[4] Betterbee *v.* Davis, 3 Camp. 70; Robinson *v.* Cook, 6 Taunt. 336.

[5] Thetford *v.* Hubbard, 22 Vt. 440.

[6] Johnson *v.* Cranage, 45 Mich. 14.

[7] Dixon *v.* Clark, 5 Com. B. 365; Helphrey *v.* R. R. Co., 29 Iowa, 480; Fridge *v.* State, 3 Gill & J. 103; 20 Am. Dec. 463. Two calves were killed on a railroad, and its agent was notified and was present at the appraisement. The appraised value was $25, and in due time the agent tendered $22.50, and told the owner he might take it in full or in part for the calves, as he pleased, which was refused. Held, that the tender was insufficient to prevent the owner from recovering double the value of the calves under the statute: Brandt *v.* R. R. Co., 26 Iowa, 114.

[8] Helphrey *v.* R. R. Co., 29 Iowa, 480.

[9] Hamar *v.* Dimmick, 14 Ind. 105.

is not a good tender.[1] Thus if the tender is accompanied by a demand for a receipt, or that the debtor shall admit that this is all that is due, or that the money shall be received in full of all demands, it is not a valid tender.[2]

[1] Bevens *v.* Rees, 5 Mees. & W. 309; Eckstein *v.* Reynolds, 7 Ad. & E. 80; Smith *v.* Keels, 15 Rich. 318; Shaw *v.* Sears, 3 Kan. 342; Pulsifer *v.* Shepherd, 36 Ill. 513; Cothran *v.* Scanlan, 34 Ga. 555; Brooklyn Bk. *v.* De Grauw, 23 Wend. 344; 35 Am. Dec. 569; Eddy *v.* O'Hara, 14 Wend. 221; Rose *v.* Duncan, 49 Ind. 269; Brown *v.* Gilmore, 8 Greenl. 107; 22 Am. Dec. 223; Rives *v.* Dudley, 3 Jones Eq. 126; 67 Am. Dec. 231; Davis *v.* Millaudon, 17 La. Ann. 97; 87 Am. Dec. 517; Storey *v.* Krewson, 55 Ind. 397; 23 Am. Rep. 668, the court saying: "When mutual acts are to be done by two parties at the same time, and the right of each depends upon the performance of the other, either may tender his part of the performance upon the condition that the other performs his part; and neither is compelled to perform his part unless the other performs his part also; as when land is bargained and sold, to be conveyed upon payment of the purchase-money. In such a case, neither can be compelled to perform his part of the agreement, except on performance by the other of his part; that is, the vendee cannot demand the conveyance without tendering the purchase-money; and the vendor cannot demand the purchase-money without tendering the conveyance; and either may make a good tender to the other upon the condition that he will perform his part of the agreement. But when one party is to perform an act, whose right does not depend upon any act to be performed by the other party, the tender must be without condition, as when money is to be paid without condition. The current of authorities — indeed, we believe it to be quite uniform — holds that the party bound to pay the money cannot make a good tender upon the condition that the party to whom the money is to be paid shall give him a written receipt therefor; and in the case of a non-commercial promissory note, the authorities are in conflict, whether a good tender can be made upon the condition that the note shall be surrendered, but in the case of commercial paper the authorities seem to be uniform that a tender upon condition that the paper shall be surrendered, is good, because such paper might be put in circulation after payment, and innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker it becomes harmless as against him, wherever it may go. A tender, to be good, must not be upon any condition prejudicial to the party to whom it is made. The mortgage is merely the incident to the note. The payment or satisfaction of a note secured by a mortgage is a full and complete discharge of the mortgage. According to the rules above expressed, — and we believe they are correct and well sustained by authority, — the answer we are considering is insufficient as to the averment of tender. The acceptance of the money, as alleged, and the surrender of the note, operated as a complete legal discharge of the mortgage by which the payment of the note was secured, as much so as if it had been surrendered with the note, released upon the record, or actually canceled. The appellees had no right to demand a cancellation of the mortgage as a condition to the tender; it would in no way have strengthened their right nor placed them in any better legal *status;* for the surrender of the note, upon its payment, worked the destruction of all legal vitality in the mortgage."

[2] Thayer *v.* Brockett, 12 Mass. 450; Perkins *v.* Beck, 4 Cranch C. C. 68; Holton *v.* Brown, 18 Vt. 224; 46 Am. Dec. 148; Sanford *v.* Bulkley, 30 Conn. 344; Eckstein *v.* Reynolds, 7 Ad. & E. 80; Wood *v.* Hitchcock, 20 Wend. 47; Draper *v.* Hitt, 43 Vt. 439; 5 Am. Rep. 292. Where a tender was made by letter, with a request that a receipt be returned, it was held that the request, not being a condition, did not void the tender: Jones *v.* Arthurs, 8 Dowl. P. C. 442.

But the tender may be upon such conditions as were, by the terms of the contract between the parties, conditions precedent to be performed by the party to whom the tender is made.[1] A tender of the amount due a pledgee is not vitiated by a demand made at the same time for the surrender of the pledged property.[2]

In the case of negotiable paper, the debtor may demand the surrender of the note,[3] and also any collaterals to the note.[4] But where the holder of the note has claims upon it against other parties, the debtor can only require that his payment be indorsed on it; he is not entitled to its possession.[5] A tender of payment made by the maker of a promissory note on condition that the holder will dismiss an action against the maker in no way connected with the note is bad.[6] But a tender made under protest is good.[7] The acceptance of a tender made upon a condition which is distinctly expressed, or necessarily implied from the circumstance, is an acceptance of the condition.[8] It is for the jury to say whether a tender was made conditionally or not.[9]

ILLUSTRATIONS.—A tender of a quarter's rent is coupled with a demand of a receipt to a particular day, it being disputed whether one or two quarters' rent is due. *Held*, not to be a valid tender: *Finch* v. *Miller*, 5 Com. B. 428. A share-holder in a company, who had presented a petition for winding up, offered to pay the amount due from him for calls, if the directors would undertake not to deal with the money pending the petition. *Held*, that the tender was void: *In re Steam Stoker Co.*, L. R. 19 Eq. 416. A held a mortgage to secure a note, but had lost the note. B, the mortgagor, tendered payment, but demanded the note as a condition, and refused to take a receipt or a discharge of the mortgage. *Held*, that there was

[1] Storey *v.* Krewson, 55 Ind. 397; Wheelock *v.* Tanner, 39 N. Y. 481.

[2] Loughborough *v.* McNevin, 74 Cal. 250; 5 Am. St. Rep. 435.

[3] Wilder *v.* Seelye, 8 Barb. 408; Storey *v.* Krewson, 55 Ind. 397; Smith *v.* Rockwell, 2 Hill, 482; Cahon *v.* Bank, 7 N. Y. 457; Strafford *v.* Welch, 59 N. H. 46.

[4] Ocean Nat. Bank *v.* Fant, 50 N. Y. 474; Cass *v.* Higenbotam, 100 N. Y. 248.

[5] Hargous *v.* Lahens, 3 Sand. 213.

[6] Rose *v.* Duncan, 49 Ind. 269.

[7] Scott *v.* R. R. Co., L. R. 1 Com. P. 596.

[8] Lee *v.* Dodd, 20 Mo. App. 271.

[9] Marsden *v.* Goole, 2 Car. & K. 133.

no legal tender: *Holton* v. *Brown*, 18 Vt. 224; 46 Am. Dec. 149. A creditor called on his debtor to receive payment of the debt. While he was counting the money, the debtor told him his claim was extortionate, whereupon the creditor left the premises. *Held*, that the tender was invalid: *Harris* v. *Mulock*, 9 How. Pr. 402. One gave his promissory note for sixty dollars, payable in neat stock at a certain day and place; and meeting the creditor on the day of payment at another place, told him that the stock was ready for him on a neighboring farm, providing he would take forty-eight dollars' worth in full for the note, denying that any more was due; which the creditor refused, asking "why he did not bring on the cattle, if he had any." *Held*, not a good tender: *Brown* v. *Gilmore*, 8 Me. 107; 22 Am. Dec. 223. D. purchased some oats of F., who took goods worth $41.78 in part payment. D. tendered $170 to F., telling him that if he took $130 of the amount, it closed the whole business, and if he took the $170, it settled the oat business, and left the account for the goods standing. *Held*, that D. merely explained his tender, without attaching any condition to it: *Foster* v. *Drew*, 39 Vt. 51.

§ 2534. Waiver of Tender or of Defects in.—A tender may be waived by the creditor, either expressly or impliedly;[1] as where he states that nothing is due him, and that he will accept nothing,[2] or says simply that he will not receive the money or chattels.[3] Though a debtor offers to pay a debt with the ability to do so, yet if the creditor proposes to let it remain, and the debtor consents, and retains the money, this is a waiver by the debtor of his tender; and he cannot afterwards set it up in his defense.[4] So where a party designedly absents himself from home, or avoids the debtor, in order that a tender shall not be made to him, this will excuse a tender.[5] Where a mortgagor tendered the amount of the principal in bank checks, which the mortgagee refused to accept, and two days thereafter returned with the amount in cash, and attempted to

[1] Holmes v. Holmes, 12 Barb. 137; 9 N. Y. 525; Thorne v. Mosher, 20 N. J. Eq. 553; Haskell v. Brewer, 11 Me. 285.

[2] Lacy v. Wilson, 24 Mich. 479.

[3] Bellinger v. Kilts, 6 Barb. 273; Brewer v. Fleming, 51 Pa. St. 102; Terrell v. Walker, 65 N. C. 91; Wesling v. Noonan, 31 Miss. 599; Hazard v. Loring, 10 Cush. 267; Dorsey v. Barbee, Litt. Sel. Cas. 204; 12 Am. Dec. 296.

[4] Terrell v. Walker, 65 N. C. 91.

[5] Southworth v. Smith, 7 Cush. 391; Gilmore v. Holt, 4 Pick. 257; Noyes v. Clark, 7 Paige, 179; 32 Am. Dec. 620; Hall v. Whittier, 10 R. I. 530.

enter the mortgagee's house, saying, "I have the money, and want the mortgage," but was thrust out by the mortgagee, it was held that this was a good tender.[1] An explicit refusal by one party to perform a contract relieves the other from all obligation to tender performance.[2]

A defect in a tender is waived by the creditor refusing to receive the thing tendered on some other ground than that which he afterwards sets up as a defect in the tender.[3] Thus a tender in money not legal tender is good where the creditor objects to the amount, and not to the quality, of the tender.[4] So in the following cases the defect in the tender was held to have been waived by the creditor, viz.: Where the money was not produced, but the creditor objected that the amount was not sufficient;[5] where a receipt was demanded, but the creditor objected that a greater amount was due;[6] where the creditor refused to accept the money, but afterwards refused to return it;[7] where the tender was not in time, but the creditor objected to it on another and an untenable ground;[8] where bank notes were offered in payment, and the payee said he would as soon receive them as specie;[9] where there was no demand for a count of the gold, which was brought in a bag, and no objection was made that there was not enough, and the person making the offer swore that he thought there was sufficient if it was all gold, and nothing but gold fell out of the bag when it was opened.[10]

ILLUSTRATIONS. — A offered to pay money to B, holding her purse in her hand in sight of B, who saw the purse, but not the bills. A opened the purse, and was in the act of taking out the bills, but stopped on account of the refusal of B to receive

[1] Sharp *v.* Todd, 38 N. J. Eq. 324.
[2] Skinner *v.* Tinker, 34 Barb. 333; Newcomb *v.* Brackett, 16 Mass. 161; Post *v.* Garrow, 18 Neb. 682.
[3] Whelan *v.* Reilly, 61 Mo. 565.
[4] Polglass *v.* Oliver, 2 Cromp. & J. 15; Jones *v.* Arthur, 8 Dowl. 442; Ball *v.* Stanley, 5 Yerg. 199; 26 Am. Dec. 263.
[5] Polglass *v.* Oliver, 2 Cromp. & J. 15.
[6] Richardson *v.* Jackson, 8 Mees. & W. 298.
[7] Rogers *v.* Rutter, 11 Gray, 410.
[8] Gould *v.* Banks, 8 Wend. 562; 24 Am. Dec. 90. See Friess *v.* Rider, 24 N. Y. 367; 82 Am. Dec. 308.
[9] Wheeler *v.* Knaggs, 8 Ohio, 169.
[10] Conway *v.* Case, 22 Ill. 127.

the money. *Held*, an excuse for not making the tender: *Thorne* v. *Mosher*, 20 N. J. Eq. 257. A purchaser of land at ten thousand dollars, on the day for delivery of the deed and payment, sought the vendor, both at her place of business and of residence, but failing to find her, and believing her to be evading his tender of payment, and that it was not safe to take such a sum home with him, deposited it in a bank at six, P. M. On his way home after dark she met him, tendered the deed, and made a demand for the purchase-money, with which he could not then and there comply. *Held*, a valid tender: *Hall* v. *Whittier*, 10 R. I. 530.

CHAPTER CXXI.

PAYMENT — APPROPRIATION OF PAYMENTS, AND RECOVERY OF MONEY PAID.

§ 2535. Effect of non-payment of debt when due.
§ 2536. Payment of less than sum due.
§ 2537. Payment by giving negotiable note or other security.
§ 2538. Payment of negotiable paper.
§ 2539. Payment in forged, invalid, or worthless notes.
§ 2540. Payment by check.
§ 2541. Payment by post.
§ 2542. Payment by setting off cross-items.
§ 2543. Receipt — Effect of as evidence of payment.
§ 2544. Payment to or by joint creditors or debtors.
§ 2545. Appropriation of payments — By debtor.
§ 2546. Intention may be inferred.
§ 2547. Appropriation by the creditor.
§ 2548. Appropriation by the law.
§ 2549. Implied contracts — Money paid for the use of another.
§ 2550. Compulsory payment of another's debt.
§ 2551. Voluntary payment of another's debt.
§ 2552. Money received to the use of another.
§ 2553. Money obtained by fraud or wrong.
§ 2554. Money obtained by compulsion or duress.
§ 2555. Money paid to protect life or goods.
§ 2556. Money paid to protect real property.
§ 2557. Compulsion of legal process.
§ 2558. Illegal fees paid to public officer.
§ 2559. Mere voluntary payment.
§ 2560. Necessity of protest at time of payment.
§ 2561. Money paid under mistake of fact.
§ 2562. Money paid under mistake of law.
§ 2563. Money paid for consideration that has failed.
§ 2564. Money paid under executory illegal contract may be recovered back.
§ 2565. Aliter where agreement is executed.
§ 2566. Where intent of law is to protect party.
§ 2567. Accord and satisfaction — What it is — Effect of.
§ 2568. The consideration.

§ 2535. Effect of Non-payment of Debt when Due. — A contract to pay money is discharged by paying or tendering the amount at the time and in the manner

appointed by the contract.[1] If made by a person acting without authority, it becomes valid on his afterwards receiving authority.[2] Payment does not import delivery of money; it may be made in property or other securities.[3] A party relying on or pleading payment must prove it. It is a defense peculiarly within his knowledge.[4] Where one of whom a sum of money is demanded states that he pays it only on certain conditions, the demandant receiving it and remaining silent will be presumed to have acquiesced in the conditions.[5]

A debtor is entitled to be satisfied of the authority of a person demanding payment before complying with the demand, and a refusal upon that specific ground is justifiable.[6] The possession of a signed receipt is sufficient evidence of the authority to demand payment of the receipted liability, if the receipt is signed by the proper person, and a demand under such authority is equivalent to a personal demand by the signer of the receipt.[7]

If the payment is not made at the proper time, the creditor has a claim against the debtor for damages for the breach of the contract. These damages are, as a rule, merely "nominal," but they give the creditor a right of action.[8] If the creditor, before commencing an action, accept the amount of his debt in satisfaction, he cannot afterwards sue for the merely nominal damages for the detention.[9] But after an action has been commenced, a

[1] The fact that a debtor has had the means of paying his debt is not evidence tending to show that he has paid it. But the fact that he has not had the means with which to pay it is admissible evidence tending to show that he has not paid it: Atwood v. Scott, 98 Mass. 177; 96 Am. Dec. 625.

[2] Vroom v. Van Horne, 10 Paige, 549; 42 Am. Dec. 94. Payment by a stranger extinguishes the debt: Harrison v. Hicks, 1 Port. 423; 27 Am. Dec. 639; Union Trust Co. v. R. R. Co., 63 N. Y. 371; 20 Am. Rep. 541.

[3] Ryan v. Dunlap, 17 Ill. 40; 63 Am. Dec. 354. Where property is seized by a judicial process which carries with it a *jus in re*, as between creditor and debtor, destruction of property, without the debtor's fault, works a payment of the debt to the extent of its value: Gill v. Packard, 4 Wood, 271.

[4] Wolfe v. Wall, 62 Ala. 94.

[5] Hall v. Holden, 116 Mass. 172.

[6] Nash v. Union Mut. Ins. Co., 43 Me. 343; 69 Am. Dec. 65.

[7] Nash v. Union Mut. Ins. Co., 43 Me. 343; 69 Am. Dec. 65.

[8] Leake on Contracts, 885.

[9] Beaumont v. Greathead, 2 Com. B. 494.

payment of the debt only affords no answer to the claim to nominal damages for the detention and to the costs, and the plaintiff may proceed to recover them.[1]

§ 2536. Payment of Less than Sum Due.—Payment of a less sum in satisfaction of a greater liquidated debt then due operates only as a discharge *pro tanto*, and cannot in law, even if so accepted by the creditor, discharge the whole debt, without a release of, or some valid consideration for abandoning, the residue.[2]

§ 2537. Payment by Giving Negotiable Note or Other Security.—The giving and accepting of a negotiable or other security — a bill or note — for a debt operates generally as a conditional payment.[3] The remedy on the original debt is suspended until the maturity of the note.[4] But if not paid at maturity, the original debt is revived, or if only partially paid, it is revived as to the residue.[5] If paid in full when due, the original debt is paid, and the payment of the note may be pleaded as payment of the debt.[6] The creditor, however, cannot succeed in an action for the debt without showing that he has used due diligence in obtaining payment of the note.[7] But the bill or note may be given to and accepted by the creditor in satisfaction and discharge of the debt, in which case if it is not paid, the original debt is not revived, but the remedy must be upon the note.[8]

In England the rule is, that, whether a bill or note, or

[1] Nosotti *v.* Page, 10 Com. B. 643; Cook *v.* Hopewell, 11 Ex. 555; 25 L. J. Ex. 71; Ash v. Pouppeville, L. R. 3 Q. B. 86; 37 L. J. Q. B. 55.

[2] See *post*, Accord and Satisfaction, and chapter on Consideration, where this topic is discussed at length. See Longworth *v.* Askren, 15 Ohio St. 370.

[3] Glenn *v.* Smith, 2 Gill & J. 493; 20 Am. Dec. 452.

[4] Happy *v.* Mosher, 48 N. Y. 313.

[5] Stedman *v.* Gooch, 1 Esp. 4; Mudd *v.* Harper, 1 Md. 110; 54 Am. Dec. 644; Winsted Bank *v.* Webb, 39 N. Y. 325; 100 Am. Dec. 435.

[6] Thorne *v.* Smith, 10 Com. B. 659.

[7] Cochran *v.* Wheeler, 7 N. H. 202; 26 Am. Dec. 732.

[8] Lewis *v.* Lyster, 2 Cromp. M. & R. 704; Sard *v.* Rhodes, 1 Mees. & W. 153; Apthorp *v.* Shepard, Quin. 298; 1 Am. Dec. 6; Wolf *v.* Fink, 1 Pa. St. 435; 44 Am. Dec. 141; Costar *v.* Davies, 8 Ark. 213; 46 Am. Dec. 311; Ralston *v.* Wood, 15 Ill. 159; 58 Am. Dec. 604.

other security, given by a debtor, or by one of several joint debtors, or by a third person, be given and accepted in absolute payment and satisfaction of the debt, or whether it be given and accepted on account of and merely as conditional payment, depends upon the intention shown by the parties in the transaction, and is a question of fact; the presumption being that such a transaction is intended to operate merely as a conditional payment, with a recourse to the original remedy.[1] This rule is followed in a number of states.[2] On the other hand, in other states, it is held that the giving of a note is *prima facie* an absolute payment and discharge of the debt.[3] In New York, it is held that a note given for a

[1] Leake on Contracts, 893. "The debt may be considered as actually paid if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt is no more than giving an extended credit, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given": Sayer *v.* Wagstaff, 5 Beav. 423.

[2] Muldon *v.* Whitlock, 1 Cow. 290; 13 Am. Dec. 533; Nightengale *v.* Chaffee, 12 R. I. 609; 23 Am. Rep. 531; Murray *v.* Gouverneur, 2 Johns. Cas. 438; 1 Am. Dec. 177; Holmes *v.* De Camp, 1 Johns. 34; 3 Am. Dec. 293; Tobey *v.* Barber, 5 Johns. 68; 4 Am. Dec. 326; Johnson *v.* Weed, 9 Johns. 310; 6 Am. Dec. 279; Jaffrey *v.* Cornish, 10 N. H. 505; Thomas *v.* Kelley, 3 Rich. (N. S.) 210; 16 Am. Rep. 716; Frisbie *v.* Learned, 21 Wend. 452; Patapsco Ins. Co. *v.* Smith, 6 Har. & J. 166; 14 Am. Dec. 268; Clopper *v.* Union Bank, 7 Har. & J. 92; 16 Am. Dec. 294; Reed *v.* Van Ostrand, 1 Wend. 424; 19 Am. Dec. 529; Folk *v.* Wilson, 21 Md. 551; 83 Am. Dec. 599; Harnes *v.* Pierce, 41 Md. 231; Glenn *v.* Smith, 2 Gill & J. 493; 20 Am. Dec. 452; In re Davis, 5 Whart. 530; 34 Am. Dec. 574; Wyman *v.* Rae, 11 Gill & J. 416; 37 Am. Dec. 70; Larrabee *v.* Talbot, 5 Gill, 426; 46 Am. Dec. 637; Moses *v.* Trice, 21 Gratt. 556; 8 Am. Rep. 609; Tyner *v.* Stoops, 11 Ind. 22; 71 Am. Dec. 341; Hill *v.* Sleeper, 58 Ind. 224; Bristol Co. *v.* Probasco, 64 Ind. 414; Blunt *v.* Walker, 11 Wis. 334; 78 Am. Dec. 709; Matteson *v.* Ellsworth, 33 Wis. 502; 14 Am. Rep. 766; Hoefflinger *v.* Wells, 47 Wis. 631; Weymouth *v.* Sanborn, 43 N. H. 171; 80 Am. Dec. 144; Yates *v.* Donaldson, 5 Md. 389; 61 Am. Dec. 283; Berry *v.* Griffin, 10 Md. 27; 69 Am. Dec. 123; Crary *v.* Bowers, 20 Cal. 85; Caldwell *v.* Hall, 49 Ark. 568; 4 Am. St. Rep. 64. It is the same where a new note is given in satisfaction of an old one: Hart *v.* Boller, 15 Serg. & R. 162; 16 Am. Dec. 536; Huff *v.* Cole, 45 Ind. 304; Albright *v.* Griffin, 78 Ind. 188. And if the new security is a mortgage, and not a note: Ainslie *v.* Wilson, 7 Cow. 662; 17 Am. Dec. 532.

[3] Apthorp *v.* Shepard, Quin. 298; 1 Am. Dec. 6; Thacher *v.* Dinsmore, 5 Mass. 299; 4 Am. Dec. 61; Parham *v.* Brock, 113 Mass. 195; Maneely *v.*

pre-existing debt is not presumed to be a payment thereof; but where the note is given contemporaneously with the debt it is.[1] In some states it is held that if the note be that of a third person, and not of the debtor, satisfaction is presumed.[2]

Where the creditor of a partnership agrees to accept the individual note of one of the partners for the firm debt it extinguishes such debt.[3] But the mere taking of such security does not discharge the firm debt, in the absence of circumstances showing such an intention.[4] A note is evidence of a settlement of all demands between the parties prior to its date.[5] A bill or note may be delivered and accepted merely as a collateral security for a debt, without suspending or affecting the remedy for the debt during its currency.[6] At common law, where the debt is a specialty, or on a contract under seal, the giving of a bill or note does not suspend the remedy, but is considered

McGee, 6 Mass. 142; 4 Am. Dec. 105; Varner *v.* Nobleborough, 2 Me. 121; 11 Am. Dec. 48; Butts *v.* Dean, 2 Met. 76; 35 Am. Dec. 389; Wyman *v.* Fabens, 111 Mass. 80; Melledge *v.* Boston Iron Co., 5 Cush. 158; 51 Am. Dec. 59; Bunker *v.* Barron, 79 Me. 62; 1 Am. St. Rep. 282; Descadillas *v.* Harris, 8 Me. 298; Gilmore *v.* Hussey, 12 Me. 418; Newhall *v.* Hussey, 18 Me. 249; 36 Am. Dec. 717; Comstock *v.* Smith, 23 Me. 202; Fowler *v.* Ludwig, 34 Me. 455; Milliken *v.* Whitehouse, 49 Me. 527; Paine *v.* Dwinal, 53 Me. 52; 87 Am. Dec. 533; Ward *v.* Bourne, 56 Me. 151; Palmer *v.* Elliott, 1 Cliff. 63; Hutchins *v.* Olcott, 4 Vt. 549; 24 Am. Dec. 634; Perrin *v.* Keene, 19 Me. 355; 37 Am. Dec. 759; Bangor *v.* Warren, 34 Me. 324; 56 Am. Dec. 657; Shumway *v.* Reed, 34 Me. 560; 56 Am. Dec. 679. But see Strang *v.* Hirst, 61 Me. 1.

[1] Noel *v.* Murray, 13 N. Y. 167; Whitbeck *v.* Van Ness, 11 Johns. 409; 6 Am. Dec. 383.

[2] Wright *v.* Crockery Ware Co., 1 N. H. 281; 8 Am. Dec. 68; Whitney *v.* Gow, 20 N. H. 354; Smith *v.* Bettgar, 68 Ind. 254; 34 Am. Rep. 256; Stafford *v.* Bacon, 1 Hill, 532; 37 Am. Dec. 366; Gibson *v.* Tobey, 46 N. Y. 637; 7 Am. Rep. 397. *Contra*, Barelli *v.* Brown, 1 McCord, 449; 10 Am. Dec. 683.

[3] Arnold *v.* Camp, 12 Johns. 409; 7 Am. Dec. 328; Van Epps *v.* Dillaye, 6 Barb. 244; Rayburn *v.* Day, 27 Ill. 46; Powell *v.* Charless, 34 Mo. 485; Bonnell *v.* Chamberlain, 26 Conn. 487; Powers *v.* Stall, 29 Pa. St. 65; Nicholls *v.* Cheirs, 4 Sneed, 229; Leach *v.* Church, 15 Ohio St. 169.

[4] Pateshall *v.* Althorp, Quin. 179; 1 Am. Dec. 3; Bonnell *v.* Chamberlain, 26 Conn. 487; Powell *v.* Charless, 34 Mo. 485; Kreel *v.* Bridgers, 18 Miss. 612; Millerd *v.* Thorn, 56 N. Y. 406.

[5] Lake *v.* Tyson, 6 N. Y. 461; Sherman *v.* McIntyre, 7 Hun, 592; De Friest *v.* Bloomingdale, 5 Denio, 304; Dutcher *v.* Porter, 63 Barb. 20; Kinman *v.* Cannefex, 34 Mo. 147; Smith *v.* Bissell, 2 G. Greene, 279; Boffardick *v.* Raleigh, 11 Ind. 136; Gaskins *v.* Wells, 15 Ind. 253. *Contra* in Illinois: Ankeny *v.* Pearce, Breese, 289; 12 Am. Dec. 174; Crabtree *v.* Rowland, 33 Ill. 421.

[6] Pring *v.* Clarkson, 1 Barn. & C. 14; Jones *v.* Johnson, 3 Watts & S. 276; 38 Am. Dec. 760.

only as collateral security.[1] The acceptance of a deed of land in payment of a debt is a bar to an action for the debt, and if the title be defective, the creditor must look to his warranty.[2] So an absolute conveyance of real estate, made to secure a debt in fact, is payment *pro tanto* of the debt.[3] One who accepts "certificates of indebtedness" instead of money in payment of his demand against the government cannot afterwards recover the difference.[4] An order not negotiable, for the payment of money, and which has not been paid or accepted by the drawee, is not a payment or extinguishment of a precedent debt.[5]

§ 2538. **Payment of Negotiable Paper.**—Payment by the maker of a note or the acceptor of a bill will operate as a discharge of it, so that it will be no longer negotiable.[6] Whether a stranger to a note who takes it buys it, or pays and extinguishes it, depends, ordinarily, on the circumstances surrounding the transaction.[7]

§ 2539. **Payment in Forged, Invalid, or Worthless Notes.**—If the bill or note given for a debt be forged or invalid for any reason, or worthless by reason of insolvency, or known by the debtor to be valueless, the creditor may repudiate the payment altogether, treat it as a nullity, and without taking any steps to obtain payment of the note, and without giving any notice of dishonor, recover the debt.[8] The rule is the same as to forged or

[1] Worthington *v.* Wigley, 3 Bing. N. C. 454; Davis *v.* Gyde, 2 Ad. & E. 623; Costelo *v.* Cave, 2 Hill, 528; 27 Am. Dec. 404. See Judge *v.* Fiske, 2 Spear, 436; 42 Am. Dec. 380; Belshaw *v.* Bush, 11 Com. B. 204, the court saying: "The cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an agreement that the bill shall operate as a conditional payment does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill."

[2] Miller *v.* Young, 2 Cranch C. C. 53; Hays *v.* Smith, 4 Ill. 427.

[3] Fales *v.* Reynolds, 14 Me. 89.

[4] Gibbons *v.* United States, 2 Ct. of Cl. 421.

[5] Hoar *v.* Clute, 15 Johns. 224.

[6] American Bank *v.* Jenness, 2 Met. 288.

[7] Wilcoxon *v.* Logan, 91 N. C. 449. And see *ante*, Title Negotiable Instruments.

[8] Cundy *v.* Marriott, 1 Barn. & Adol. 696; Markle *v.* Hatfield, 2 Johns. 455;

worthless bank bills or counterfeit coin.[1] But a party who innocently makes payment in a counterfeit bank bill or in spurious money is protected if the payee does not return it to him within a reasonable time.[2] What is a reasonable time depends upon the facts, the question of negligence, under the circumstances, being for the jury to decide.[3] Six months has been held an unreasonable time;[4] so has two months;[5] so has ten days.[6]

The bills of an insolvent bank are no satisfaction of the debt, though at the time of payment neither party was aware that the bank had failed.[7] But the loss falls

3 Am. Dec. 446; Bank *v.* Smith, 5 Conn. 71; 13 Am. Dec. 37 (Roberts *v.* Fisher, 43 N. Y. 159, 3 Am. Rep. 680, where the maker was insolvent, but neither party knew it); Hussey *v.* Sibley, 66 Me. 192; 22 Am. Rep. 557.

[1] Markle *v.* Hatfield, 2 Johns. 455; 3 Am. Dec. 446; United States *v.* Morgan, 11 How. 154; Gilman *v.* Peck, 11 Vt. 516; 34 Am. Dec. 702; Watson *v.* Cresap, 1 B. Mon. 195; 36 Am. Dec. 572; Young *v.* Adams, 6 Mass. 182; Mudd *v.* Reeves, 2 Har. & J. 368; Ramsdale *v.* Horton, 3 Pa. St. 330; Blalock *v.* Phillips, 38 Ga. 216; Bank *v.* Buchanan, 87 Tenn. 32; 10 Am. St. Rep. 617.

[2] Simms *v.* Clark, 11 Ill. 137; Union Nat. Bank *v.* Baldenwick, 45 Ill. 374; Pindall *v.* Bank, 7 Leigh, 617; Thomas *v.* Todd, 6 Hill, 340; Cucier *v.* Pinnock, 14 Serg. & R. 56; Atwood *v.* Cornwall, 28 Mich. 336; 15 Am. Rep. 219; Widgate *v.* Neidlinger, 50 Ind. 520; Samuels *v.* King, 50 Ind. 527; Laurenceburg Nat. Bank *v.* Stevenson, 51 Ind. 594. In Pindall *v.* Bank, 7 Leigh, 617, it is said: "The policy of the law requires that after the detection of the counterfeit character of the money, whether coin or bank notes, there should be no negligence or want of diligence on the part of the creditor who receives it in giving information to the payer of the true character of the money, and in returning it to him and demanding payment. Indeed, justice to the debtor requires it. By giving him this notice, and returning it to him in a reasonable time, he will be perhaps enabled to ascertain from whom he received it, and to trace it back from holder to holder till it shall be returned either to the original forger, or to him who passed it knowing it to be counterfeit. If the innocent receiver of the note neglects his duty in this respect, if he holds it up after he ascertains it to be counterfeit, without returning it in due time to the payor, he ceases to be innocent, or at least is more in fault than the innocent payer, and this neglect must necessarily affect his remedy."

[3] Burrill *v.* Watertown Bank, 51 Barb. 105.

[4] Raymond *v.* Baar, 13 Serg. & R. 318; 15 Am. Dec. 603; Rick *v.* Kelly, 30 Pa. St. 530.

[5] Pindall *v.* Bank, 7 Leigh, 617.

[6] Thomas *v.* Todd, 6 Hill, 340.

[7] Ontario Bank *v.* Lightbody, 13 Wend. 101; 27 Am. Dec. 179; Fogg *v.* Sawyer, 9 N. H. 365; Wainwright *v.* Webster, 11 Vt. 576; 34 Am. Dec. 707; Gilman *v.* Peck, 11 Vt. 516; 34 Am. Dec. 702; Westfall *v.* Braley, 10 Ohio St. 188; 75 Am. Dec. 509; Frontier Bank *v.* Morse, 22 Me. 88; 38 Am. Dec. 284; Magee *v.* Carmack, 13 Ill. 289; Harley *v.* Thornton, 2 Hill (S. C.), 509; Townsends *v.* Bank, 7 Wis. 185; Honore *v.* Comesnil, 1 J. J. Marsh. 523; White *v.* Guthrie, 1 J. J. Marsh. 503. *Contra*, Bayard *v.* Skunk, 1 Watts & S. 92; 37 Am. Dec. 441; Edmunds *v.* Digges, 1 Gratt. 359; 42 Am. Dec. 561; Ware *v.* Street, 2 Head, 609; 75 Am. Dec. 755; Corbit *v.* Bank, 2 Harr. (Del.) 235; 30 Am.

upon the receiver, where the bank suspends payment immediately after payment.[1] Where the note forged is the note of a third person, the creditor, as soon as the forgery is discovered, must offer to return the note,[2] wherever not returning it would result to the injury of the transferrer of the note.[3] The receipt by the vendor of a chattel of the worthless note of a third person, falsely and fraudulently represented by the vendee to be solvent, is no payment, and the vendor may maintain an action for the balance due according to the bargain.[4] So where a sale is for cash, but payment is made in worthless securities, suit may be had as though the securities had not been given.[5] Payment by a worthless check is not payment, and it makes no difference whether the payor was the drawer of the check or an indorser.[6]

§ 2540. **Payment by Check.**—The giving and accepting of a check on a banker on account of a debt is equivalent to payment, and suspends the remedy until it has been duly presented for payment and dishonored.[7] But a bank check is not payment of a pre-existing debt until cashed, without an agreement to receive it as such, any more than a promissory note is a payment of such a debt.[8] A check received as payment, and afterwards paid, becomes

Dec. 635; Lowery *v.* Murrell, 2 Port. 280; 27 Am. Dec. 651; Scruggs *v.* Gass, 8 Yerg. 175; 29 Am. Dec. 114. A payment of a debt due a bank in its own depreciated bank notes is good: Northampton Bank *v.* Balliet, 8 Watts & S. 311; 42 Am. Dec. 297; Blount *v.* Windley, 68 N. C. 1; 12 Am. Rep. 616.

[1] Ware *v.* Street, 2 Head, 609; 75 Am. Dec. 755. A general agreement to receive depreciated paper in business transactions may be abandoned by common consent of the parties, and after abandonment, one abandoning party cannot hold the other to it: Marine Bank of Chicago *v.* Chandler, 27 Ill. 525; 81 Am. Dec. 249.

[2] Pope *v.* Nance, Minor, 299; 12 Am. Dec. 51.

[3] Pope *v.* Nance, 1 Stew. 354; 18 Am. Dec. 60.

[4] Vallier *v.* Ditson, 74 Me. 553.

[5] Monticello *v.* Grant, 104 Ind. 168.

[6] Fleig *v.* Sleet, 43 Ohio St. 53; 54 Am. Rep. 800.

[7] Puckford *v.* Maxwell, 6 Term Rep. 52; Hough *v.* May, 4 Ad. & E. 954; Caine *v.* Coulton, 1 Hurl. & C. 764; 32 L. J. Ex. 97; Charles *v.* Blackwell, L. R. 2 C. P. D. 151; 46 L. J. Com. P. 368; Briggs *v.* Holmes, 118 Pa. St. 283; 4 Am. St. Rep. 597; Wells *v.* Morrison, 91 Ind. 51; Heartt *v.* Rhodes, 66 Ill. 351. See Title XIX., Negotiable Instruments.

[8] Barnet *v.* Smith, 30 N. H. 256; 64 Am. Dec. 290.

a valid payment as of the time when it was given.[1] A check drawn to another's order, indorsed by the latter, and paid, is presumptive evidence that its amount was paid to the payee on account of a debt shown to have existed at that time.[2]

§ 2541. Payment by Post. — If the creditor directs his debtor to send bank notes by post, and they are so sent, but are lost in transit, the debtor is discharged.[3] But to charge the creditor with money sent by mail, the debtor must prove either the express direction of the creditor to send it by mail, or a usage to send it in that way, from which an authority may be implied.[4] A general direction by a creditor to his debtor to remit money to him, without prescribing the mode of remittance, does not authorize the debtor to remit by mail at the risk of the creditor. The direction must be specific, both as to the mode and the subject of remittance, to make it at the risk of the creditor.[5] A previous remittance by letter does not authorize a debtor to adopt the mode pursued in that instance as the one by which the creditor desires future remittances to be made, so as to impose the risk of loss *in transitu* on him.[6] Where a debtor is authorized by the creditor to remit by registered letter, and he sends in a letter not registered, and the money does not reach the creditor, the loss must fall on the debtor.[7]

[1] Hunter v. Wetsell, 17 Hun, 135; 84 N. Y. 549; 38 Am. Rep. 544.

[2] Masser v. Bowen, 29 Pa. St. 128; 72 Am. Dec. 619.

[3] Warwick v. Noakes, Peake, 67.

[4] Burr v. Sickles, 17 Ark. 428; 65 Am. Dec. 437; Gurney v. Howe, 9 Gray, 404; 69 Am. Dec. 299; Buell v. Chapin, 99 Mass. 594; 97 Am. Dec. 58.

[5] Gross v. Criss, 3 Gratt. 262; Burr v. Sickles, 17 Ark. 428; 65 Am. Dec. 437.

[6] Burr v. Sickles, 17 Ark. 428; 65 Am. Dec. 437.

[7] Williams v. Carpenter, 36 Ala. 9; 76 Am. Dec. 317, the court saying: "To absolve a debtor who transmits money by mail to his creditor for the payment of his debt from the hazard of loss in the transmission, it is necessary that the remittance should be made by the authority, express or implied, of the creditor, and in the manner and with the precautions prescribed by him: Smith's Mercantile Law, 528, 529; Warwicke v. Noakes, Peake, 67; Hawkins v. Rutt, Peake, 186; Townsend v. Henry, 9 Rich. 318; 3 Phillips on Evidence, last ed., 440, 441, note 11; 2 Greenl. Ev. 429, sec. 525. If it is impossible for the debtor to transmit

§ 2542. **Payment by Setting off Cross-items.**—Where an account is stated between two parties respecting items due on both sides, and it is agreed that the items admitted on the one side shall be set off against the items admitted on the other, so as to leave the balance only due, the transaction is equivalent to payment of the debts so set off, and it may be so pleaded.[1] If the insured is indebted to his broker, and hands him a policy to be adjusted, and the broker adjusts the policy, debits the insurer, and credits the assured, it is a payment, unless the assured dissents at the time.[2] But it is essential that the agreement shall be executed in some way.[3] Thus where it was agreed that goods were to be paid for by the buyer's surrendering a note of the seller held by him, it was ruled that this did not operate as payment until the note was given up.[4] Payment to an agent by acquittance of the agent's personal debt is not payment to the principal.[5]

§ 2543. **Receipt—Effect of as Evidence of Payment.**—A written receipt or admission by the creditor of payment of the debt is *prima facie* evidence against him; but unless it be executed with the formalities of a deed, it is not conclusive, and it is competent for him to contradict or explain it, and to show that the money was not

the money in the manner and under the precautionary attendant circumstances directed by the creditor, he cannot make the remittance at the risk of the creditor. His authority is to remit in the manner and under the circumstances prescribed, and if he remits without pursuing the directions, he acts without authority. Like an agent, he must pursue his authority and strictly observe its limitations and qualifications."

[1] Leake on Contracts, 889; Livingston v. Whiting, 15 Q. B. 723, the court saying: "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment, it has the same effect, because in contemplation of law a pecuniary transaction is supposed to have taken place by which each debt was then paid."

[2] Bethune v. Neilson, 2 Caines, 139.

[3] Cary v. Bancroft, 14 Pick. 315; 25 Am. Dec. 393; Dehon v. Stetson, 9 Met. 345; Doody v. Pierce, 9 Allen, 143; Manville v. Gay, 1 Wis. 250; 60 Am. Dec. 379.

[4] Gray v. White, 108 Mass. 229.

[5] Bostick v. Hardy, 30 Ga. 836.

in fact paid.[1] The words "received in full payment," "received in full satisfaction," or words similar in sense, are not construed to mean absolute satisfaction, when applied to the taking of a note or other security. It is a question of fact.[2] A receipt is not alone sufficient evidence of the payment against a third party, as where it is sought to charge another party liable to make good the money expressed to be paid.[3] A receipt or acknowledgment of payment made with the formality of a deed under seal operates as an estoppel upon the party making it as against the party to whom it is delivered.[4] The acknowledgment in a deed of the receipt of the consideration, like any other receipt, is *prima facie* evidence that the amount recited has been received, but it may be rebutted.[5]

§ 2544. Payment to or by Joint Creditors or Debtors. — Payment to one of several joint creditors discharges the debt as to all of them.[6] Payment by one of co-debtors or co-contractors, whether liable jointly only, or jointly and severally, for the same debt or liability, discharges all, and may be pleaded as payment by any of them.[7] Payment of half the debt by one of two joint and several debtors does not release him.[8] Money paid on a joint promissory note by one of the makers cannot afterwards be differently appropriated by the payee and the holder.[9] *Prima facie*, the note of one debtor is no discharge of a joint debt.[10] An assignment before maturity of a joint and several promissory note made by the payee to one of the makers constitutes a payment.[11]

[1] Tobey *v.* Barber, 5 Johns. 68; 4 Am. Dec. 326; Muldon *v.* Whitlock, 1 Cow. 290; 13 Am. Dec. 533; Real Estate Bank *v.* Rawdon, 5 Ark. 558.

[2] In re Hurst, 1 Flip. 462.

[3] Leake on Contracts, 902.

[4] Leake on Contracts, 904.

[5] Jackson *v.* McChesney, 7 Cow. 360; 17 Am. Dec. 521; Wood *v.* Chapin, 13 N. Y. 509; 67 Am. Dec. 62; Daniels *v.* Moses, 12 S. C. 130.

[6] Wallace *v.* Kelsall, 7 Mees. & W. 264.

[7] Leake on Contracts, 906; Cook *v.* Field, 3 Ala. 53; 36 Am. Dec. 436.

[8] Griffith *v.* Grogan, 12 Cal. 317.

[9] Frost *v.* Martin, 26 N. H. 422; 59 Am. Dec. 353.

[10] Tyner *v.* Stoops, 11 Ind. 22.

[11] Gordon *v.* Wansey, 21 Cal. 77.

§ 2545. Appropriation of Payments — By Debtor. — Where a payment is made by a debtor owing several distinct debts to the same creditor, the general rule is that the debtor has the right to apply that payment as he thinks fit; and if there are several debts due from him, he has a right to say to which of those debt the payment shall be applied.[1] If the creditor do not consent to apply the money tendered according to the declared intention of the debtor, he must then refuse it, and stand upon the rights which the law gives him.[2] If payment is offered on an account not due, the creditor need not receive it, but if he does receive it, he is bound to apply it in accordance with the directions of the debtor.[3] But the rule that a debtor may appropriate payments as he pleases applies only to voluntary payments, and not to those made by process of law.[4] To make an application of a payment, the person paying must give directions before or at the time of payment.[5] Where an agent is employed to receive money for his principal, he cannot appropriate it to the payment of a debt due to him from the principal, without the consent of the latter.[6] A debtor who has directed payments made by him to his creditor to be applied to the satisfaction of an illegal claim cannot afterwards require them to be otherwise appropriated.[7]

ILLUSTRATIONS. — A man handed money to his wife, telling her to put it in the bank, and that it would go toward paying a certain creditor. The wife afterwards withdrew the money

[1] Clayton's Case, 1 Mer. 605; Mann v. Marsh, 2 Caines, 99; Stone v. Seymour, 15 Wend. 19; Seymour v. Van Slyck, 8 Wend. 403; Patty v. Milne, 16 Wend. 557; 22 Wend. 558; Champenoes v. Fort, 45 Miss. 355; Leef v. Goodwin, Taney, 460; Vicary v. Moore, 2 Watts, 451; 27 Am. Dec. 323; Pickering v. Day, 3 Houst. 474; 95 Am. Dec. 291; Washington etc. Gas Co. v. Johnson, 123 Pa. St. 526; 10 Am. St. Rep. 553.

[2] Croft v. Lumley, 5 El. & B. 680; Kitchin v. Hawkins, L. R. 2 Com. P. 31. And see Hansen v. Rounsavell, 74 Ill. 138; Reed v. Boardman, 20 Pick. 440.

[3] Wetherell v. Joy, 40 Me. 325.

[4] Blackstone Bank v. Hill, 10 Pick. 129; Orleans Co. Bank v. Moore, 112 N. Y. 443; 8 Am. St. Rep. 775.

[5] Reynolds v. McFarlane, 1 Over. 488.

[6] Morse v. Woods, 5 N. H. 297.

[7] Hubbell v. Flint, 15 Gray, 550; Richardson v. Woodbury, 12 Cush. 279; Caldwell v. Wentworth, 14 N. H. 431.

from the bank and used it. The husband died. *Held*, that there had been no such specific appropriation of the money as to enable the creditor to maintain a suit therefor against the wife: *Ryan* v. *O'Neil*, 49 Mich. 281. A debtor, by note to a bank, paid the full anount of the note to the cashier, declaring that the payment was intended to discharge that debt. *Held*, that the cashier was bound to make the application accordingly, and could not apply any part of the sum so paid to the payment of damages on a protested bill, which he alleged to be due to the bank from the debtor: *Runyon* v. *Latham*, 5 Ired. 551.

§ 2546. **Intention may be Inferred.**—The intention of appropriating a payment to a particular debt may be inferred from the circumstances, although not declared in express terms by the debtor,[1] or it may be proved by parol evidence of directions given either previously or subsequently.[2] The receipt of money for a defined use amounts to an agreement on the part of the person receiving it that he will not apply it to any other.[3] Where a person is indebted on two contracts, and makes a payment, it must be applied on the contract to which it appears by the receipt that the party intended that it should be applied.[4]

ILLUSTRATIONS.—A debtor, being indebted in his own right and also in a different right, as an executor, makes a general payment. *Held*, that he is presumed to make it in discharge of his own debt; but as between debts incurred by himself and those for which he is liable as incurred by his wife before marriage, there is no such presumption: *Goddard* v. *Cox*, 2 Strange, 1194. A payment is made to the exact amount of one of two debts. *Held*, that it is presumptively appropriated to the discharge of that debt: *Marryatts* v. *White*, 2 Stark. 102. A payment is made, with discount deducted. *Held*, that it is presumptively appropriated to a debt upon which discount

[1] Leake on Contracts, 915; Stone *v.* Seymour, 8 Wend. 403; 15 Wend. 19; Robert *v.* Garnie, 3 Caines, 14. "If a man sends money to another, and that other receives it, the first point is, what was the intention with which it was sent; and if that cannot be ascertained by direct proof, it must be got at by circumstantial evidence; and whatever is the intention, that must prevail, unless only the other elects to return the money": Nash *v.* Hodgson, 6 De Gex, M. & G. 474.

[2] Wittkowsky *v.* Reid, 82 N. C. 116; Hansen *v.* Rounsavell, 73 Ill. 238.

[3] Smuller *v.* Union Canal Co., 37 Pa. St. 68.

[4] Stewart *v.* Keith, 12 Pa. St. 238.

might be claimed, instead of debts for which the time of credit had expired: *Marryatts* v. *White*, 2 Stark. 102. The question is as between an admitted and a disputed debt. *Held*, that a payment must necessarily be referred to the debt admitted: *Burn* v. *Boulton*, 2 Com. B. 476. A collector of tolls on the Erie canal made a payment in July corresponding in amount precisely with an account of tolls which he had returned as collected by him in the preceding month of May (there being no other charge against him at the time in the comptroller's office, except a trifling balance for previous months); and in August made another payment, also precisely corresponding in amount with the account of tolls rendered or collected in the month of June. *Held*, that a jury would be warranted in finding that the collector intended the payment in July to apply to the tolls returned as collected in the month of May: *Seymour* v. *Van Slyck*, 8 Wend. 403. O., who was indebted to K. and K. & Co., on paying to K. a sum less than the aggregate of the two accounts, took from K. a receipt in full, signed K. & Co., without making any application of the payment as between the two debts, K. voluntarily promising to accept the part payment in satisfaction of both. *Held*, that the receipt indicated an application first to the company account, and the unpaid balance might be recovered by K.: *Otto* v. *Klauber*, 23 Wis. 471.

§ 2547. Appropriation by the Creditor.—If the debtor make a payment generally, without appropriating it, expressly or impliedly, to a particular debt, the creditor has the right of appropriating it to any debt then due,[1] which

[1] Mills *v.* Fowkes, 6 Bing. N. C. 461; Brady *v.* Hill, 1 Mo. 315; 13 Am. Dec. 503; Cremer *v.* Higginson, 1 Mason, 338; Bell *v.* Radcliff, 32 Ark. 645; McLendon *v.* Frost, 57 Ga. 448; Shipsey *v.* Bank, 59 N. Y. 485; Harding *v.* Tifft, 75 N. Y. 461; Bank *v.* Bigler, 83 N. Y. 51; Feldman *v.* Beier, 78 N. Y. 293; Troller *v.* Grant, 2 Wend. 413; Allen *v.* Culver, 3 Denio, 284; Van Rensselaer *v.* Roberts, 5 Denio, 470; Webb *v.* Dickinson, 11 Wend. 62; Mayor *v.* Patten, 4 Cranch, 317; Waterman *v.* Younger, 49 Mo. 413; Nuttall *v.* Bannin, 5 Bush, 11; Hargroves *v.* Cook, 15 Ga. 321; Howard *v.* McCall, 21 Gratt. 205; Haynes *v.* Waite, 14 Cal. 446; Calvert *v.* Carter, 18 Md. 73; Burks *v.* Albert, 4 J. J. Marsh. 97; 20 Am. Dec. 209; Byrnes *v.* Claffey, 69 Cal. 120. In Harker *v.* Conrad, 12 Serg. & R. 301, 14 Am. Dec. 691, it is said: "Although, as between the immediate parties, the creditor has a right to appropriate where the debtor has failed to do so, yet this right must be exercised within, at the furthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial, and were it otherwise, there would, in the absence of an actual appropriation by the debtor, be no rule on the subject but the will of the creditor, which would, in all cases, be decisive. But such is not the case. In default of actual appropriation, the matter is to be determined by rules and circumstances of equity. The debtor has a right to make the application in the first instance, and failing to exercise it, the same right devolves on the creditor; but where neither has

right may be exercised at any time before suit.[1] So where a debtor pays money to the attorney of several creditors whose debts are presently due, and does not designate the debt to which he wishes it to be applied, the attorney may apply it.[2] But the creditor must make the application directly, and cannot be allowed to change it as his interest or convenience may change.[3] After a creditor has received money, and rendered an account of the application of it in payment of various debts, he cannot make his election to appropriate it in a different manner, so as to vary the rights of third parties.[4] The Roman law, which, in the application of a payment, requires the creditor, where the right has devolved on him by the laches of the debtor, to consult the debtor's interest in preference to his own, has not been adopted by the common law.[5]

The creditor may appropriate such payment to the debt for which he has an inferior remedy or security, as a simple contract debt instead of a specialty debt;[6] or to a purely equitable debt instead of a legal debt, as a debt that has arisen out of a partnership transaction; but not, it seems, where the claim remains still an unsettled matter of account, or is a debt not due.[7] He may

exercised it, the law nevertheless presumes, in ordinary cases, that the debtor intended to pay in the way which, at the time, was most to his advantage. Thus if it were peculiarly the interest of the party to have the money received in extinguishment of such demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Such intendment is reasonable and natural, and one which will, in most cases, accord with what was actually the fact; it is therefore equivalent to an exercise of the party's right by acts, or an express declaration of intention. Where, however, the interest of the debtor would not be prompted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption, for the same reason, that the payment was actually received in the way that was most to the advantage of the creditor. I think these principles, as furnishing general rules, may fairly be extracted from the cases."

[1] Haynes *v.* Waite, 14 Cal. 446; Pickering *v.* Day, 3 Houst. 474; 95 Am. Dec. 291.

[2] Carpenter *v.* Goin, 19 N. H. 479.

[3] Hill *v.* Southerland, 1 Wash. 128.

[4] Bank of North America *v.* Meredith, 2 Wash. 47.

[5] Logan *v.* Mason, 6 Watts & S. 9.

[6] Peters *v.* Anderson, 5 Taunt. 596.

[7] Bosanquet *v.* Wray, 6 Taunt. 597; Goddard *v.* Hodges, 1 Cromp. & M. 33; Bobe *v.* Stickney, 36 Ala. 495; Kidder *v.* Norris, 18 N. H. 534.

apply the payment to a debt which is unguaranteed, instead of one for which he has the guaranty of a surety.[1] A creditor who has a security for several debts may appropriate the proceeds in any way he thinks fit; thus having a mortgage from one of two partners to secure whatever might be due from the partner, either alone or upon the joint account of the partnership, it was held that upon a bankruptcy he might apportion the proceeds of the security between the joint and separate debts in whatever way was most to his advantage.[2] The creditor may appropriate the payment to a claim which he could not recover by action, provided it is founded on proper and legal consideration.[3] So he may appropriate it to discharge a debt barred by limitation, although other more recent debts are due;[4] or to discharge a liability unenforceable by action under the statute of frauds.[5]

But he cannot appropriate it to an illegal and invalid claim,[6] or to a claim arising out of a transaction forbidden by statute,[7] unless the debtor consent thereto, which consent cannot be revoked;[8] or on a debt or liability not yet due.[9] Where he has a demand personally against the

[1] Kirby *v.* Marlborough, 2 Maule & S. 18; Mathews *v.* Snitzler, 46 Mo. 301; Harding *v.* Tifft, 75 N. Y, 461; Wood *v.* Callaghan, 61 Mich. 402; 1 Am. St. Rep. 597.

[2] Ex parte Dickin, L. R. 20 Eq. 767.

[3] Leake on Contracts, 918; Arnold *v.* Mayor, 4 Man. & G. 600; James *v.* Child, 2 Cromp. & J. 678; McCausland *v.* Ralston, 12 Nev. 195; 28 Am. Rep. 781; Lamprell *v.* Billericay Union, 3 Ex. 283, the court saying: "The doctrine has never been held to authorize a creditor, receiving money on account, to apply it towards the satisfaction of what does not nor ever did constitute any legal or equitable demand." But see Sellick *v.* Munson, 2 Aiken, 150; 16 Am. Dec. 689.

[4] Where the demands consisted of three notes, all of which were barred by the statute of limitations, and the debtor made a general payment, it was held that the creditor might apply it upon which note he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent in date to the others, and that the effect would be to take the note, upon which the application was made, out of the statute of limitations, but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute: Ayer *v.* Hawkins, 19 Vt. 26.

[5] Haynes *v.* Nice, 100 Mass. 327; 1 Am. Rep. 109; Murphy *v.* Webber, 61 Me. 478.

[6] Phillips *v.* Moses, 65 Me. 70; Pickett *v.* Bank, 32 Ark. 346; McCausland *v.* Ralston, 12 Nev. 195; 28 Am. Rep. 781; Rohan *v.* Hanson, 11 Cush. 44; Greene *v.* Tyler, 39 Pa. St. 361.

[7] Phillips *v.* Moses, 65 Me. 70.

[8] Brown *v.* Burns, 67 Me. 535; Feldman *v.* Gamble, 26 N. J. Eq. 494.

[9] Heard *v.* Pulaski, 80 Ala. 502.

debtor, and also one against him in a representative capacity as trustee, executor, or partner, he must apply it to the former;[1] but the residue must be appropriated to the latter debt, and cannot be held for future demands against the debtor personally.[2]

The right of appropriation in the creditor only arises upon the debtor omitting to exercise the right on his part; and therefore does not extend to a payment received from a third party on account of the debtor, and without his knowledge.[3] A creditor cannot lawfully pay himself with the debtor's money without the debtor's consent, express or implied; and when the debtor delivers him money for a purpose which negatives the idea of payment, the creditor's control of it is limited to the purpose declared.[4] A mortgagee has no right to apply money received from the mortgagor to the payment of the mortgage before maturity, in the absence of authority from the mortgagor.[5]

The creditor is not bound to exercise his right of appropriation immediately upon receiving the payment, but may do so at any time whilst the position of the parties remains unaltered; nor is he bound by an intended appropriation until it has been communicated to the debtor.[6] The right of appropriation is strictly confined to the original parties, and no third person can insist on any application of such money which has not been made by either party.[7]

§ 2548. **Appropriation by the Law.**—If neither the debtor nor the creditor make any appropriation, the law, in general, appropriates the payment to the earlier debt;[8]

[1] Fowke *v.* Bowie, 4 Har. & J. 566; Sawyer *v.* Tappan, 14 N. H. 352; Johnson *v.* Boone, 2 Har. (Del.) 172; Sneed *v.* Webster, 2 A. K. Marsh. 277. See Wiesenfeld *v.* Byrd, 17 S. C. 106.

[2] Baker *v.* Stackpole, 9 Cow. 420; 18 Am. Dec. 508.

[3] Leake on Contracts, 920.

[4] Detroit etc. R. R. Co. *v.* Smith, 50 Mich. 112.

[5] Richardson *v.* Coddington, 49 Mich. 1.

[6] Leake on Contracts, 920.

[7] Gordon *v.* Hobart, 2 Story, 243.

[8] Cremer *v.* Higginson, 1 Mason, 338; Pickering *v.* Day, 2 Del. Ch. 333; 3 Houst. 474; 95 Am. Dec. 291; Yeomans *v.* Heartt, 34 Mich. 401; Smith *v.* Lloyd, 11 Leigh, 512; 37 Am. Dec. 621; Clark *v.* Knight, 31 Vt. 701;

though some cases hold that there is no fixed rule, but that the law will appropriate the payment according to the justice of the particular case.[1] The rules of law for the appropriation of payments are applicable only where the parties have no contrary understanding.[2] Payments will be applied according to the intent of the parties, if this can be determined with reasonable certainty.[3]

Where there are two contracts, one lawful and the other void for illegality, a payment not specifically appropriated by either party will be appropriated in discharge of the debt recoverable by law.[4] A payment by a mortgagor will not be applied to discharge a debt due on the mortgage in favor of a purchaser of part of the premises, who had not paid for them, but had given them to a son to

Stone *v.* Seymour, 15 Wend. 19; Allen *v.* Culver, 3 Denio, 284; Dous *v.* Morewood, 10 Barb. 183; Wheeler *v.* Cropsey, 5 How. Pr. 288; Sprague *v.* Hazennubel, 53 Ill. 419; Crompton *v.* Pratt, 105 Mass. 255; Langdon *v.* Bowen, 46 Vt. 512; Fairchild *v.* Holly, 10 Conn. 176; Hunter *v.* Ousterbout, 11 Barb. 33; Miller *v.* Miller, 23 Me. 22; 39 Am. Dec. 597; Parks *v.* Ingram, 22 N. H. 283; 55 Am. Dec. 153; Hersey *v.* Bennett, 28 Minn. 86; 41 Am. Rep. 271; Hollister *v.* Davis, 54 Pa. St. 508; Goetz *v.* Piel, 26 Mo. App. 634; Willis *v.* McIntyre, 70 Tex. 34; 8 Am. St. Rep. 574. The civil-law rule was to appropriate the payment to the debt most burdensome to the debtor: See Snell's Equity, 448; Clayton's Case, 1 Mer. 606. In White *v.* Trumbull, 15 N. J. L. 314, 29 Am. Dec. 687, the court say: "The application of payments seems to be a subject about which it is difficult to find general principles in the books to guide our practice. The party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of its appropriation. If both are silent, the law must decide. But what is the decision of the law, or of enlightened reason, seems not to be well settled. Sometimes the court seems to have gone on the principle of preferring the supposed wishes or interest of the party paying; and sometimes a similar preference has been given to the party receiving; at other times the interest of a third party has governed the decision. And the cases seem to rest more on their own particular facts than upon any general principles. In the written argument submitted to the court, it is contended that the older debt should be first paid, and cited Peake, 64; 3 Starkie on Evidence, 1091, and notes. But that has not always been allowed, as may be seen by consulting the book last cited, and the cases there collected."

[1] White *v.* Trumbull, 15 N. J. L. 314; 29 Am. Dec. 687; Smith *v.* Lloyd, 11 Leigh, 512; 37 Am. Dec. 621.

[2] Mack *v.* Adler, 22 Fed. Rep. 570.

[3] The Martha, 29 Fed. Rep. 708.

[4] Leake on Contracts, 921; Backman *v.* Wright, 27 Vt. 187; 65 Am. Dec. 187; Hall *v.* Clement, 41 N. H. 169. If a party indebted upon a running account, partly for legal and partly for illegal sales, made payments generally upon account, those payments are to be applied to the items of charge for legal sales; but if at any time the amount paid exceed the amount due for legal sales, the balance will be applied to pay for the goods illegally sold: Hall *v.* Clement, 41 N. H. 166.

defraud creditors.[1] The payment will in the first place be applied to liquidate interest, if interest be due on the debt,[2] and if one debt bears interest, and the other do not, the payment will be applied to the former;[3] to an existing indebtedness, and not to a future one.[4] Advances made on account generally, for work done on several distinct contracts, some of which have not been completed, must be applied in the first place to the extinguishment of the amounts due on the contracts which have been completed, and not of those which have not been completed.[5] So it has been held that the law will apply the payment to the debt whose security is most precarious;[6] to a secured in preference to a simple debt;[7] to a certain in preference to a contingent liability.[8]

§ 2549. Implied Contracts — Money Paid for the Use of Another. — In certain cases, where one person pays money for another under circumstances which make it right that it should be repaid, the law implies a contract on the part of the person benefited to repay it without any actual agreement on his part.[9]

§ 2550. Compulsory Payment of Another's Debt. — Where a person has been compelled by law to pay money

[1] Dorsey *v.* Gassaway, 2 Har. & J. 402; 3 Am. Dec. 557.

[2] North *v.* Mallett, 2 Hayw. (N. C.) 151; 2 Am. Dec. 622; Johnson *v.* Johnson, 5 Jones Eq. 167. Where interest is paid in advance on a note for a stipulated time, and the principal is paid before the expiration of that time, the excess of interest paid is to be applied to the payment of the principal: Freeman's Bank *v.* Rollins, 13 Me. 202.

[3] Bacon *v.* Brown, 1 Bibb, 334; 4 Am. Dec. 640. A payment made before maturity on a demand drawing interest should be applied to the principal. After principal and interest both become due, the rule is otherwise: Starr *v.* Richmond, 30 Ill. 276; 83 Am. Dec. 139.

[4] Harrison *v.* Johnston, 27 Ala. 445.

[5] McDowell *v.* Canal Co., 5 Mass. 11.

[6] Field *v.* Holland, 6 Cranch, 8; Stamford Bank *v.* Benedict, 15 Conn. 437; Goetz *v.* Piel, 26 Mo. App. 634.

[7] Patterson *v.* Hall, 9 Cow. 747; Robinson *v.* Doolittle, 12 Vt. 246; Dowes *v.* Morewood, 10 Barb. 168; Field *v.* Holland, 6 Cranch, 8; Callagan *v.* Boozman, 21 Ala. 246; Thomas *v.* Kelsey, 30 Barb. 268; Jones *v.* Benedict, 83 N. Y. 79; Stamford Bank *v.* Benedict, 15 Conn. 438; Wright *v.* Wright, 7 Daly, 55; Langdon *v.* Bowen, 46 Vt. 512; Vance *v.* Monroe, 4 Gratt. 53. But see Lanier *v.* Wyman, 5 Rob. (N. Y.) 160; Burks *v.* Albert, 4 J. J. Marsh. 97; 20 Am. Dec. 209; Putnam *v.* Russell, 17 Vt. 54; 42 Am. Dec. 478.

[8] Bank *v.* Rosevelt, 9 Cow. 409; Bank *v.* Brown, 22 Me. 294; Newman *v.* Meek, 1 Smedes & M. 331.

[9] Lewis *v.* Campbell, 8 Com. B. 545.

which another person was liable to pay, and the latter has obtained the benefit of the payment, he may be compelled to repay the sum.[1] But a debt cannot be implied in law from a payment, however compulsory, made for the use of another, unless it operates in discharge of some liability on his part; the discharge of a merely moral obligation of another, or of any obligation not recognized in law or equity, will not create a debt.[2]

§ 2551. **Voluntary Payment of Another's Debt.**—But from a mere voluntary payment of another's debt no legal liability by the party benefited to pay it arises.[3]

§ 2552. **Money Received to the Use of Another.**—Where money has been received by another under circumstances which, in justice, require that it should be paid over to another, the law implies a contract to so pay it.[4] If one person obtains possession of money which *ex æquo et bono* belongs to another, the latter may maintain an action to recover it.[5] A county treasurer may maintain *assumpsit* against his predecessor for county funds, for which the plaintiff has accounted to the county as received from the defendant, but which have not been received.[6]

§ 2553. **Money Obtained by Fraud or Wrong.**—Thus where a person has wrongfully or fraudulently possessed himself of money, or of goods which he has turned into money, the rightful owner of the money or goods has a remedy by action for the specific wrong, as by an action

[1] Ralston *v.* Wood, 15 Ill. 159; 58 Am. Dec. 604.

[2] Leake on Contracts, 85.

[3] By the law of this country, differing, it is said, in that respect from the civil law, nobody can make himself the creditor of another by paying that other's debt against his will or without his consent; that is, expressed by the common formula of the claim for money paid for the defendant's use, at his request. That is the general rule; but it is subject to this modification: that money paid to discharge the debt of another cannot be recovered, unless it was paid at his request, or under compulsion: Johnson *v.* Packet Co., L. R. 3 Com. P. 43.

[4] Leake on Contracts, 88. See Title Trusts, *ante*.

[5] Peterson *v.* Foss, 12 Or. 81.

[6] Van Ness *v.* Hadsell, 54 Mich. 560.

of trespass or trover for the taking or converting of the property, or by an action to recover damages for the fraud; or may waive the wrong, and claim the sum received by the wrong-doer as a debt.[1] *Assumpsit* lies by an insurance company to recover back money paid by reason of false swearing by the assured.[2] A vendee may recover back money paid to a broker for a forged note, sold by the broker without disclosing the name of his principal, although the broker has paid over the money to his principal, there having been no unreasonable delay in giving notice of the forgery after discovery, and although the note was sold for a sum less than its face.[3] Where a person, for the purpose of obtaining money from another, procures him to drink drugged liquor, and while he is under its influence wins money from him by betting on cards, the money so lost may be recovered.[4]

If the owner of the property that has been wrongfully sold accept payment of the proceeds of the sale from the wrong-doer, he so far adopts the sale that he cannot afterwards sue for damages in respect of it as a wrongful act.[5] So if he claim the proceeds, and accept part payment on account, he waives the wrong altogether, and cannot afterwards bring an action for damages; he can recover the residue only as a debt for money received to his use.[6] The bringing of an action for the money received, in general, operates as an election to waive the wrongful act of which the money is the proceeds.[7] Money paid by the drawee of a forged draft cannot be recovered back from the innocent holder; and this,

[1] Benton *v.* Driggs, 20 Wall. 125; Gibson *v.* Stevens, 3 McLean, 551; Magoffin *v.* Muldrow, 12 Mo. 512; Reynolds *v.* Rochester, 4 Ind. 43; Barnard *v.* Colwell, 39 Mich. 215; McConnell *v.* Ins. Co., 18 Ill. 228; Johnson *v.* Ins. Co., 39 Mich. 33; Walker *v.* Coleman, 81 Ill. 380; 25 Am. Rep. 285; McDonald *v.* Brown, 16 Ill. 32. See *ante*, Title Trusts.

[2] Western Assurance Co. *v.* Towle, 65 Wis. 247.

[3] Merriam *v.* Wolcott, 3 Allen, 258; 80 Am. Dec. 69.

[4] Jones *v.* Inness, 32 Kan. 177.

[5] Brewer *v.* Sparrow, 7 Barn. & C. 310.

[6] Lythgoe *v.* Vernon, 5 Hurl. & N. 180; 29 L. J. Ex. 164.

[7] Leake on Contracts, 93.

though the drawee, having an opportunity to see the draft, did not see it, and though the holder in presenting it for payment, stated that he had the draft of the purported drawer.[1]

§ 2554. Money Obtained by Compulsion or Duress.— Money paid under duress of the person, or imprisonment, or by threats of imprisonment, or of personal injury, or money paid to obtain possession of goods wrongfully taken or detained, or to protect property from threatened injury, may be recovered back.[2] As to what amounts to compulsion of this kind, it is said in a leading case: "There must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money."[3] The commencement of legal proceedings, without any seizure of property or person, does not constitute legal compulsion; for the party has an ample remedy in his right to set up his defense in the court.[4] Thus money wrongfully demanded as rent paid under threats of ejectment is not recoverable.[5] Duress of goods does not exist because of a mere threat by a mortgagee of chattels with power of sale to use his power, unless over-

[1] Bernheimer *v.* Marshall, 2 Minn. 78; 72 Am. Dec. 79.

[2] Cobb *v.* Charter, 32 Conn. 358; 87 Am. Dec. 178; Emerson *v.* Lee, 18 La. Ann. 134; 89 Am. Dec. 648; Heckman *v.* Swartz, 64 Wis. 48. "Such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust, or oppressive": Dickerman *v.* Lord, 21 Iowa, 338; 89 Am. Dec. 579; Mann *v.* Lewis, 3 W. Va. 215; 100 Am. Dec. 747. As to what constitutes duress, see *ante*, Chapter CXI., Duress.

[3] Brumagim *v.* Tillinghast, 18 Cal. 265; 79 Am. Dec. 176. And see Garrison *v.* Tillinghast, 18 Cal. 404; Radick *v.* Hutchins, 95 U. S. 210; Elston *v.* Chicago, 40 Ill. 514; 89 Am. Dec. 361; Waubansee Co. *v.* Walker, 8 Kan. 431; Mays *v.* Cincinnati, 1 Ohio St. 260; Ladd *v.* Southern Press Co., 53 Tex. 172; Corkle *v.* Maxwell, 3 Blatchf. 413; Maxwell *v.* Griswold, 10 How. 242; Wolfe *v.* Marshall, 52 Mo. 167.

[4] Benson *v.* Monroe, 7 Cush. 125; 54 Am. Dec. 716; Dickerman *v.* Lord, 21 Iowa, 338; 89 Am. Dec. 579; Watson *v.* Cunningham, 1 Blackf. 321; Cummins *v.* White, 4 Blackf. 356.

[5] Emmons *v.* Scudder, 115 Mass. 367.

paid by taking possession of the mortgaged property, and selling it pursuant to a provision in the mortgage.[1]

The danger to person or to property must be imminent, and avoidable only by the payment of the money.[2] Therefore if it is paid after the compulsion is over, it is not recoverable.[3] And the compulsion must proceed from the person to whom the payment is made and the recovery is wanted,[4] and must be exercised on the person who makes the payment. Money paid to release the person or property of a third person cannot be recovered back,[5] unless, it seems, where the party is a blood relative.[6]

§ 2555. **Money Paid to Protect Life or Goods.** — Thus money paid by a person to save his life or preserve his liberty may be recovered back.[7] A menace of personal injury is not duress, unless it threatens serious bodily harm sufficient to overcome the will of a person of ordinary firmness.[8] Fear of an arbitration committee of a stock exchange is not duress.[9] It is only, however, where the imprisonment is unlawful that duress is present.[10] But a threat of imprisonment is the same as actual imprisonment in its effect.[11] And where there is an arrest without just cause, or for an improper purpose, even

[1] Vick *v.* Shinn, 49 Ark. 70; 4 Am. St. Rep. 26.

[2] Cook *v.* Boston, 9 Allen, 393; Preston *v.* Boston, 19 Pick. 7; Cloflin *v.* McDonough, 33 Mo. 412; Garrison *v.* Tillinghast, 18 Cal. 404; Taylor *v.* Board of Health, 31 Pa. St. 73; 72 Am. Dec. 724; Fellows *v.* School Dist., 39 Me. 559; Mayor *v.* Lefferman, 4 Gill, 425; 45 Am. Dec. 145; Harmon *v.* Harmon, 61 Me. 227; 14 Am. Rep. 556.

[3] Fellows *v.* School Dist., 39 Me. 559; Cunningham *v.* Boston, 15 Gray; 468; Schulz *v.* Culberson, 46 Wis. 313; 49 Wis. 122. See Heckman *v.* Swartz, 50 Wis. 267.

[4] Brumagim *v.* Tillinghast, 18 Cal. 265; 79 Am. Dec. 176; Smith *v.* Schroeder, 15 Minn. 35; Taylor *v.* Board of Health, 31 Pa. St. 73; 72 Am. Dec. 724. See Cunningham *v.* Monroe, 15 Gray, 471; Voiers *v.* Stout, 4 Bush, 572.

[5] Robertson *v.* Marsh, 42 Tex. 149; Robinson *v.* Gould, 11 Cush. 57.

[6] Solinger *v.* Earle, 60 How. Pr. 116; 82 N. Y. 393; Schulz *v.* Culberson, 46 Wis. 313; 49 Wis. 122.

[7] Richardson *v.* Duncan, 3 N. H. 508; Harvey *v.* Boyd, 42 Ill. 336. See *ante*, Chapter CXI., Duress.

[8] Harmon *v.* Harmon, 61 Me. 227; 14 Am. Rep. 556.

[9] Quincey *v.* White, 63 N. Y. 370.

[10] Eddy *v.* Herrin, 17 Me. 338; 35 Am. Dec. 261.

[11] Harmon *v.* Harmon, 61 Me. 227; 14 Am. Rep. 556; Eddy *v.* Herrin, 17 Me. 338; 35 Am. Dec. 261; Sartwell *v.* Horton, 28 Vt. 370.

though the process is valid, and the party pays money to regain his liberty, he may recover it back.[1] So of money paid on an unlawful demand to save or obtain possession of his goods;[2] as where one pays money to free his goods from an attachment levied on his goods by one who has no cause of action, and brings the proceeding to extort money.[3] Where a bailee of property refuses to carry or deliver property, except on payment of an excessive or illegal charge, the demand may be paid under protest, and an action instituted to recover the amount unlawfully claimed.[4] So if a sheriff levy on property which does not belong to the judgment debtor, and the owner is compelled to pay the judgment to save his goods, he may get his money back in a action at law.[5] And where a man pays an illegal tax or assessment under protest to save his property, he may recover the amount paid by showing that the levy is illegal.[6]

[1] Schourmer *v.* Farwell, 56 Ill. 542; Richardson *v.* Duncan, 3 N. H. 508; Devlin *v.* U. S., 12 Ct. of Cl. 266; Severance *v.* Kimball, 8 N. H. 386; Heckman *v.* Swartz, 50 Wis. 267; Durr *v.* Howard, 6 Ark. 461.

[2] Fleetwood *v.* New York, 2 Sand. 479; Scholey *v.* Mumford, 60 N. Y. 501; Carew *v.* Rutherford, 106 Mass. 1; 8 Am. Rep; 287; Peyser *v.* Mayor, 70 N. Y. 501; 26 Am. Rep. 624; Commercial Bank *v.* Rochester, 41 Barb. 342; Baldwin *v.* Liverpool Co., 11 Hun, 325; Dewey *v.* Supervisors, 2 Hun, 395.

[3] Chandler *v.* Sanger, 114 Mass. 364; 19 Am. Rep. 367.

[4] Tutt *v.* Ide, 3 Blatchf. 249; Briggs *v.* Boyd, 56 N. Y. 289; Harmony *v.* Bingham, 12 N. Y. 99; Schorfe *v.* Halifax, 7 Mees. & W. 288; Chase *v.* Taylor, 4 Har. & J. 54; Chase *v.* Dwinal, 7 Me. 134; 20 Am. Dec. 352; Clinton *v.* Strong, 9 Johns. 369; Quinnett *v.* Washington, 10 Mo. 54; Lafayette etc. R. R. Co. *v.* Patteson, 41 Ind. 312; Beckwith *v.* Frisbie, 32 Vt. 559; Mobile etc. R. R. Co. *v.* Steiner, 61 Ala. 559; Chicago etc. R. R. Co. *v.* Chicago etc. Coal Co., 79 Ill. 121; Kenneth *v.* R. R. Co., 15 Rich. 284; 98 Am. Dec. 382. *Contra*, Potomac Coal Co. *v.* R. R. Co., 38 Md. 226.

[5] Adam *v.* Town of Litchfield, 10 Conn. 127; Preston *v.* Boston, 12 Pick. 7; Valpy *v.* Manning, 1 Com. B. 593; Snowdon *v.* Davis, 1 Taunt. 359.

[6] Elliot *v.* Swartwout, 10 Pet. 139; Smith *v.* Redfield, 27 Me. 145; Stephan *v.* Daniels, 27 Ohio St. 527; Erskine *v.* Van Arsdale, 15 Wall. 75; Branam *v.* Mayor, 24 Cal. 585; Union Ins. Co. *v.* City of Alleghany, 15 Pittsb. Rep. 221; Peyser *v.* Mayor, 70 N. Y. 497; 26 Am. Rep. 624; Wiley *v.* Parmer, 14 Ala. 627; Crutchfield *v.* Wood, 16 Ala. 702; Cahaba *v.* Burnett, 34 Ala. 400; Hubbard *v.* Brainard, 35 Conn. 563; Lanman *v.* Des Moines, 29 Iowa, 310; De Fremey *v.* Austin, 53 Cal. 380; Hendy *v.* Soule, Deady, 400; Union R. R. Co. *v.* Skinner, 9 Mo. App. 189; County Comm'rs *v.* Parker, 7 Minn. 267; First Nat. Bank *v.* Blakely, 40 Mich. 367; Greenbaum *v.* King, 4 Kan. 284; 96 Am. Dec. 172; Tuttle *v.* Everett, 51 Miss. 27; 24 Am. Rep. 622.

ILLUSTRATIONS. — A manager of a theater was prevented by an officer from giving an exhibition until he had paid a license fee, which he did under protest. The license fee was illegal. *Held*, that he could recover the amount paid: *Baker* v. *Cincinnati*, 11 Ohio St. 534. An actor, after everything is ready for the performance, refuses to perform until a certain sum of money, to which he is not entitled, is paid him. The payment is involuntary, and recoverable: *Dana* v. *Kemble*, 17 Pick. 545.

§ 2556. **Real Property.** — As to real property it is generally held that a payment made to prevent the seizure or sale of real property is not made under compulsion.[1] So it is held that a payment made to satisfy a void assessment on land, or to prevent its sale, or the issuance of a deed to the purchaser, is not compulsory, and cannot be recovered back, since such a sale, being illegal, would not create a cloud on the title.[2] Other cases, however, hold a contrary doctrine.[3]

§ 2557. **Compulsion of Legal Process.** — Money paid under compulsion of legal process cannot be recovered

[1] Forrest *v.* Mayor, 13 Abb. Pr. 350; Fleetwood *v.* New York, 2 Sand. 475; Stover *v.* Mitchell, 45 Ill. 213, the court saying: "In order to render a payment compulsory, such a pressure must be brought to bear upon the person paying as to interfere, in some way, with the free enjoyment of his rights of person or of property: Bradford *v.* Chicago, 25 Ill. 420; Elston *v.* Chicago, 40 Ill. 514; 89 Am. Dec. 361. . . . . It has been sometimes held that a seizure of goods amounts to duress, because the owner may have such a pressing necessity for their immediate use that his legal remedies would not sufficiently protect him, though this has been held not to apply where replevin could be brought: Preston *v.* Boston, 12 Pick. 7; Knibbs *v.* Hall, 1 Esp. 84. But we can discover no duress or compulsion where an execution against A is levied on the land of B. The latter is not disturbed in his person, or the possession or enjoyment of his property. If confident of his title, he need give himself no trouble. If the superiority of his title to the lien of the judgment is questionable, or depends on matters *in pais* resting in parol proof, and he fears a sale may create a cloud upon his title, he can stay the sale by injunction. If, instead of this, he prefers to buy his peace, he cannot subsequently say he acted under compulsion, and call on the courts to give him back his money."

[2] Detroit *v.* Martin, 34 Mich. 170; 22 Am. Rep. 512; Rogers *v.* Greenbush, 58 Me. 390; 4 Am. Rep. 292; Bucknall *v.* Story, 46 Cal. 589; 13 Am. Rep. 220; Wills *v.* Austin, 53 Cal. 152; Shane *v.* St. Paul, 26 Minn. 543; Lanborn *v.* Dickenson, 97 U. S. 181; Forrest *v.* Mayor, 13 Abb. Pr. 350; Mariposa Co. *v.* Bowman, Deady, 231; Phillips *v.* Jefferson Co., 5 Kan. 412; Powell *v.* Supervisors, 46 Wis. 210; Dickinson Co. *v.* Land Co., 23 Kan. 196; Peebles *v.* Pittsburg, 101 Pa. St. 304; 47 Am. Rep. 714.

[3] Stephen *v.* Daniels, 27 Ohio St. 527; Galveston Gas Co. *v.* Galveston Co., 54 Tex. 287. And see Cazenove *v.* Cutler, 4 Met. 246; Bennett *v.* Healy, 6 Minn. 240.

back so long as the process stands, though the money may not have been justly due, and though the process may have been irregularly or wrongfully issued; for the validity of legal proceedings cannot be questioned in a new action.[1] A debtor who has paid money on account of a debt cannot, on a subsequent recovery by the creditor of a judgment against him for the whole amount of the debt, maintain an action against the creditor to recover back the money so paid.[2] This rule extends to money voluntarily paid in compliance with an award of arbitrators.[3] After a judgment has been reversed, money paid under it may be recovered back.[4] Where an assessment is set aside on *certiorari*, money voluntarily paid thereunder may be recovered.[5] And if the act of compulsion be not authorized by the process, an action may be maintained to recover back the money paid under it, because the validity of the process is not questioned in such action; as where the goods of one person were taken under a writ of execution against the goods of another; or where the wrong person was taken under a writ of *capias;* and the person under such circumstances compelled to pay the debt in order to release his goods or his person may recover the amount paid from the sheriff or his officer.[6] Where money is paid under the process of a court which had no jurisdiction of the subject-matter, it is recoverable.[7]

[1] Marriott *v.* Hampton, 7 Term Rep. 269; 2 Smith's Lead. Cas. 356; Gray *v.* Roberts, 2 A. K. Marsh. 208; 12 Am. Dec. 383; Kirklan *v.* Brown, 4 Humph. 174; 40 Am. Dec. 635; Stevens *v.* Howe, 127 Mass. 164; Le Grand *v.* Francisco, 3 Munf. 83; Tilton *v.* Gordon, 1 N. H. 33; Corbet *v.* Evans, 25 Pa. St. 310; James *v.* Cavit, 2 Brev. 174; Federal Ins. Co. *v.* Robinson, 82 Pa. St. 357; Travelers' Ins. Co. *v.* Heath, 95 Pa. St. 333; Gordon *v.* Mayor, 5 Gill, 231; Brangdon *v.* Somerby, 55 Me. 92; Kobler *v.* Wells, 26 Cal. 606; Supervisors *v.* Briggs, 2 Denio, 26.

[2] Fuller *v.* Shattuck, 13 Gray, 70; 74 Am. Dec. 622.

[3] Bulkley *v.* Stewart, 1 Day, 130; 2 Am. Dec. 57.

[4] Rann *v.* Reynolds, 18 Cal. 275; Scholey *v.* Halsey, 72 N. Y. 578; Travelers' Ins. Co. *v.* Heath, 95 Pa. St. 333; Metzner *v.* Bauer, 98 Ind. 425.

[5] Mayor *v.* Riker, 38 N. J. L. 225; 20 Am. Rep. 386.

[6] Leake on Contracts, 98; Logan *v.* Sumter, 28 Ga. 242; 73 Am. Dec. 755.

[7] Gordon *v.* Mayor, 5 Gill, 231.

§ 2558. **Illegal Fees Paid to Public Officer.** — Where a public officer exacts fees to which he is not entitled, as a condition to the performance of a public duty, they are considered in law as paid involuntarily, and may be recovered back.[1]

ILLUSTRATIONS. — A register requires the payment of excessive fees for permitting the examination of the records in his charge. The amount over what he has a legal right to demand may be recovered back: *Townshend* v. *Dyckman*, 2 E. D. Smith, 224. A clerk of a court refused to give an order for the redelivery of a vessel until certain fees, which he had no right to demand, were paid. *Held*, that the fees could be recovered back: *Clinton* v. *Strong*, 9 Johns. 370.

§ 2559. **Mere Voluntary Payment.** — A voluntary payment, or a payment made without any circumstances of compulsion or extortion, is not, in general, recoverable; as a payment made by way of gift or with a gratuitous intention; or a payment made with knowledge of all the circumstances, in discharge of a claim which was not due, or which might have been successfully resisted. And it makes no difference in this respect whether or not the claim was made in an action or legal proceeding.[2] A debtor, after paying specifically as interest higher rates than the law requires, cannot charge the excess of his payments above the legal rate against the principal of his debt.[3]

[1] Clinton v. Strong, 9 Johns. 370; Am. Ex. Ins. Co. v. Britton, 8 Bosw. 148; Townshend v. Dyckman, 2 E. D. Smith, 224; Alston v. Durant, 2 Strob. 257; 49 Am. Dec. 596; Robinson v. Ezzell, 72 N. C. 231; Walker v. Ham, 2 N. H. 238.

[2] Leake on Contracts, 100; Elliott v. Swartwout, 10 Pet. 137; Smith v. Redfield, 27 Me. 145; Sprague v. Birdsall, 2 Cow. 419; Taylor v. Board of Health, 31 Pa. St. 73; 72 Am. Dec. 724; Morris v. Tarin, 1 Dall. 147; 1 Am. Dec. 233; Hall v. Shulz, 4 Johns. 240; 4 Am. Dec. 270; Mayor v. Hughes, 1 Gill & J. 480; 19 Am. Dec. 243; Dickens v. Jones, 6 Yerg. 483; 27 Am. Dec. 488; Hubbard v. Martin, 8 Yerg. 500; Stevens v. Head, 9 Vt. 174; 31 Am. Dec. 617; Beecher v. Buckingham, 18 Conn. 110; 44 Am. Dec. 580; Potomac Coal Co. v. R. R. Co., 38 Md. 226; Baltimore etc. R. R. Co. v. Faunce, 6 Gill, 68; 46 Am. Dec. 665; Morrison v. Kelly, 22 Ill. 610; 74 Am. Dec. 169; Knox Co. B'k v. Doty, 9 Ohio St. 506; 75 Am. Dec. 479; Brumagim v. Tillinghast, 18 Cal. 265; 79 Am. Dec. 176; Gould v. McFall, 118 Pa. St. 455; 4 Am. St. Rep. 606; Dickerman v. Lord, 21 Iowa, 338; 89 Am. Dec. 579.

[3] Pettis v. Ray, 12 R. I. 344.

Where a person pays a tax or assessment voluntarily,—not to save his goods from being sold, there being no seizure or proceeding to compel the payment,—he cannot recover it back on the ground that the tax or assessment was illegal.[1] Where a judgment is rendered against land for an assessment, and the owner of the land pays it without the issuance of any precept or execution, such payment is a voluntary payment, and not one made under compulsion.[2] So payment of a license fee to engage in a particular business is voluntary, and cannot be recovered, though illegal, where the effect of not paying would be a prosecution, either criminal or civil, in which the party could contest its legality.[3] But payment of a water-license fee under threat of cutting the water off is not voluntary, and any excessive charge may be recovered.[4]

ILLUSTRATIONS. — A lease provided that the lessee should keep the premises repaired, except in case of fire, and in case the premises should be rendered unfit for tenancy by fire, there should be a just and proportionate abatement of the rent. The premises were rendered unfit for tenancy by fire, but the lessor demanding the rent, the lessee paid it under protest. *Held*, that he could not recover it back: *Regan* v. *Baldwin*, 126 Mass. 485; 30 Am. Rep. 689. A municipal corporation, in pursuance of a statute, passed an ordinance requiring a license for the sale of intoxicating liquors, and imposing a penalty for selling without a license. Plaintiff, a liquor dealer, procured a license, and paid a fee therefor; afterwards the statute and the ordinance were decided to be unconstitutional and void. *Held*, that the

[1] Union Pac. R. R. Co. *v.* Comm'rs, 98 U. S. 541; Town of Ligonier *v.* Ackerman, 46 Ind. 552; 15 Am. Rep. 323; Morris *v.* Mayor, 5 Gill, 248; Wills *v.* Austin, 53 Cal. 152; Goddard *v.* Seymour, 30 Conn. 394; Garrigan *v.* Knight, 47 Iowa, 525; Christy *v.* St. Louis, 20 Mo. 143; 61 Am. Dec. 598; Claflin *v.* McDonough, 33 Mo. 412; 84 Am. Dec. 54.

[2] Elston *v.* Chicago, 40 Ill. 514; 89 Am. Dec. 361.

[3] Cook *v.* Boston, 9 Allen, 393; Lee *v.* Templeton, 13 Gray, 476; Emery *v.* Lowell, 127 Mass. 138; Noyes *v.* State, 46 Wis. 250; 32 Am. Rep. 710; Mays *v.* Cincinnati, 1 Ohio St. 268; Sullivan *v.* McCammon, 51 Ind. 264; Edinburg *v.* Hackney, 54 Ind. 83; Cahaba *v.* Burnett, 34 Ala. 400; Garrison *v.* Tillinghast, 18 Cal. 408; Claflin *v.* McDonough, 33 Mo. 412; 84 Am. Dec. 54; Irving *v.* St. Louis Co., 33 Mo. 575; Robinson *v.* Charleston, 2 Rich. 317; 45 Am. Dec. 739; Corkle *v.* Maxwell, 3 Blatchf. 413; Benson *v.* Monroe, 7 Cush. 125; 54 Am. Dec. 716; O'Brien *v.* Colusa Co., 67 Cal. 503. *Contra*, Harvey *v.* Olney, 42 Ill. 336.

[4] Westlake *v.* St. Louis, 77 Mo. 47; 46 Am. Rep. 4.

plaintiff could not recover back the money paid for the license: *Town of Ligonier* v. *Ackerman*, 46 Ind. 552; 15 Am. Rep. 323. Plaintiff accepted, under protest, a sum of money awarded to her as damages for injury to her land by widening a street. She protested because interest was not tendered her, and then sued for the interest. *Held*, that her action could not be maintained: *Cutter* v. *New York*, 92 N. Y. 166.

§ 2560. **Necessity of Protest at Time of Payment.**— Where there is no legal compulsion, a voluntary payment is none the less voluntary because it is accompanied by a protest.[1] But where a statute requires a protest, no recovery can be had without one.[2] So, also, where the payment is made to an agent, and the action is against him.[3] Some cases hold that an illegal tax paid cannot be recovered unless the payment was made under protest.[4] A protest made after the payment is of no avail.[5]

§ 2561. **Money Paid under Mistake of Fact.**— Money paid under a mistake of fact may be recovered back, where the mistake is such as to have produced a supposed liability to pay the money which in reality did not exist.[6] A mistake of fact occurs where some fact

[1] Fleetwood *v.* New York, 2 Sand. 475; McMillan *v.* Richards, 9 Cal. 365; 70 Am. Dec. 655; Brumagim *v.* Tilinghast, 18 Cal. 265; 79 Am. Dec. 176; Flower *v.* Lance, 59 N. Y. 603; Trinity Church *v.* Mayor, 10 How. Pr. 138; Forrest *v.* Mayor, 13 Abb. Pr. 350; Benson *v.* Monroe, 7 Cush. 125; 54 Am. Dec. 716; Ladd *v.* Southern Cotton Press Co., 53 Tex. 172; Marietta *v.* Slocumb, 6 Ohio St. 471; Patterson *v.* Cox, 25 Ind. 261; Awelt *v.* Eulaw etc. Ass'n, 34 Md. 435; Wauhausee Co. *v.* Walker, 8 Kan. 431; Kansas etc. R. R. Co. *v.* Wyandotte Co., 16 Kan. 587; Detroit *v.* Martin, 34 Mich. 170; 22 Am. Rep. 512; Shane *v.* St. Paul, 26 Minn. 543.

[2] United States *v.* Clement, Crabbe, 499; Schlesinger *v.* United States, 1 Ct. of Cl. 16. Where the statute requires a written protest, an oral protest is unavailing: Knowles *v.* Boston, 129 Mass. 551.

[3] Van Buren *v.* Downing, 41 Wis. 122; Elliot *v.* Swartwout, 10 Pet. 137.

[4] Allentown *v.* Saeger, 20 Pa. St. 421; McCrickart *v.* Pittsburg, 88 Pa. St. 133; Jackson *v.* Atlanta, 61 Ga. 228.

[5] Marriott *v.* Brune, 9 How. 619.

[6] Leake on Contracts, 101; Garland *v.* Salem Bank, 9 Mass. 408; 6 Am. Dec. 86; Waite *v.* Leggett, 8 Cow. 195; 18 Am. Dec. 441; Lake *v.* Artisans' Bank, 3 Keyes, 378; Feemster *v.* Markham, 2 J. J. Marsh. 303; 19 Am. Dec. 131; Dickins *v.* Jones, 6 Yerg. 483; 27 Am. Dec. 488; Frazier *v.* Tubb, 2 Heisk. 667; Frontier Bank *v.* Morse, 22 Me. 88; 38 Am. Dec. 284; Baltimore etc. R. R. Co. *v.* Faunce, 6 Gill, 68; 46 Am. Dec. 655; Appleton Bank *v.* McGilvray, 4 Gray, 518; 64 Am. Dec. 92. And although at the time the payment was made the plaintiff might have ascertained the truth by

which really exists is unknown to the party, or some fact is believed by him to exist which really does not.[1] Money is not paid by mistake or recoverable as such where the payment has been made in discharge of clearly ascertained legal rights and duties; as when an express company undertakes to carry money, fails to deliver it to the owner, and makes good the loss by payment.[2] So money voluntarily paid in the reasonable belief that it is due, and after investigation, or the opportunity therefor, and without fraud on the part of the recipient, cannot be recovered back as paid under a misapprehension.[3] But a well-established exception to the rule as to the recovery of money paid under a mistake is where a drawee pays a forged bill of exchange to a holder thereof, without fault, and for a valuable consideration. In such a case the foundation upon which the drawee is made to suffer the loss is the imputed negligence in accepting or paying until he has ascertained the bill to be genuine. He is supposed to know the handwriting of his correspondent much better than the holder can.[4] Where the parties cannot be placed *in statu quo*, the loss must fall upon the person who occasioned it.[5]

ILLUSTRATIONS. — A creditor was trusted to calculate the interest on some notes, and by a mistake obtained an erroneous amount, which he assured the debtor was correct. *Held*, that the mistake was mutual, and the debtor could recover the excess: *Worley* v. *Moore*, 97 Ind. 15. The plaintiff prepaid the defendant for transportation of a pile of bark, which he estimated at sixty cords, after allowing three cords for shrinkage. On arrival, the bark measured but forty cords, measured in the usual manner at its destination. *Held*, that he could not recover back the excess paid: *Buffalo* v. *O'Malley*, 61 Wis. 255; 50 Am. Rep. 137.

the exercise of proper vigilance and care: Kingston Bank v. Eltinge, 40 N. Y. 391; 100 Am. Dec. 516; Lyle v. Shinnebarger, 17 Mo. App. 66.

[1] Mowatt v. Wright, 1 Wend. 355; 19 Am. Dec. 509.

[2] Hagerstown Bank v. Adams Ex. Co., 45 Pa. St. 419; 84 Am. Dec. 499.

[3] Wheeler v. Hatheway, 58 Mich. 77.

[4] Ellis v. Ohio Life Ins. and Trust Co., 4 Ohio St. 628; 64 Am. Dec. 610.

[5] Boas v. Updegrove, 5 Pa. St. 516; 47 Am. Dec. 425.

§ 2562. Money Paid under Mistake of Law. — But where money is paid voluntarily with knowledge of all the facts, the party cannot recover it back on the ground that he made a mistake as to his legal liability, or was ignorant of the law of the case.[1] A mistake of law is where a party knows the facts of the case, but is ignorant of the legal consequences.[2] But if the mistake was as to the law of another state, the rule is different.[3]

ILLUSTRATIONS. — The maker of a note paid interest at more than the legal rate after maturity, under a mistake as to the legal effect of a phrase used in the note. *Held*, that he could not recover it back: *Rector* v. *Collins*, 46 Ark. 167; 55 Am. Rep. 571. Defendant, after suit brought, voluntarily paid a part of the demand, and a decree was afterwards rendered for the residue, which, on appeal, was reversed. *Held*, that the part so paid could not be recovered, as it was paid under a mistake of law: *Beard* v. *Beard*, 25 W. Va. 486; 52 Am. Rep. 219. Defendant, a skilled attorney, induced plaintiff to pay him money to remove alleged liens on property conveyed by plaintiff to defendant. *Held*, that, though the mistake was one of law, plaintiff could recover: *Kinney* v. *Dodge*, 101 Ind. 573.

§ 2563. Money Paid for Consideration Which has Failed. — Where one person pays money to another for a consideration which wholly fails, he may, as a rule, recover it back.[4] If a party has obtained the specific consideration that he stipulated to have, he cannot recover back the money paid for it merely upon the ground that it was,

[1] Town *v.* Burnett, 34 Ala. 400; Branham *v.* Mayor of San José, 24 Cal. 585; Bucknall *v.* Story, 46 Cal. 589; 13 Am. Rep. 220; Sprague *v.* Birdsall, 2 Cow. 419; Clarke *v.* Dutcher, 9 Cow. 694; Mut. Law Inst. *v.* Enstein, 46 Mo. 200; Benson *v.* Monroe, 7 Cush. 125; 54 Am. Dec. 716; Supervisors *v.* Briggs, 2 Denio, 26; Downs *v.* Donnelly, 5 Ind. 496; Silliman *v.* Wing, 7 Hill, 159; Jenks *v.* Lima, 17 Ind. 326; Rheel *v.* Hicks, 25 N. Y. 291; Granger *v.* Olcutt, 1 Lans. 171; Goddard *v.* Bank, 2 Sandf. 253; Wheaton *v.* Olds, 20 Wend. 176; Champlin *v.* Laytin, 18 Wend. 407; 31 Am. Dec. 382; Hemphill *v.* Moody, 64 Ala. 468; Churchill *v.* Bradley, 58 Vt. 403; 56 Am. Rep. 563; Lester *v.* Mayor of Baltimore, 29 Md. 415; 96 Am. Dec. 542. But see Ray *v.* Bank, 3 B. Mon. 510; 39 Am. Dec. 479; Northrop *v.* Graves, 19 Conn. 548; 50 Am. Dec. 264; Culbreath *v.* Culbreath, 7 Ga. 64; 50 Am. Dec. 375.

[2] Mowatt *v.* Wright, 1 Wend. 355; 19 Am. Dec. 509.

[3] Haven *v.* Foster, 9 Pick. 112; 19 Am. Dec. 353; Norton *v.* Marden, 15 Me. 45; 32 Am. Dec. 132.

[4] Leake on Contracts, 105; Chapman *v.* Brooklyn, 40 N. Y. 380; Johnson *v.* Jennings, 10 Gratt. 1; 60 Am. Dec. 323.

or that it turns out to be, of no value.[1] A party is not entitled to recover back the money paid for a consideration which has failed, where the failure has been caused by his own default.[2] And it is essential that the failure of consideration should be complete.[3]

ILLUSTRATIONS.—A pays B the price of certain goods. B does not deliver the goods. A may recover the money paid: *Devaux* v. *Conolly*, 8 Com. B. 640. Money is paid for railroad scrip which turns out to be forged. The money may be recovered back: *Westropp* v. *Solomon*, 8 Com. B. 345. Money paid in discounting a bill of exchange, the acceptance of which is a forgery. *Held*, that it may be recovered as upon a failure of the consideration: *Jones* v. *Ryde*, 5 Taunt. 488; *Gurney* v. *Womersley*, 4 El. & B. 133; 24 L. J. Q. B. 46. Money is paid for a bill of exchange which has been rendered void as against former parties by a material alteration. *Held*, that it may be recovered back: *Burchfield* v. *Moore*, 3 El. & B. 683; 23 L. J. Q. B. 261. Money is paid for the services of an agent. He performs them so badly as to be useless to his employer. The latter may recover the money: *Bostock* v. *Jardine*, 3 Hurl. & C. 700. Money is paid as a contract to convey lands. It turns out that the vendor has no title to them. The money may be recovered back: *Pipkin* v. *James*, 1 Humph. 325; 34 Am. Dec. 652. A, relying wholly on B's representations made without fraud, paid for the privilege of operating under a patent which turned out to be void. *Held*, that the money paid could not be recovered back: *Schwarzenbach* v. *Odorless Excavating Apparatus Co.*, 65 Md. 34; 57 Am. Rep. 301.

§ 2564. Money Paid under Executory Illegal Contract may be Recovered back.—Where money has been paid in consideration of an executory contract or purpose which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed, and reclaim the money as if upon a failure of consideration.[4] Thus where a person had paid money to another upon the illegal consideration of procuring him a public office, it was held that he might repudiate the agreement while

[1] Leake on Contracts, 108.
[2] Leake on Contracts, 110.
[3] Leake on Contracts, 111.
[4] Spring Co. v. Knowlton, 103 U. S. 49; Hooker v. De Palos, 2 Conn. 369.

it remained executory, and recover back the money.[1] And money paid as the consideration of an illegal or void wagering contract depending upon a future event may be reclaimed at any time before the risk is determined.[2] So if money has been paid to or deposited with a third party to be disposed of under an illegal contract, or for an illegal purpose, it may be reclaimed at any time before it has been actually paid over under the authority given for its disposal.[3] So goods that have been delivered under an illegal agreement, or for an illegal purpose, may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted.[4]

ILLUSTRATIONS. — Goods had been delivered under a fictitious sale for the purpose of protecting the possession whilst the owner compounded with his creditors. *Held*, that he might repudiate the transaction before the composition had been carried out, and recover the goods from the pretended buyer, or from a subvendee to whom they had been delivered with notice of the illegal transaction: *Taylor* v. *Bowers*, L. R. 1 Q. B. D. 291.

§ 2565. But Aliter where Agreement is Executed. — After the execution of the illegal contract or purpose, the money paid under it, whether as the consideration or in performance of the promise, cannot be recovered back; for the parties are then equally delinquent, and the rule applies, that *in pari delicto, melior est conditio possidentis*.[5]

[1] Walker *v.* Chapman, cited in 2 Doug. 471.

[2] Tappenden *v.* Randall, 2 Bos. & P. 467; Busk *v.* Walsh, 4 Taunt. 290.

[3] Spring Co. *v.* Knowlton, 103 U. S. 49.

[4] Taylor *v.* Bowers, 1 L. R. 1 Q. B. D. 291.

[5] Leake on Contracts, 774; Worcester *v.* Eaton, 11 Mass. 368; Waite *v.* Merrill, 4 Me. 102; 16 Am. Dec. 238; Boutelle *v.* Melendy, 19 N. H. 196; 49 Am. Dec. 153; Staples *v.* Gould, 5 Sandf. 416. "The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party": Taylor *v.* Chester, L. R. 4 Q. B. 314. "The rule is, *In pari delicto, potior est conditio possidentis;* and where the contract is executed and the money paid *in pari delicto*, this rule certainly holds, and the party who has paid it cannot recover it back. But where contracts or transactions are prohibited for the sake of protecting one set of men from another, — the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, — there the parties are not *in pari delicto*, and the person injured, after the transaction is finished and com-

Money voluntarily paid for losses in stock-jobbing transactions, in violation of statute, cannot be recovered back.[1]

§ 2566. **Where Intent of Law Violated is to Protect Party.** — If the law violated was intended to protect one of the parties against the acts of the other, they are not *in pari delicto*, and the party intended to be protected may recover money paid in violation of such law.[2] But only the party which the law was designed to protect can take advantage of it.[3]

ILLUSTRATIONS. — Lotteries are forbidden by law, but a person pays money for lottery tickets. He may recover it back: *Gray* v. *Roberts*, 2 A. K. Marsh. 208; 12 Am. Dec. 383. A borrower pays interest, usurious by law. He may recover it back: *Bosanquet* v. *Dashwood*, Talb. Eq. Cas. 38; *Schroeppel* v. *Corning*, 5 Denio, 236.

§ 2567. **Accord and Satisfaction — What It is — Effect of.** — A right of action for a breach of contract, or for any wrong, cannot be discharged by any payment or performance, or tender of payment or performance, without the consent and acceptance of the promisee; for the promisee, after breach, or the person injured, becomes entitled to the compensation or remedy provided by process of law, and is not bound to accept any tender or offer made in satisfaction of his legal rights. He may, however, agree to do so; and an agreement to accept something in satisfaction, accompanied by the delivery or performance of what is so agreed upon, satisfies and discharges his right of action. Such an arrangement is called an accord and satisfaction.[4] Where one makes an

pleted, may bring his action and defeat the contract. For instance, by the statutes of usury, taking more than five per cent is declared illegal and the contract void; but these statutes were made to protect needy persons from the oppression of usurers, therefore the party injured may bring an action for the excess of interest": Lord Mansfield, C. J., in Browning v. Morris, 2 Cowp. 792.

[1] Wyman v. Fiske, 3 Allen, 238; 80 Am. Dec. 66.

[2] Gray v. Roberts, 2 A. K. Marsh. 208; 12 Am. Dec. 383.

[3] Deming v. State, 23 Ind. 416; Babcock v. Goodrich, 47 Cal. 509.

[4] Leake on Contracts, 876; Pulliam v. Taylor, 50 Miss. 251; Bull v. Bull, 43 Conn. 455; Stockton v. Frey, 4 Gill, 406; 45 Am. Dec. 138; Heirn v. Carron, 11 Smedes & M. 361; 49 Am. Dec. 65.

offer of a sum of money to settle a disputed claim for a larger unliquidated amount, he may attach to his offer the condition that, if accepted, it shall operate as a full settlement, and its acceptance will then be deemed an accord and satisfaction.[1]

By the accord the parties agree upon a sum of money, or other matter, to be given and accepted as compensation for the breach, instead of the legal remedy provided by process of law. This, however, is insufficient to bar an action on the claim.[2] It is by the execution of the accord, that is, by the actual delivery and acceptance of the matter agreed upon, that the right of action is satisfied and discharged.[3] Saying "it is not enough, but there will be no trouble," at the time of the payment of a claim, is not an acceptance in full satisfaction.[4] Readiness to perform the accord,[5] or a tender of performance,[6] or even part performance,[7] is not enough. An accord and satisfaction, to constitute a bar, must be full, perfect, and complete.[8] The accord must be executed, and not executory merely.[9] It must be a satisfaction of the entire

"An accord and satisfaction in money, when applied to a debt or liquidated money claim, is commonly called payment; but the payment of a debt, made and accepted after it is due, and default made in payment, which operates in satisfaction of the right of action, must be distinguished from payment of the debt at the time of falling due, which operates in discharge of the contract by performance": Leake on Contracts, 878.

[1] Berdell *v.* Bissell, 6 Col. 162; McDaniels *v.* Bank, 29 Vt. 230; 70 Am. Dec. 406.

[2] Ballard *v.* Nokes, 2 Ark. 45; Rising *v.* Cummings, 47 Vt. 345; Piper *v.* Kingsbury, 48 Vt. 480; McKean *v.* Reed, Litt. Sel. Cas. 395; 12 Am. Dec. 318; Noe *v.* Christie, 51 N. Y. 272; Kromer *v.* Heim, 75 N. Y. 577; 31 Am. Rep. 491; Mitchell *v.* Hawley, 4 Denio, 414; 47 Am. Dec. 260.

[3] Leake on Contracts, 876; Hall *v.* Smith, 10 Iowa, 45; Flack *v.* Garland, 8 Md. 188; Barnes *v.* Lloyd, 2 Miss. 584; Diller *v.* Brubaker, 52 Pa. St. 498; 91 Am. Dec. 177.

[4] Willey *v.* Warden, 27 Vt. 655.

[5] Hearn *v.* Kiehl, 38 Pa. St. 147; 80 Am. Dec. 472; Russell *v.* Lytle, 6 Wend. 390; 22 Am. Dec. 537.

[6] Hearn *v.* Kiehl, 38 Pa. St. 147; 80 Am. Dec. 472; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Kromer *v.* Heim, 75 N. Y. 574; 31 Am. Rep. 491.

[7] Hearn *v.* Kiehl, 38 Pa. St. 147; 80 Am. Dec. 472.

[8] Jones *v.* Fennimore, 1 G. Greene, 134; Frentress *v.* Markle, 2 G. Greene, 553; Clark *v.* Dinsmore, 5 N. H. 136.

[9] Ballard *v.* Nooks, 2 Ark. 45; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; 35 Am. Dec. 569; Frost *v.* Johnson, 8 Ohio, 393; Coit *v.* Houston, 3 Johns. Cas. 243; Watkinson *v.* Inglesby, 5 Johns. 386; Russell *v.* Lytle, 6 Wend. 390; 22 Am. Dec. 537.

debt so as completely to extinguish it.[1] Where there have been mutual accounts between two persons, the giving of a note by one to the other is *prima facie* evidence of a settlement of accounts between them.[2]

Accord and satisfaction after breach discharges the right of action, whether it be founded on a deed or other writing, or upon an agreement by word of mouth.[3] An accord and satisfaction in parol is a good defense to an action on a specialty.[4] Accord and satisfaction made with and accepted by one of several joint creditors discharges the debtor as against all.[5] Accord and satisfaction made by one of several parties jointly liable, or jointly and severally liable, for the same debt, and accepted by the creditor, discharges all.[6]

An accord and satisfaction obtained by the fraud and misrepresentation of the debtor is void;[7] and if the satisfaction entirely fails, the accord is no bar to a suit on the debt.[8]

ILLUSTRATIONS.—A collector of customs received money for penalties. A coastwise clerk at the custom-house claimed a share as informer, which the collector refused to allow him; but did however, as did also the naval officer, pay him, from time to time, small amounts of money, by way of gratuities, on account of his services in the matter, which were understood to be in full settlement for his services. *Held*, a valid accord and satisfaction: *Barry* v. *Goodrich*, 98 Mass. 335. A creditor agreed to take certain property of his debtor in satisfaction of his debt, upon the faith of representations of the debtor as to its condition, and he took it under such agreement, after he had an opportunity to test their truth. *Held*, a good accord and satisfaction of the debt: *Williams* v. *Phelps*, 16 Wis. 80. A and B had mutual causes of action against each other. A paid B in satisfaction, taking his receipt; B procured from A a receipt "in full of all demands," nothing being said as to A's particular demand. *Held*, a good accord and satisfaction of A's

[1] Line v. Nelson, 38 N. J. L. 358.
[2] Kinman v. Cannefax, 34 Mo. 147.
[3] Leake on Contracts, 877; or upon a judgment: Savage v. Everman, 70 Pa. St. 315; 10 Am. Rep. 676.
[4] Cabe v. Jameson, 10 Ired. 193; 51 Am. Dec. 386.
[5] Wallace v. Kelsall, 7 Mees. & W. 264.
[6] Nicholson v. Revill, 4 Ad. & E. 675.
[7] Stafford v. Bacon, 1 Hill, 532; 37 Am. Dec. 366; Dolsen v. Arnold, 10 How. Pr. 531.
[8] Clark v. Bowen, 22 How. 270.

cause of action against B: *Vedder* v. *Vedder*, 1 Denio, 257. Upon a disputed claim for damages for not making repairs, one party finally paid a certain sum to the other, who said that "all his claim was settled." *Held*, a satisfaction, and that no action could then be brought: *Neary* v. *Bostwick*, 2 Hilt. 514. Plaintiff and defendant having had a controversy as to the amount due the former, he wrote to the latter to send "such an amount as you feel inclined, which shall be accepted in full satisfaction of my claims." An amount was sent and retained. *Held*, an accord and satisfaction: *Childs* v. *Millville Mut. etc. Ins. Co.*, 56 Vt. 609. A receipt was given to the buyer of goods by the seller on receiving from the buyer the check of a third person upon a fourth, which, on presentation to the drawee within a reasonable time, was dishonored. *Held*, not an accord and satisfaction: *Weddigen* v. *Boston Elastic Fabric Co.*, 100 Mass. 422. A held lands charged with an equitable lien. He undertook to give his own notes for part of the sum, and gave the bond of a third person for the remainder. The creditor agreed to receive them in settlement, but on their being tendered, refused so to do. *Held*, not a satisfaction of the lien: *Day* v. *Roth*, 18 N. Y. 448. The debtor sent his statement of the account to the creditor with a note for the apparent balance. The creditor kept the note, but wrote, giving his view of certain items. *Held*, not an accord and satisfaction: *Boston Rubber Co.* v. *Peerless Wringer Co.*, 58 Vt. 551.

§ 2568. **The Consideration.**—It is not necessary that the consideration be adequate.[1] But the matter or thing agreed to be received in satisfaction must have some legal value to the creditor.[2] And the consideration must not be illegal.[3] An agreement by two having each an action for false imprisonment pending against the other to discontinue their respective actions, and an actual discontinuance accordingly, are a good accord and satisfaction.[4] And the matter of the accord must be something presently done, or agreed to be done, in satisfaction, and not something already done and past; for any past matter would not constitute a consideration sufficient to support it.[5]

[1] Leake on Contracts, 878; Warren *v.* Skinner, 20 Conn. 589; Donahoe *v.* Woodbury, 6 Cush. 148; Pierce *v.* Pierce, 25 Barb. 243; Ogborn *v.* Hoffman, 52 Ind. 439; Fisher *v.* May, 2 Bibb, 449; 5 Am. Dec. 626; Reid *v.* Bartlett, 19 Pick. 273.

[2] Keeler *v.* Neal, 2 Watts, 424; Davis *v.* Noaks, 3 J. J. Marsh. 494.

[3] Driesbach *v.* Keller, 2 Pa. St. 77.

[4] Foster *v.* Trull, 12 Johns. 456.

[5] Stead *v.* Poyer, 1 Com. B. 782.

In the case of a payment made in satisfaction of a money debt, the acceptance of a smaller sum is no satisfaction of a debt of larger amount,[1] without a release of the residue or some additional consideration for giving it up.[2] A parol release of a judgment for less than the amount due is invalid, although indorsed on the execution.[3] An executed agreement to accept part in satisfaction of the whole, accompanied by a formal release, is valid.[4] The liability of a third party may be accepted in satisfaction of the debt of the original debtor, under a valid agreement of all the parties to that effect. The acceptance of the liability of a new party in discharge of the obligation before breach constitutes, as we have seen, what is called "novation."[5] Thus the note of a third person accepted in satisfaction of a debt discharges the debt.[6]

[1] Warren *v.* Skinner, 20 Conn. 557; Curran *v.* Rummell, 118 Mass. 482; Hayes *v.* Davidson, 70 N. C. 573; Vance *v.* Lubenbill, 9 B. Mon. 249; Harrison *v.* Close, 2 Johns. 448; 3 Am. Dec. 444; Seymour *v.* Minturn, 17 Johns. 169; 8 Am. Dec. 381; Kraft *v.* Wickey, 4 Gill & J. 392; 23 Am. Dec. 569; Oberndorf *v.* Bank, 31 Md. 132; 1 Am. Rep. 31; Reynolds *v.* French, 8 Vt. 85; 30 Am. Dec. 456; Spann *v.* Baltzell, 1 Fla. 301; 46 Am. Dec. 346; Daniels *v.* Hatch, 21 N. J. L. 391; 47 Am. Dec. 169; Pearson *v.* Thomason, 15 Ala. 700; 50 Am. Dec. 59; Donohoe *v.* Woodbury, 6 Cush. 148; 52 Am. Dec. 777; Twitchell *v.* Shaw, 10 Cush. 46; 57 Am. Dec. 80; Walan *v.* Kerby, 99 Mass. 3; Young *v.* Jones, 64 Me. 563; 18 Am. Rep. 279; St. Louis etc. R. R. Co. *v.* Davis, 35 Kan. 464; Hooker *v.* Hyde, 61 Wis. 204; Luddington *v.* Bell, 77 N. Y. 138; 33 Am. Rep. 601; White *v.* Kuntz, 107 N. Y. 518; 1 Am. St. Rep. 886.

[2] Gain *v.* McAden, 2 Ired. Eq. 79; Merchants' Bank *v.* Davis, 3 Ga. 112; Booth *v.* Smith, 3 Wend. 68; Phillips *v.* Berger, 2 Barb. 612; Baim *v.* Beulyn, 62 Miss. 110; Mitchell *v.* Wheaton, 46 Conn. 315; 33 Am. Rep. 24; Schweider *v.* Lang, 29 Minn. 254; 43 Am. Rep. 202. The receipt of one hundred dollars and a cow in full of a judgment for two hundred dollars works a satisfaction of the judgment: Neal *v.* Handley, 116 Ill. 418; 56 Am. Rep. 784. See *ante*, Composition with Creditors.

[3] Weber *v.* Couch, 134 Mass. 26; 45 Am. Rep. 274.

[4] Gordon *v.* Moore, 44 Ark. 349; 51 Am. Rep. 606.

[5] Bennett *v.* Hill, 14 R. I. 322. See *ante*, Title Trusts, and see *post*, § 2572; Leavitt *v.* Morrow, 6 Ohio St. 71; 67 Am. Dec. 334.

[6] Boyd *v.* Hitchcock, 20 Johns. 76; 11 Am. Dec. 247; Le Page *v.* McCrea, 1 Wend. 164; 19 Am. Dec. 469; Frisbie *v.* Larned, 21 Wend. 453; Conkling *v.* King, 10 Barb. 375; Keeler *v.* Salisbury, 27 Barb. 488; Webb *v.* Goldsmith, 2 Duer, 418; Brooks *v.* White, 2 Met. 283; 37 Am. Dec. 95.

CHAPTER CXXII.

RESCISSION AND RELEASE.

§ 2569. Rescission of contract by express agreement.
§ 2570. Rescission may be implied.
§ 2571. Requisites of new agreement rescinding or altering prior contract.
§ 2572. Acceptance of new debtor — Novation.
§ 2573. Rescission by death.
§ 2574. Release — Effect of.
§ 2575. Form of and requisites of release.
§ 2576. What matter release covers.
§ 2577. Covenant not to sue.
§ 2578. Release of and by co-debtors and co-creditors.
§ 2579. Rescission by act of one party.

§ 2569. Rescission of Contract by Express Agreement. — A contract may be discharged at any time before the performance is due, by a new agreement validly made, with the effect of altering the terms of the original agreement, or of rescinding it altogether; and a claim under the original contract may then be met by the new agreement, so far as the latter operates to alter or rescind the former.[1] Where a contract remains executory, and before breach, it may be annulled by agreement of all parties; but when broken, and right of action accrued, the debt or damages can only be released for a consideration; but so far as the contract remains executory, an agreement to annul on one side is consideration for an agreement to annul on the other side.[2] The period for the performance of a written contract or the payment of money may be enlarged by parol, and an action in the contract cannot

[1] Smith *v.* Tunno, 1 McCord Ch. 443; 16 Am. Dec. 617; Johnson *v.* Reed, 9 Mass. 78; 6 Am. Dec. 36; Mills *v.* Riley, 7 Ind. 137; Dunham *v.* Barnes, 9 Allen, 352; Byrd *v.* Bertrand, 7 Ark. 321; Lawrence *v.* Dale, 3 Johns. Ch. 23; 19 Johns. 439; Hart *v.* Lauman, 29 Barb. 410; Hadden *v.* Dimick, 13 Abb. Pr., N. S., 135; Mather *v.* Butler County, 28 Iowa, 253; Reed *v.* McGrew, 5 Ohio, 550; Baum *v.* Covert, 62 Miss. 113.

[2] Collyer *v.* Moulton, 9 R. I. 90; 98 Am. Dec. 370.

be sustained until the expiration of the enlarged time.[1] An agreement in writing to deliver an article at a particular place may be controlled and modified by a subsequent parol agreement to deliver it at a different place.[2] A provision in a contract against extra work, except as agreed to in writing, may be rescinded by the parties, who may agree to alterations by parol.[3] A contract may be rescinded in part, and stand as to the residue, by the consent of the parties to it.[4] One written contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject-matter.[5] But the making of a new contract between the parties to the old one does not affect rights of third persons which have accrued thereunder.[6] Executory contracts may be rescinded by the parties to them only where they continue interested until the agreement to rescind is made.[7] Where a promise is made for the benefit of a stranger to the contract, it may be rescinded by the parties thereto before it is accepted by the stranger.[8] A proposition for a mutual rescission of a contract assumes its validity, and the proposition being rejected, the parties stand where they did before.[9]

§ 2570. Rescission may be Implied.—The rescission may be implied in some cases. Thus if agreements be made between the same parties concerning the same matter, of which the terms of the latter are inconsistent with those of the former, so that they cannot subsist together, the latter will be construed to discharge the

[1] Cox *v.* Carrell, 6 Iowa, 350; Stryker *v.* Vanderbilt, 25 N. J. L. 482; Fleming *v.* Gilbert, 3 Johns. 520; Blood *v.* Goodrich, 9 Wend. 68; 24 Am. Dec. 121; Clark *v.* Dales, 20 Barb. 42; Meehan *v.* Williams, 36 How. Pr. 73; Thrall *v.* Mead, 40 Vt. 540; Lane *v.* Sprague, 36 Vt. 289; Schmidt *v.* Couperthwait, 66 How. Pr. 477.

[2] Langford *v.* Cummings, 4 Ala. 46; Miles *v.* Roberts, 34 N. H. 245.

[3] McFadden *v.* O'Donnell, 18 Cal. 160.

[4] Borum *v.* Garland, 9 Ala. 452.

[5] Chrisman *v.* Hodges, 75 Mo. 413; Munford *v.* Wilson, 15 Mo. 540.

[6] Sargeant *v.* Daunoy, 14 La. 43; 33 Am. Dec. 573.

[7] Johnson *v.* Reed, 9 Mass. 78; 6 Am. Dec. 36.

[8] Thompson *v.* Parker, 83 Ind. 96; Davis *v.* Calloway, 30 Ind. 112; 95 Am. Dec. 671.

[9] Gillespie *v.* Battle, 15 Ala. 276.

former.[1] So the rescission may be implied where it has never been followed or acted upon for a length of time.[2]

§ 2571. **Requisites of New Agreement Rescinding or Altering Prior Contract.**—The form in which the new agreement must be depends, as a rule, upon the form of the old. If the original contract was put in writing merely by agreement of the parties, and not in pursuance of any statutory requirement, the new agreement, in alteration or discharge, is not required to be in writing, and may be proved by parol evidence.[3] Thus evidence of a parol agreement extending the time of performance of a written contract previously made is admissible.[4] But if the original contract was required by the statute of frauds or any other statute to be in writing, the new contract must also be in writing.[5] A sealed executory contract cannot be released or rescinded by a parol agreement.[6] Where, in a contract, a mode of rescinding it is provided, as by giving notice, and repaying the money received, the party cannot rescind it in any other mode.[7] One seeking to rescind a contract must put, or offer to put, the other

[1] Wheeden *v.* Fiske, 50 N. H. 125; Murray *v.* Harway, 56 N. Y. 337; Green *v.* Wells, 2 Cal. 584.

[2] Rushbrook *v.* Laurence, L. R. 5 Ch. 3.

[3] Robinson *v.* Batchelder, 4 N. H. 40; Fleming *v.* Gilbert, 3 Johns. 528; Stearns *v.* Hall, 9 Cush. 31; Dodge *v.* Crandall, 30 N. Y. 307; Munroe *v.* Perkins, 9 Pick. 298; 20 Am. Dec. 475; Blood *v.* Enos, 12 Vt. 625; 36 Am. Dec. 363; Spann *v.* Baltzell, 1 Fla. 301; 46 Am. Dec. 346; McGrann *v.* R. R. Co., 29 Pa. St. 82; Low *v.* Forbes, 18 Ill. 568. In Goss *v.* Lord Nugent, 5 Barn. & Adol. 65, a leading case, it is said: "By the general rules of the common law, if there be a contract which has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement."

[4] Keating *v.* Price, 1 Johns. Cas. 222; 1 Am. Dec. 92; Solomons *v.* Jones, 3 Brev. 54; 5 Am. Dec. 538; Grafton Bank *v.* Woodward, 5 N. H. 99; 20 Am. Dec. 566; Langworthy *v.* Smith, 2 Wend. 587; 20 Am. Dec. 652; Deshazo *v.* Lewis, 5 Stew. & P. 91; 24 Am. Dec. 769.

[5] Goss *v.* Lord Nugent, 5 Barn. & Adol. 65; Blood *v.* Goodrich, 9 Wend. 68; 24 Am. Dec. 121. *Contra*, Lauer *v.* Lee, 42 Pa. St. 165.

[6] Delacroix *v.* Bulkley, 13 Wend. 71; Sigard *v.* Patterson, 3 Blackf. 353.

[7] McKay *v.* Carrington, 1 McLean, 50.

party *in statu quo*, or sufficiently excuse himself from such duty.[1] Where a new contract is consistent with the continuance of the former one, and only provides a new mode of discharging such former one, it has no effect unless or until it is performed.[2]

§ 2572. Acceptance of New Debtor — Novation. — The contract may be discharged as to the original debtor by the acceptance by the creditor of a new one in his place. This is called a "novation."[3] To entitle the creditor to recover against the substituted debtor, the creditor must have consented to the arrangement, and the old debt must have been extinguished.[4] Novation is never presumed, and must be clearly established by a full discharge of the original debt, the express terms of the agreement, or the acts of the parties.[5] An agreement upon no new consideration between debtor and creditor that the former shall pay the amount of his debt to a third person — a creditor of the latter — is not, in the absence of any notice or acceptance of or assent to the arrangement by such third person, irrevocable by the creditor; nor does such an arrangement create any trust for or interest in such third person as to the debt or fund owing by the debtor as will prevent its being held under attachment against the property of the creditor.[6]

ILLUSTRATIONS. — An agent takes notes payable to himself for goods sold by him. Subsequently new notes for the same debt, but for a longer time, are given to the principal. This is

[1] Jarrett *v.* Morton, 44 Mo. 275; Johnson *v.* Walker, 25 Ark. 196; Ellington *v.* King, 49 Ill. 449.

[2] McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574.

[3] Leake on Contracts, 790. In the civil law novation is of three kinds: 1. Where the debtor and creditor remain the same, but a new debt is substituted for the old; 2. Where the debt remains the same, but a new debtor is substituted; 3. Where the debt and debtor remain, but a new creditor comes in: Adams *v.* Power, 48 Miss. 451.

[4] Butterfield *v.* Hartshorn, 7 N. H. 345; 26 Am. Dec. 741; Bonnemer *v.* Negrete, 16 La. 474; 35 Am. Dec. 217; Currier *v.* Taylor, 19 N. H. 189.

[5] Parker *v.* Alexander, 2 La. Ann. 188; Short *v.* New Orleans, 4 La. Ann. 281; Goldschmidt *v.* New Orleans, 5 La. Ann. 436; Marsh *v.* Perry, 6 La. Ann. 669; Pattison *v.* Creditors, 9 La. Ann. 228; Overend *v.* Robinson, 10 La. Ann. 728; Rachel *v.* Rachel, 11 La. Ann. 687.

[6] Kelly *v.* Roberts, 40 N. Y. 432.

not a novation: *Hobson* v. *Davidson*, 8 Mart. (La.) 422; 13 Am. Dec. 294. A owed B, and C owed A. By agreement between the three, B accepted C's note for A's debt. C was, unknown to the parties, insolvent at the time. *Held*, that the loss fell on B: *Cadens* v. *Teasdale*, 53 Vt. 460; 38 Am. Rep. 697. A sold to B a wagon. B afterwards sold the wagon to C, who agreed to pay A the price which B had agreed to pay A for the wagon, and A agreed to take C as his debtor for that price. *Held*, that the debt due to A from B was extinguished: *Heaton* v. *Angier*, 7 N. H. 397; 28 Am. Dec. 353.

§ 2573. Rescission by Death.—The contracts of a person are not avoided by his death. Death operates as an assignment in law of all the personal estate of the deceased to his executor or administrator, but subject to the liabilities of the deceased chargeable against it. The title of the executor is derived from the will of the deceased, and vests immediately upon the death, though the only proof of the title is the probate of the will. The title of the administrator is derived from the letters of administration, and takes effect from the grant.[1] The death of one of the contracting parties does not operate as a revocation or discharge of his part of the agreement, where it is of such a character that it can be performed by his personal representative.[2] There are, however, certain contracts which are expressly or impliedly limited to or conditional upon the life of the promisor, and do not survive to or against the executor. The following are examples of this class, viz.: All contracts concerning the specific personal qualities, skill, or services of a person;[3] contracts to marry.[4] So contracts of service are personal, and are discharged by the death of the master or servant.[5]

[1] Hawkins *v.* Ball, 18 B. Mon. 816; 68 Am. Dec. 755; Brown *v.* Leavitt, 26 N. H. 493; Billings's Appeal, 106 Pa. St. 558; Fowler *v.* Kelly, 3 W. Va. 71; Pahlman *v.* King, 49 Ill. 266; Martin *v.* Hunt, 1 Allen, 418; Parnell *v.* James, 6 Rich. 370; Green *v.* Rugely, 23 Tex. 539.

[2] Hawkins *v.* Ball, 18 B. Mon. 816; 68 Am. Dec. 755.

[3] Wills *v.* Murray, 4 Ex. 866; Jarrin *v.* Browne, 59 Cal. 44; Shulz *v.* Johnson, 5 B. Mon. 497; Siler *v.* Gray, 86 N. C. 566; Billing's Appeal, 106 Pa. St. 558.

[4] Chamberlain *v.* Williamson, 4 Maule & S. 415; Wade *v.* Kalbfleisch, 16 Abb. Pr., N. S., 104.

[5] Leake on Contracts, 1259. An express provision in the contract for

Contracts of partnership are dissolved by the death of one of the partners, whether entered into expressly for a fixed term or not, unless it be expressly stipulated to the contrary.[1]

§ 2574. **Release—Effect of.**—Release is a discharge of the claim or right of action growing out of the breach of an agreement.[2] A party may release a cause of action against one upon a consideration flowing from another.[3] A release under seal operates as an estoppel against the party executing it.[4] A cause of action accruing from a breach of covenant cannot be discharged by any act of the plaintiff short of a release, or the acceptance of something in satisfaction of that cause of action.[5]

§ 2575. **Form and Requisites of Release.**—At common law, a release of a right of action for a breach of a contract, whether under seal or not, was required to be under seal.[6] As a general rule, a sealed instrument cannot be varied or abrogated by another agreement, unless the latter is also sealed.[7] A parol release of a judgment for less than its face, although indorsed on the execution, is invalid.[8] A release not under seal will not operate to release the parties defendant in an action for damages caused by an unlawful assault and battery.[9] A release, or agreement amounting to a release, made upon good consideration,

the termination of the service does not exclude or affect the implied condition, arising from the nature of the service, of the continued existence of the parties. Thus a farm-bailiff, contracting to serve at weekly wages, with residence in a farm-house, the service to be determinable by six months' notice or payment of six months' wages, upon the death of the employer, was held to have no claim against the administrator for not continuing the service: Farrow v. Wilson, L. R. 4 Com. P. 744.

[1] Leake on Contracts, 1261.

[2] Where the discharge is before breach, "rescission," and not "release," is strictly the proper term. But in practice the word "release" is often used in the wider sense.

[3] Compton v. Elliott, 48 N. Y. Sup. Ct. 211.

[4] Rountree v. Jacob, 2 Taunt. 181; Harding v. Ambler, 2 Mees. & W. 279.

[5] Nesbitt v. McGehee, 26 Ala. 748.

[6] Leake on Contracts, 922.

[7] Pratt v. Morrow, 45 Mo. 404; 100 Am. Dec. 381.

[8] Weber v. Couch, 134 Mass. 26; 45 Am. Rep. 274.

[9] Smithwick v. Ward, 7 Jones, 64; 75 Am. Dec. 453.

and in the form of a binding contract, although not under seal, may be effectual in equity in discharge of the debt.[1] A voluntary release, or intention to release, without a deed, and without consideration, is equally inoperative in equity and in law.[2] At law a release under seal cannot be varied by evidence of a parol agreement between the parties at the time of its execution.[3] But in equity a release under seal may be inquired into and corrected.[4] A receipt of money "in full" of a demand for unliquidated damages is treated as a release, and not subject to be contradicted or explained by parol evidence.[5] When the creditor voluntarily delivers up to his debtor a bond, note, or other evidence of his claim, the law will imply the release and discharge of any right of action of the creditor thereupon.[6] Destroying a bond with the intention of forgiving the debt releases it.[7] A release need not be averred to be under seal. A release imports a seal, and it is a matter of evidence whether it have a seal or not, if a seal be necessary.[8]

§ 2576. **What Matters Release Covers.** — The release of a debt discharges all securities held by the creditor,[9] but cannot operate to extinguish or defeat any future rights or claims.[10] A release in general terms may be construed as qualified by the recitals or other matter in the deed, or as restricted by the particular object of the

[1] Taylor *v.* Manners, L. R. 1 Ch. 48; Thomason *v.* Dill, 30 Ala. 444.

[2] Jackson *v.* Stackhouse, 1 Cow. 122; 13 Am. Dec. 514.

[3] Leake on Contracts, 923; Buswell *v.* Poineer, 35 How. Pr. 450; 37 N. Y. 314; Allen *v.* Cowan, 28 Barb. 108; Ryan *v.* Ward, 48 N. Y. 204; 8 Am. Rep. 539.

[4] Leake on Contracts, 923; Barnes *v.* Ward, Busb. Eq. 93; 57 Am. Dec. 590.

[5] Coon *v.* Knap, 8 N. Y. 402; 59 Am. Dec. 502; Chestnut *v.* Strong, 1 Hill, 122.

[6] Beach *v.* Endress, 51 Barb. 570.

[7] Gardner *v.* Gardner, 22 Wend. 526; 34 Am. Dec. 340.

[8] Ill. Cent. R. R. Co. *v.* Read, 37 Ill. 484; 87 Am. Dec. 260.

[9] Cowper *v.* Green, 7 Mees. & W. 633; Jackson *v.* Stackhouse, 1 Cow. 122; 13 Am. Dec. 514.

[10] Francis *v.* Boston and Roxbury Mill Corporation, 4 Pick. 365, 368; Hastings *v.* Dickinson, 7 Mass. 153; 5 Am. Dec. 34; Gibson *v.* Gibson, 15 Mass. 106; 8 Am. Dec. 94; Quarles *v.* Quarles, 4 Mass. 688; Cocke *v.* Stuart, Peck, 137.

release. Thus a general release is qualified and controlled by a recital of the particular class of debts to which alone it is intended to apply.[1] A general release in a composition deed is construed as restricted to the debts and liabilities which are the proper subjects of the composition and provable under it.[2] Where a condition is disjunctive, a release of one alternative releases the other also.[3]

§ 2577. **Covenant not to Sue.**—A covenant made by a creditor with his debtor not to sue him at any time for the debt, although it does not in terms release the debtor, and purports only to bind the creditor by covenant, is held, upon the principle of avoiding circuity of action, to be equivalent, in effect, to a release, and may be so pleaded in an action by the creditor for the debt, the subject of the covenant.[4] But this principle applies only between the parties to the covenant.[5] A covenant not to sue for a limited time cannot be pleaded as equivalent to a release; it operates as a covenant only.[6] So with a simple contract not to sue for a limited time, or merely in suspension of a debt; it operates by way of contract only, and cannot be pleaded in bar of an action for the debt.[7] But where there is a condition attached to such a covenant, that if an action is brought within the limited time the right of action will be forfeited, this may be pleaded in bar of an action brought within the time.[8] A covenant not to sue within a limited period does not apply to any new cause of action which may arise between the debtor and creditor.[9]

[1] Payler *v.* Homersham, 4 Maule & S. 423; Simons *v.* Johnson, 3 Barn. & Adol. 175.

[2] Haselgrove *v.* House, L. R. 1 Q. B. 101.

[3] Smith *v.* Durell, 16 N. H. 344; 41 Am. Dec. 732.

[4] Russell *v.* Adderton, 64 N. C. 417. A bond conditioned not to sue, unless on a future contract, is a perpetual covenant, amounting to an absolute release of all demands on any contract then existing: Cuyler *v.* Cuyler, 2 Johns. 186.

[5] Hatton *v.* Eyre, 6 Taunt. 289; Walmesley *v.* Cooper, 11 Ad. & E. 216.

[6] Ayloffe *v.* Scrimpshire, 2 Salk. 523; Clopper *v.* Union Bank, 7 Har. & J. 92; 16 Am. Dec. 294. *Contra*, Robinson *v.* Godfrey, 2 Mich. 408; Morgan *v.* Butterfield, 3 Mich. 615.

[7] Ford *v.* Beech, 11 Q. B. 852.

[8] Leake on Contracts, 929.

[9] Brigham *v.* Eveleth, 9 Mass. 538.

§ 2578. Release of and by Co-debtors and Co-creditors. — A release of one of several debtors jointly, or jointly or severally, liable for the same debt, releases all,[1] even where the release contains a proviso that the other debtor shall not take advantage of it.[2] But a release of one co-debtor may reserve a right against the other debtors, in which case they are not discharged.[3] A covenant not to sue one of co-debtors jointly, or jointly and severally, liable, although it operates by construction as a release as between the covenantor and covenantee, does not operate as a release of the other debtors.[4]

The release by one of co-creditors jointly entitled to the debt discharges the debtor as to all.[5] A release under the seal of one of the members of a copartnership is a sufficient release of a joint cause of action.[6] A release by two of three joint obligees is a bar to a suit by a third, brought in the name of the three, for one third of the benefit of the contract. In such joint action the plaintiffs cannot set up that such release was a fraud on one of their number, and thus deprive the defendant of a legal defense to the claim of the three.[7] But if an absolute release be given by one co-creditor in fraud of the others, and in collusion with the debtor, the court will set it aside.[8]

[1] Leake on Contracts, 929; Baldwin *v.* Gray, 4 Martin, N. S., 192; 16 Am. Dec. 169; Allin *v.* Shadburne, 1 Dana, 68; 25 Am. Dec. 121; Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 585; Bozeman *v.* State Bank, 7 Ark. 328; 46 Am. Dec. 291; Williamson *v.* McGinness, 11 B. Mon. 74; 52 Am. Dec. 561; Hale *v.* Spaulding, 145 Mass. 482; 1 Am. St. Rep. 475. But see Ellis *v.* Esson, 50 Wis. 138; 36 Am. Rep. 830;

[2] Benjamin *v.* McConnell, 4 Gilm. 536; 46 Am. Dec. 474.

[3] Yates *v.* Donaldson, 5 Md. 389; 61 Am. Dec. 283; North *v.* Wakefield, 13 Q. B. 541, the court saying: "The reason why a release to one debtor releases all jointly is, because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor." *Contra*, Gunther *v.* Lee, 45 Md. 60; 24 Am. Rep. 505.

[4] Goodnow *v.* Smith, 18 Pick. 414; 29 Am. Dec. 600; Berry *v.* Gillis, 17 N. H. 9; 43 Am. Dec. 585; Bozeman *v.* State Bank, 7 Ark. 328; 46 Am. Dec. 291; Williamson *v.* Ginness, 11 B. Mon. 74; 52 Am. Dec. 561; Brown *v.* White, 29 N. J. L. 514; 80 Am. Dec. 226.

[5] Leake on Contracts, 932.

[6] Beltzhoover *v.* Stockton, 4 Cranch C. C. 695.

[7] Myrick *v.* Dame, 9 Cush. 248.

[8] Leake on Contracts, 933.

§ 2579. Rescission by Act of One Party.—The act of one party incapacitating himself from performing entitles the other, if he choose, to treat the contract as rescinded.[1] So where one party has refused to perform an essential part of an entire contract.[2] If a contractor stipulate to build and finish a house by a certain day, and at the expiration of the time he has not commenced the work, the other party may rescind the contract.[3] The vendee may rescind a contract of sale, in the event of a total departure from it by the vendor.[4] On a contract to deliver corn, where the article tendered is not merchantable, the vendee has the right to rescind the contract and recover the purchase-money.[5] In a conditional contract, whether the condition is express or implied, if one party fails to perform, the other may retract.[6] The fact that the contract was induced by fraud gives the party defrauded the right, on discovering the fraud, to elect whether he will continue to treat the contract as binding or avoid it; but the contract continues valid until he has determined his election by avoiding it.[7] If a purchaser of goods make material statements as to his debts and means, at the time of the purchase, which are relied on, and turn out to have been false, the sale is voidable.[8] Where a contract is entered into under the inducement of a false representation made by the other party, he will be entitled to consider the contract at an end on discovering the fraud, though the misrepresentation was innocently made.[9] The

[1] Shaffner *v.* Killian, 7 Ill. App. 620.
[2] Luey *v.* Bundy, 9 N. H. 298; 32 Am. Dec. 359; Allen *v.* Webb, 24 N. H. 278; Webb *v.* Stone, 24 N. H. 282; Preble *v.* Bottom, 27 Vt. 247; Selby *v.* Hutchinson, 9 Ill. 319.
[3] Miller *v.* Phillips, 31 Pa. St. 218.
[4] Phillips *v.* Bruce, Anth. 89.
[5] Peck *v.* Armstrong, 38 Barb. 215.
[6] Dodge *v.* Greeley, 31 Me. 343.
[7] Whitworth *v.* Thomas, 83 Ala. 308; 3 Am. St. Rep. 725; Holbrook *v.* Burt, 22 Pick. 546; Perley *v.* Balch, 23 Pick. 283; 34 Am. Dec. 56; Thurston *v.* Blanchard, 22 Pick. 18; 33 Am. Dec. 700; Phelps *v.* Quinn, 1 Bush, 375; Ketletas *v.* Fleet, 7 Johns. 324; Elwell *v.* Chamberlain, 4 Bosw. 320.
[8] Johnson *v.* Peck, 1 Wood. & M. 334; Bradberry *v.* Keas, 5 J. J. Marsh. 446; Scott *v.* Simmons, 34 How. Pr. 66.
[9] Lockridge *v.* Foster, 5 Ill. 569; Bowen *v.* Schuler, 41 Ill. 192; Herrin *v.* Libbey, 36 Me. 350; Willoughby *v.* Moulton, 47 N. H. 205.

purchaser is not entitled to rescind for breach of warranty, unless there be fraud in the case, or an express agreement that the goods might be returned in the event of such breach.[1] A contract of sale cannot be rescinded after delivery simply because the article delivered is not equal in quality to that contracted for. The difference must be one of kind or class.[2] A purchaser cannot rescind a contract for sale of land because it is not reduced to writing.[3]

A contract cannot be rescinded by one of the parties, unless the other can be placed *in statu quo*.[4] Thus where one party has partly performed the contract, the other cannot rescind it and recover the money paid because of the failure to perform it completely.[5] So if the complainant has disposed of and cannot restore part of the consideration, he cannot rescind.[6]

A party cannot rescind a contract and at the same time retain the consideration. He must rescind *in toto* or not at all.[7] In order to rescind a contract for the sale of a chattel, the property must be returned, or an offer to return made, unless it is valueless to both parties.[8] A party entitled to rescind a contract on the ground of fraud can

[1] Kiernan *v.* Rocheleau, 6 Bosw. 148; Prentiss *v.* Russ, 16 Me. 30; Muller *v.* Eno, 14 N. Y. 597.

[2] Hoadley *v.* House, 32 Vt. 179; 76 Am. Dec. 167.

[3] Rowland *v.* Garman, 1 J. J. Marsh. 76; 19 Am. Dec. 54.

[4] Conner *v.* Henderson, 15 Mass. 319; 8 Am. Dec. 103; Bassett *v.* Brown, 105 Mass. 558; Morse *v.* Brackett, 98 Mass. 205; Carneal *v.* May, 2 A. K. Marsh. 587; 12 Am. Dec. 453; Luey *v.* Bundy, 9 N. H. 298; 32 Am. Dec. 359; Chance *v.* Comm'rs, 5 Blackf. 441; 35 Am. Dec. 131; Evans *v.* Gale, 17 N. H. 573; 43 Am. Dec. 614; Fay *v.* Oliver, 20 Vt. 118; 49 Am. Dec. 764; Pettus *v.* Roberts, 6 Ala. 811; Buell *v.* Tate, 7 Blackf. 55; Calhoun *v.* Davis, 2 Ind. 532; Teter *v.* Hinders, 19 Ind. 93; McGuire *v.* Callahan, 19 Ind. 128; Griffith *v.* Frederick Co. Bank, 6 Gill & J. 4; Masson *v.* Bovet, 1 Denio, 69; 43 Am. Dec. 651; Brown *v.* Wither, 10 Ohio, 142; Hammond *v.* Buckmaster, 22 Vt. 375.

[5] Stevens *v.* Cushing, 1 N. H. 17; 8 Am. Dec. 27.

[6] Durrett *v.* Simpson, 3 T. B. Mon. 517; 16 Am. Dec. 115.

[7] Jennings *v.* Gage, 13 Ill. 610; 56 Am. Dec. 476; Buchenau *v.* Horney, 12 Ind. 336; Tisdale *v.* Buckmore, 33 Me. 461; Cocke *v.* Rucks, 34 Miss. 105; Evans *v.* Gale, 17 N. H. 573; 43 Am. Dec. 614; Utter *v.* Stuart, 30 Barb. 20.

[8] Cristy *v.* Cummings, 3 McLean, 386; Dill *v.* Camp, 22 Ala. 249; Hancock *v.* Tucker, 8 Fla. 435; Love *v.* Oldham, 22 Ind. 51; Minor *v.* Kelly, 5 T. B. Mon. 272; Stewart *v.* Dougherty, 3 Dana, 479; Buford *v.* Brown, 6 B. Mon. 553; Sanborn *v.* Osgood, 16 N. H. 112; Smally *v.* Hendrickson, 29 N. J. L. 371; Benson *v.* Littlefield, 2 Mill Const. 180; Poor *v.* Woodburn, 25 Vt. 234; Smith *v.* Smith, 30 Vt. 139.

only do so by returning, or offering to return, everything of value which he has received under it.[1] One who would rescind a contract must do so distinctly and unequivocally. He cannot treat the contract as binding and rescinded at the same time.[2] The rescission of an executed contract on the ground of fraud or failure of consideration, and the like, is a right in equity subject to a restoration of the consideration. The party seeking equity must do equity; he must return the property obtained, or reconvey the title, and a failure in this particular will be followed by a denial of equity. But if the thing the consideration for which is sought to be recovered is entirely worthless, there is no duty to return it in order to entitle plaintiff to recover.[3]

The right to rescind a contract must be exercised within a reasonable time.[4] To enable a party to rescind a contract for fraud, he must act with reasonable promptness after he discovers such fraud.[5] The failure of a party to perform his part of a contract does not *per se* rescind it; the other party must, within a reasonable time, give notice of his intention to rescind.[6] What is or is not a reasonable time within which a party may rescind a contract, where no time is fixed by its terms, is a question of law.[7] When a party rescinds a contract, even without cause, he cannot renew the same without the consent of the other party.[8]

[1] Herman *v.* Haffenegger, 54 Cal. 161.
[2] Sumner *v.* Parker, 36 N. H. 449; Weeks *v.* Robie, 42 N. H. 316; Clarkson *v.* Mitchell, 3 E. D. Smith, 269; Jewett *v.* Petit, 4 Mich. 508; Hendricks *v.* Goodrich, 15 Wis. 679.
[3] Babcock *v.* Case, 61 Pa. St. 427; 100 Am. Dec. 654.
[4] Johnson *v.* McLane, 7 Blackf. 501; 43 Am. Dec. 102.
[5] Williams *v.* Ketchum, 21 Wis. 432; Fratt *v.* Fiske, 17 Cal. 380; Blen *v.* Bear River etc. Co., 20 Cal. 602; 81 Am. Dec. 132; Shaw *v.* Barnhart, 17 Ind. 183; Shepherd *v.* Fisher, 17 Ind. 229; Fisher *v.* Wilson, 18 Ind. 133; Cook *v.* Gilman, 34 N. H. 556; Gatling *v.* Newell, 9 Ind. 572; Desha *v.* Robinson, 17 Ark. 228; Lawrence *v.* Dale, 3 Johns. Ch. 23.
[6] Carney *v.* Newberry, 24 Ill. 203.
[7] Kingsley *v.* Wallis, 14 Me. 57; Ragan *v.* Gaither, 11 Gill & J. 472.
[8] Lassen *v.* Mitchell, 41 Ill. 102.

CHAPTER CXXIII.

MERGER.

§ 2580. Merger on taking higher security.
§ 2581. Merger by judgment.
§ 2582. Merger in case of joint debtors.

§ 2580. Merger on Taking Higher Security. — The taking or acquiring of a higher security merges and extinguishes the legal remedy upon the lower one.[1] A debt is merged when its original form is changed into a form importing a higher dignity, as a parol contract converted into a bond, or a bond or other contract into a judgment.[2] Prior contracts are merged in and superseded by a subsequent contract on the same subject, which, as the last act of the parties, must be held to contain and express their true meaning and intention.[3] Where a party to a contract, after a breach by the other party, instead of rescinding the contract, in effect releases and discharges it, merging it in a new and different contract, he can have no remedy for the breach of the contract thus released and superseded. He must predicate his rights upon the new contract.[4] A parol contract, or an implied one, merges in a written agreement.[5] It is on this principle that all parol negotiations and agreements which precede the execution of a written contract are not admissible to explain or contradict it, as they are considered as merged

[1] Price *v.* Moulton, 10 Com. B. 574; Groverman *v.* Diffenderffer, 11 Gill & J. 15; Wann *v.* McNulty, 2 Gilm. 355; 43 Am. Dec. 58; Baker *v.* Baker, 28 N. J. L. 13; 75 Am. Dec. 243. A superior right is never merged in an inferior one: Myers *v.* Hewitt, 16 Ohio, 453. Thus taking a note does not relinquish a lien: The Charlotte *v.* Hammond, 9 Mo. 58; 43 Am. Dec. 536.

[2] McDonald *v.* Ingraham, 30 Miss. 389; 64 Am. Dec. 166; McNaughten *v.* Partridge, 11 Ohio, 223; 38 Am. Dec. 731; Davidson *v.* Kelly, 1 Md. 492; Bank of Missouri *v.* Tesson, 1 Mo. 617; Settle *v.* Davidson, 7 Mo. 604; Curson *v.* Monteiro, 2 Johns. 308.

[3] Stow *v.* Russell, 36 Ill. 18; Hargrave *v.* Conroy, 19 N. J. Eq. 281.

[4] Magarity *v.* Shipman, 2 Mackey, 334.

[5] Ferguson *v.* Weatherford, 4 J. J. Marsh. 195; Coleman *v.* Hart, 25 Ind. 256; Martin *v.* Hamlin, 18 Mich. 354; 100 Am. Dec. 181.

in the writing.[1] No merger takes place where the two securities are of equal degree; thus a bond taken for another bond, or for a covenant, does not effect a merger by mere operation of law.[2] A judgment recovered upon a contract of record does not merge the contract, because both securities, as being matter of record, are of equal degree.[3] So articles of agreement under seal for the sale of land do not merge in a conveyance of it subsequently executed.[4] A vendor's lien is not merged in a purchase-money mortgage.[5] A right of action on a debt is not merged in a note given on the agreement that it is to be a discharge of the debt only when paid.[6] A deed given after a note, and to be void if the amount was not paid by a certain day, merges the note.[7] A warrant of attorney to confess judgment does not merge the debt.[8] The two securities must be co-extensive; that is, the new and superior security must be for the same debt and between the same parties.[9]

The doctrine of merger applies by mere operation of law, independently of any intention of the parties, and without any express or implied agreement between them that the inferior remedy should be extinguished.[10] "It seems doubtful whether it be competent for the parties to provide by express declaration or agreement against the operation of the rule of law, so that the new security for the same debt shall be an additional or collateral security only, and not a merger or extinguishment of the former

[1] Vanderkarr *v.* Thompson, 19 Mich. 82; Oiler *v.* Gard, 23 Ind. 212.

[2] Leake on Contracts, 936; Andrews *v.* Smith, 9 Wend. 53; Weakley *v.* Bell, 9 Watts, 280; 36 Am. Dec. 116; Ladd *v.* Wiggin, 35 N. H. 421; 69 Am. Dec. 551.

[3] Leake on Contracts, 936.

[4] Speed *v.* Harm, 1 T. B. Mon. 16; 15 Am. Dec. 78.

[5] Boos *v.* Ewing, 17 Ohio, 500; 49 Am. Dec. 478; Neil *v.* Kinney, 11 Ohio St. 58; Anketel *v.* Converse, 17 Ohio St. 11; 91 Am. Dec. 115.

[6] Proctor *v.* Mather, 3 B. Mon. 353.

[7] Shaw *v.* Burton, 5 Mo. 478.

[8] Sloo *v.* Lea, 18 Ohio, 279.

[9] Norfolk Bank *v.* McNamara, 3 Ex. 628; Holmes *v.* Bell, 3 Man. & G. 213; Ansell *v.* Baker, 15 Q. B. 20; Jones *v.* Johnson, 3 Watts & S. 276; 38 Am. Dec. 760; Day *v.* Seal, 14 Johns. 404; Davis *v.* Anable, 2 Hill, 339; United States *v.* Lyman, 1 Mason, 482.

[10] Price *v.* Moulton, 10 Com. B. 561.

and inferior security."[1] And if the face of the security or other evidence shows that the higher security was taken only as a further or collateral security, there is no merger or extinguishment.[2] If service be performed by one person for another, and afterwards the parties enter into a contract as to the compensation to be made for the services, which contract is void for its illegality, such

[1] Leake on Contracts, 937; citing Owen *v.* Homan, 3 Macn. & G. 408, where the chancellor said: "I am not aware of any case where a specialty has been given by a sole debtor, or one of several joint debtors, that the legal effect of such bond as a merger of the simple contract debt has been controlled or defeated by the agreement of the parties; and I have some difficulty in receiving the idea that it is competent to parties by agreement to control or vary such legal effect": See Whittaker *v.* Dick, 5 How. (Miss.) 296; 35 Am. Dec. 436. In Van Vliet *v.* Jones, 20 N. J. L. 340, 43 Am. Dec. 633, the court say: "There can be no doubt, as a general rule, that the taking of a bond and mortgage, or other security of a higher nature, extinguishes a debt arising from mere matter of account; yet this will depend on the intention of the parties. If the higher security was given as the future evidence of the debt, to which the party was to look for payment, then the less security would merge in the greater; but if the higher security was to be merely additional or collateral to the less, showing that the intention of the parties was to keep the latter open, to be looked to for payment in any event, then the less is not extinguished by the greater security. This doctrine is familiar, and may be found in most of the elementary works and cases that treat upon this subject, particularly in Chitty on Contracts, 607, and authorities there cited. The defendant's counsel admitted the position, but insisted that it must appear upon the face of the instrument itself that it was an additional or collateral security, and the works that treat on this subject, and cases adduced, seem to give countenance to this idea; for in the former it is usually stated as an exception to the general doctrine of merger, that if it appear upon the face of the instrument that it is intended to be a further or collateral security, then the rule of merger does not apply, and the cases referred to by counsel are of the description where the matter appeared upon the face of the instrument. But these authorities, although they show very clearly that, when the matter does so appear, the general rule of extinguishment does not apply, yet they do not therefore prove that when it does not so appear, the rule does apply; and if such cases do exist, the labors of counsel and the researches of the court have failed to produce them. Deciding the case, then, upon principle rather than precedent, the question of extinguishment or not is one of intention. What did the parties mean by the transaction? Did they intend that the old security should remain open and the new one be merely collateral or additional? or did they intend to extinguish the former? This intention is, of course, to be collected from the face of the instrument itself, where it so appears; and if it does not so appear, then from the next best evidence, the only difference being that, in the former case, the security itself proves the exception to the rule, and also the intention of the parties; whilst in the latter, the party alleging the exception must prove it."

[2] Van Vliet *v.* Jones, 20 N. J. L. 340; 43 Am. Dec. 633; Gardiner *v.* Hust, 2 Rich. 601; Yates *v.* Donaldson, 5 Md. 389; 61 Am. Dec. 283; The Betsey, Daveis, 112; Charles *v.* Scott, 1 Serg. & R. 294; Banorgee *v.* Hovey, 5 Mass. 11; 4 Am. Dec. 17; Graves *v.* Allen, 66 Tex. 589.

contract does not operate as a merger of the original demand.[1]

ILLUSTRATIONS. — A suit was compromised under an oral agreement, and subsequently a bond was given, virtually embodying the provisions of the agreement. *Held*, that the oral agreement was merged in the written one, and that suit should be brought on the latter: *Rhoads* v. *Jones*, 92 Ind. 328. A bid was made for certain work, and subsequently the bidder signed an agreement, which covered the terms of the bid, with some additional provisions. *Held*, that the bid was merged in the subsequent agreement: *Taylor* v. *Fox*, 16 Mo. App. 527. Sureties made an agreement under seal to equalize their possible loss by the principal, and afterwards made a further parol agreement respecting some of the liabilities referred to in the former, but providing expressly that that agreement should not be rendered void. *Held*, that the former agreement was not merged in the latter: *Patterson* v. *Patterson*, 23 Pa. St. 464. The parties, disagreeing as to the method of computing interest, left the question to an arbitrator, who decided erroneously. The defendant gave his bond for the sum found due by the arbitrator. *Held*, that the debt was merged in the bond: *Baker* v. *Baker*, 28 N. J. L. 13; 75 Am. Dec. 243. After an oral agreement in relation to a certain building, the same parties, a year after, entered into a written contract concerning the same building, but not including the subject-matter, nor covering the time of the first. *Held*, that the first contract was not merged in the second: *Kempsy* v. *Metcalf*, 61 Iowa, 320. A party, being liable upon a replevin bond, promised in writing to pay the amount of his liability by the next term of court, if no suit was brought on the bond, but the bond was not released. *Held*, that no action would lie upon the subsequent promise, as it could not merge or destroy the higher security: *Leland* v. *Barry*, 69 Ill. 348.

§ 2581. Merger by Judgment. — Where judgment is recovered upon either a simple contract or one under seal, the remedy is merged in the judgment.[2] A judgment recovered for a less sum than that claimed merges the entire claim, because it is conclusive as to the amount recoverable; and no further action can be brought upon the same claim in respect of the residue.[3] A judgment

[1] Thurston v. Percival, 1 Pick. 415.
[2] Owen v. Homan, 3 Macn. & G. 407; Wayman v. Cochrane, 35 Ill. 152; Runnamaker v. Cordrey, 54 Ill. 303.
[3] Leake on Contracts, 939.

recovered upon a collateral security for a debt, or upon a security given merely on account of a debt, although it may merge the security, does not operate to merge the original debt or cause of action. Thus where a bill of exchange was given on account of a debt due under a covenant, and judgment recovered upon the bill, it was held that the judgment alone, without payment or satisfaction, although it merged the remedy upon the bill, afforded no answer to an action upon the covenant.[1] A foreign judgment does not merge the cause of action.[2]

§ 2582. **Merger in Case of Joint Debtors.** — The merger of a claim against one joint debtor, as by taking a bond for a simple contract debt, in general merges the remedy against a co-debtor upon the joint liability, but not the remedy upon his separate liability, if any,[3] unless given at the time the liability occurred, or accepted in satisfaction of the simple contract.[4] Where partners each covenant to pay his proportion of the partnership debts, and the creditor releases their joint liability, the original debt is merged.[5] A judgment recovered against one joint debtor merges the remedy for the joint debt, and is a bar to an action against a co-debtor upon the joint liability.[6] But if the debt be several as well as joint, the judgment against the one, without satisfaction, is no bar to an action against the other upon his several liability; and whilst any part of the debt remains due, the other may be sued.[7]

[1] Drake *v.* Mitchell, 3 East, 251.

[2] Eastern Tp. Bank *v.* Beebe, 53 Vt. 177; 38 Am. Rep. 665; Nat. Bank *v.* Peabody, 55 Vt. 492; 45 Am. Rep. 632.

[3] Leake on Contracts, 940.

[4] Maddin *v.* Edmondson, 10 Mo. 643; Phelps *v.* Johnson, 8 Johns. 54.

[5] Le Page *v.* McCrea, 1 Wend. 164; 19 Am. Dec. 469.

[6] Mason *v.* Eldred, 6 Wall. 231; Suydam *v.* Barber, 18 N. Y. 468; 75 Am. Dec. 254; Olmstead *v.* Webster, 4 N. Y. 413; Robertson *v.* Smith, 18 Johns. 459; 9 Am. Dec. 227; Root *v.* Dill, 38 Ind. 169; Wann *v.* McNulty, 2 Gilm. 355; 43 Am. Dec. 58; Smith *v.* Black, 9 Serg. & R. 142; 11 Am. Dec. 686; Ward *v.* Johnson, 13 Mass. 148; Sessions *v.* Johnson, 95 U. S. 347; United States *v.* Ames, 99 U. S. 45. At common law a judgment against one partner is a merger of the debt against the firm: Lovey *v.* Bailey, 43 Md. 18.

[7] King *v.* Hoare, 13 Mees. & W. 494.

PART V. — THE REMEDIES FOR BREACH OF THE CONTRACT.

CHAPTER CXXIV.

SPECIFIC PERFORMANCE.

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§ 2583. Jurisdiction to Decree Specific Performance.—Equity at all times has exercised a jurisdiction to compel parties to actually perform their contracts, instead of leaving the injured person to his remedy for damages for the breach. The foundation of this jurisdiction is the fact that the legal remedy would not be an adequate compensation for the breach,—would not, in fact, put the party in as beneficial a situation as if the agreement were specifically performed.[1] "The ground of the jurisdiction includes two classes of cases: 1. Where, from the lack of some legal formality or condition in the contract, no action at law can be maintained. 2. Where, from some peculiar feature of the contract, either in its subject-matter or in its terms, or in the relation of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty."[2] A written contract for the sale of land varied by parol in a material point will not be enforced in equity.[3] The defendant may show that by fraud the written agreement does not show the real contract; but the plaintiff cannot do so for the purpose of obtaining specific performance with a variation.[4] The bill must not be filed before the day when performance was due under the contract.[5]

§ 2584. Both Specific Performance and Damages not Generally Given.—A plaintiff has, in general, the option of suing for specific performance or for damages, but cannot obtain both.[6] But a plaintiff may claim damages for

[1] Willard *v.* Tayloe, 8 Wall. 557; Morgan *v.* Morgan, 3 Stew. 383; 21 Am. Dec. 638; Hays *v.* Hall, 4 Port. 374; 30 Am. Dec. 531; Buck *v.* Swazey, 35 Me. 41; 56 Am. Dec. 681; Wynn *v.* Garland, 19 Ark. 23; 68 Am. Dec. 190; Grassmeyer *v.* Beeson, 18 Tex. 753; 70 Am. Dec. 309; Peters *v.* Phillips, 19 Tex. 70; 70 Am. Dec. 319; Jones *v.* Newhall, 115 Mass. 244; 15 Am. Rep. 97.

[2] 3 Pomeroy's Eq. Jur., sec. 1403.

[3] Heith *v.* Wooldridge, 6 Rand. 605; 18 Am. Dec. 751.

[4] Wollam *v.* Hearn, 7 Ves. 211; 2 White and Tudor's Lead. Cas. 484; Long *v.* Dooley, 4 Hayw. (Tenn.) 128; 9 Am. Dec. 754.

[5] De Rivafinoli *v.* Corsetti, 4 Paige, 264; 25 Am. Dec. 532.

[6] Leake on Contracts, sec. 1122; Duke of Beaufort *v.* Glynn, 3 Smale & G. 226; Kell *v.* Nokes, 32 L. J. Ch. 785; Lord Tredegar *v.* Windus, L. R. 19 Ex. 607; Fennings *v.* Humphery, 4 Beav. 6, where it was said: "One proceeding would allege that the agreement could and ought to be performed,

breaches up to the time of action brought, together with specific performance in the future; and a plaintiff may claim specific performance generally, and at the same time damages in respect of acts that are of a kind which do not admit of a decree for specific performance.[1] Where there is an unexecuted contract for the sale of land, the vendor may file a bill to have specific performance, and the land sold for his debt, i. e., the purchase-money.[2] Where the court has jurisdiction, but it cannot apply the remedy in the particular case, as where, on account of the vendor of land not being able to make title, the specific execution of the contract cannot be decreed, the court will award damages instead,[3] unless the plaintiff, at the time of bringing the suit, was aware of the vendor's disability.[4] Where specific performance is refused, the court may retain the bill for the purpose of granting compensation to the plaintiff for his damages.[5] Thus though it may decide that the plaintiff is not entitled to specific performance, the court may decree the repayment of the money expended on the faith of the agreement.[6]

§ 2585. **Mandatory Injunctions.**—The court will in some cases enforce indirectly the affirmative terms of a contract of which it could not directly decree the specific

and the other proceeding would allege or imply that compensation in lieu of performance should be given. The two proceedings would be inconsistent with each other": Baldwin *v.* Munn, 2 Wend. 399; 20 Am. Dec. 627; Herrington *v.* Hubbard, 1 Scam. 569; 33 Am. Dec. 427.

[1] Fennings *v.* Humphery, 4 Beav. 1.

[2] Yancey *v.* Mauck, 15 Gratt. 308; Hempfield R. R. Co. *v.* Thornburg, 1 W. Va. 264; Andrews *v.* Sullivan, 2 Gilm. 327; 43 Am. Dec. 53; Heatherwick *v.* Heatherwick, 32 Ill. 73. So may an assignee of a note given for the purchase price: Hanna *v.* Wilson, 3 Gratt. 243; 46 Am. Dec. 190.

[3] Milkman *v.* Ordway, 106 Mass. 232; McQueen *v.* Chouteau, 20 Mo. 222; 64 Am. Dec. 178; Hamilton *v.* Hamilton, 59 Mo. 232; Morss *v.* Elmendorf, 11 Paige, 277; Chartier *v.* Marshall, 56 N. H. 478; Hopkins *v.* Gilman, 22 Wis. 476; Harrison *v.* Deramus, 33 Ala. 413; Foley *v.* Crow, 37 Md. 51.

[4] Hatch *v.* Cobb, 4 Johns. Ch. 559; Sternberger *v.* McGovern, 56 N. Y. 12; Smith *v.* Kelley, 56 Me. 64.

[5] Aday *v.* Echols, 18 Ala. 353; 52 Am. Dec. 225; Kelley *v.* Allen, 34 Ala. 663; Bowie *v.* Stonestreet, 6 Md. 418; 61 Am. Dec. 318; Rider *v.* Gray, 10 Md. 282; 69 Am. Dec. 135.

[6] Green *v.* Drummond, 31 Md. 71; 1 Am. Rep. 14; Worth *v.* Worth, 84 Ill. 442.

performance, by means of what has been called a "mandatory injunction."[1] Thus the court may compel the removal of buildings by an injunction against the continuance of the buildings.[2] So it may enforce a covenant to supply water by a canal by an injunction against preventing the flow of the water by means of the want of repair in the canal.[3]

§ 2586. Agreements not to do Certain Acts — Injunction the Mode of Compelling Specific Performance. — Where a person agrees not to do a certain act, specific performance is decreed in the form of an injunction restraining the party from doing the act.[4] Where a party agrees to do certain acts, and not to do others, the court may enjoin the doing of the latter, although it has no power to decree the performance of the latter.[5] Thus where an author agreed not to write for any other but a certain theater, the court restrained him from writing for any other theater, although it could not compel him to write for that theater;[6] where an actress agreed to perform at a certain theater, and no other, during a certain period, the court enjoined her from playing at any other theater, though it could not make her play at the theater in question.[7]

§ 2587. Contracts Subject to Specific Performance — In General. — Specific performance will be decreed of an

[1] Leake on Contracts, 1120; citing Isenberg *v.* East India House Co., 3 De Gex, J. & S. 272, where it is said: "There has been superadded a power of the court to grant what has been denominated 'a mandatory injunction,' that is, an order compelling a defendant to restore things to the condition in which they were when the plaintiff's complaint was made. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the plaintiff cannot be estimated, and sufficiently compensated by a pecuniary sum."

[2] Rankin *v.* Huskisson, 4 Sim. 13; Lord Manners *v.* Johnson, L. R. 1 C. D. 673; 45 L. J. Ch. 404.

[3] Lane *v.* Newdigate, 10 Ves. 192.

[4] Banet *v.* Blagrave, 5 Ves. 555; 6 Ves. 104; Hapgood *v.* Rosenstock, 23 Fed. Rep. 86.

[5] Lumley *v.* Wagner, 1 De Gex, M. & G. 604.

[6] Morris *v.* Colman, 18 Ves. 437.

[7] Lumley *v.* Wagner, 1 De Gex, M. & G. 604; Hays *v.* Willis, 11 Abb. Pr., N. S., 167; Daly *v.* Smith, 49 How. Pr. 150. An engagement or promise to perform at a certain theater implies a promise not to perform at any other: Montague *v.* Flockton, L. R. 16 Eq. 189.

agreement to execute a mortgage;[1] or an agreement to grant an annuity, and to charge it on land or other specific property;[2] or an agreement to renew a contract, although the contract was with plaintiffs as copartners;[3] or an agreement to give or renew a lease;[4] or to assign choses in action to indemnify a surety or lender;[5] or to execute a release of a mortgage or other security;[6] or to transfer an interest in a patent right;[7] or to exchange property;[8] or an agreement to give collateral security;[9] or a contract to renew a license;[10] or an agreement to insure;[11] or an executory agreement, made in contemplation of marriage, that the wife shall share with the husband's heirs in lieu of dower.[12]

§ 2588. Contracts not Subject to Specific Performance — In General. — With contracts that result in a mere debt, or claim to the payment of money, the remedy at common law is sufficiently specific and adequate, and no other remedy is required; as with a debt for work and labor or for money payable under a building contract executed, or a contract for personal services;[13] or a mere

[1] Ashton v. Corrigan, L. R. 13 Eq. 76; McClintock v. Laing, 22 Mich. 212; St. Paul Division Co. v. Brown, 11 Minn. 356; City etc. Ins. Co. v. Olmstead, 33 Conn. 476; De Pierres v. Thorn, 4 Bosw. 266; Dean v. Anderson, 34 N. J. Eq. 496; Arnold v. Cord, 16 Ind. 177; Richardson v. Hawlett, 33 Ark. 237; Lawrence v. Lawrence, 42 N. H. 109; Cole v. Cole, 41 Md. 301; Ogden v. Ogden, 4 Ohio St. 182.

[2] Witty v. Cottle, 1 Sausse & S. 174; Lyde v. Mann, 1 Mylne & K. 683.

[3] Floyd v. Storrs, 144 Mass. 56.

[4] Switzer v. Gardner, 41 Mich. 164; Clark v. Clark, 49 Cal. 586; Robinson v. Perry, 21 Ga. 183; Johnson v. Conger, 14 Abb. Pr. 195.

[5] Stockley v. Davis, 17 Ga. 177; 63 Am. Dec. 233; Triebert v. Burgess, 11 Md. 452; Brooks v. Ruff, 37 Ala. 371; Tiernan v. Granger, 65 Ill. 351; Collins v. Buck, 63 Me. 459; Ceas v. Bramley, 18 Hun, 187.

[6] Malinis v. Brown, 4 N. Y. 403; Bennett v. Abrams, 41 Barb. 619; Stark v. Wilder, 36 Vt. 752; Barkley v. Barkley, 14 Rich. Eq. 12; Weir v. Mundell, 3 Brewst. 594.

[7] Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459; Searle v. Hill, 73 Iowa, 368; 5 Am. St. Rep. 688.

[8] Shaddle v. Disborough, 30 N. J. Eq. 370.

[9] Robinson v. Cathcart, 2 Cranch C. C. 590.

[10] Domestic Tel. etc. Co. v. Telegraph Co., 39 N. J. Eq. 160.

[11] Carpenter v. Ins. Co., 4 Sand. Ch. 408.

[12] Brooks v. Austin, 95 N. C. 474.

[13] Kirk v. Brownley Union, 2 Phillim. 640; Crampton v. R. R. Co., L. R. 7 Ch. 562. The personal service of an actor will not be enforced by a court of equity: Ford v. Jermon, 6 Phillim. 6. And see Iron Age Publishing Co. v. Western Union Tel. Co., 83 Ala. 498; 3 Am. St. Rep. 758.

claim for damages or pecuniary compensation for a breach of contract.[1] So specific performance of a contract to borrow or to lend money will not be decreed;[2] nor of an agreement to pay a certain fund to one creditor in preference to others;[3] nor an agreement by creditors to receive a portion of their debts in satisfaction of the whole;[4] nor an agreement by the owner of an undivided part of land to lease his interest;[5] nor an agreement, contained in a lease, upon the part of the lessor, to repair damages caused by fire;[6] nor to compel the delivery of insurance policies in pursuance of a contract;[7] nor continuous duties which involve personal labor and care; as, for example, the running of the cars of a street-railroad along a particular street, daily, "at such regular intervals as may be right and proper," whether the obligation of the railroad company be rested on contract or the provisions of its charter;[8] nor a contract to build or repair a railroad;[9] nor a contract which deprives a person of his liberty.'[10]

[1] Greenaway *v.* Adams, 12 Ves. 401; Todd *v.* Gee, 17 Ves. 278; Jenkins *v.* Parkinson, 2 Mylne & K. 5; Webb *v.* R. R. Co., 1 De Gex, M. & G. 521; 21 L. J. Ch. 337; Paris Chocolate Co. *v.* Crystal Palace Co., 3 Smale & G. 119. In a case in the supreme court of the United States, it is said that the specific performance of a contract will not be decreed, — 1. Against one party in favor of another who has disregarded his own reciprocal obligations in the matter. Thus specific performance will not be decreed against a grantee of land charged with certain duties in regard to it in favor of a grantor, who has made unlawful and fraudulent entry. 2. Where the duties to be fulfilled by the grantee are continuous, and involve the exercise of skill, personal labor, and cultivated judgment, as to deliver marble of certain kinds and in blocks of such a kind that the court is incapable of determining whether they accord with the contract or no. 3. Where there is a want of mutuality in the contract, as where it is stipulated that one of the parties may abandon the contract at any time on giving a year's notice. 4. Where the party has a complete remedy at law; as in a grant of quarry-land, the grantee agreeing to quarry and deliver to the grantor certain sorts of marble from it and the grantor reserving a right of re-entry in case of non-performance, in order to supply himself, and having, moreover, a remedy by an ordinary suit at law on the contract: Marble Co. *v.* Ripley, 10 Wall. 339.

[2] Rogers *v.* Challis, 27 Beav. 175; Siebel *v.* Mosenthal, 31 L. J. Ch. 380; Larios *v.* Ginety, L. R. 5 P. C. 346.

[3] Boomer *v.* Cunningham, 22 Ill. 320; 74 Am. Dec. 155.

[4] Acker *v.* Phœnix, 4 Paige, 305.

[5] Bergengren *v.* Aldrich, 139 Mass. 259.

[6] Beck *v.* Allison, 56 N. Y. 367; 15 Am. Rep. 430.

[7] Nestel *v.* Ins. Co., 12 Phila. 477.

[8] McCann *v.* R. R. Co., 2 Tenn. Ch. 773.

[9] Ross *v.* R. R. Co., 1 Woolw. 26; Gallon *v.* Railroad, 1 Dill. 121; Oregonian R. R. Co. *v.* Oregon Nav. Co., 11 Saw. 33.

[10] In re Baker, 29 How. Pr. 485.

§ 2589. Contracts for Sale of Lands.—Where land, or any estate therein, is the subject-matter of the agreement, it will generally happen that damages calculated upon its money value will not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. Hence contracts for the sale of lands are considered a proper subject for specific performance,[1] although the plaintiff may have a remedy at law by an action for the purchase-money.[2] But specific performance will not be decreed where the value of the real property of which a conveyance is sought is so small as to amount to little more than the usual costs of an undefended suit in chancery, unless there are some special circumstances showing that the property has a special value to the complainant.[3]

§ 2590. Contracts for Sale of Chattels.—The court will not, in general, decree specific performance of an ordinary contract of sale of goods, because the breach may be sufficiently remedied by damages.[4] And the same rule applies to a contract for the sale of goods to be delivered at future times by installments, as contracts for a periodical supply of iron, or of coal from a colliery; although damages in such cases must be assessed upon conjecture as to the future market price.[5] But a sale of goods may be attended with exceptional circumstances, requiring specific performance to render it effectual,[6] as

[1] Willard *v.* Tayloe, 8 Wall. 557; Barnes *v.* Barnes, 65 N. C. 251; Bogan *v.* Drayhill, 51 Ala. 312; Duff *v.* Fisher, 15 Cal. 375; McGarvey *v.* Hall, 23 Cal. 140; Richmond *v.* R. R. Co., 33 Iowa, 422; Blanchard *v.* R. R. Co., 31 Mich. 43; 18 Am. Rep. 142; Ewins *v.* Gordon, 49 N. H. 444; Hart *v.* Brand, 1 A. K. Marsh. 159; 10 Am. Dec. 715; Sproule *v.* Winant, 7 T. B. Mon. 195; 18 Am. Dec. 165.

[2] Phyfe *v.* Wardell, 5 Paige, 268; 28 Am. Dec. 430; Springs *v.* Sanders, Phill. Eq. 67; Finley *v.* Aiken, 1 Grant Cas. 83; Larison *v.* Burt, 4 Watts & S. 27.

[3] Blake *v.* Flatley, 44 N. J. Eq, 228; 6 Am. St. Rep. 886.

[4] Eckstein *v.* Downing, 64 N. H. 248; 10 Am. St. Rep. 404.

[5] Leake on Contracts, 1126.

[6] In Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733, the court say: "It is objected that the court ought not to exercise jurisdiction in equity for a specific performance of agreements relating to personal property. And generally that rule has been observed in the English courts, but has been subject to numerous exceptions, and has been uniformly limited to cases where a compensation in damages fur-

a contract for the purchase of coal-tar, solely obtainable in the city from defendant, and absolutely necessary to plaintiff's business.[1] And specific performance of a contract for the sale of both realty and personalty for a lump sum has been decreed.[2]

§ 2591. Sale of Stock or Bonds. — Contracts for the sale of public securities, as government bonds, stock, etc., will not be enforced, since they can always be bought in the market.[3] In England a distinction is made between government stock and the stock and bonds of railroad and business corporations, on the ground that the latter are limited in number, and cannot always be had in the market;[4] and this view is approved in a few cases in this country.[5] But the weight of authority in the United States refuses specific performance of contracts concerning bonds and stock of corporations, whether governmental or otherwise.[6] An agreement for the sale of shares in a corporation may be "enforced in equity

nishes a clear and adequate remedy. If the party complaining has no such remedy, it is quite immaterial whether the contract relates to real or personal estate: 2 Story's Eq. Jur., sec. 24. The exercise of equity jurisdiction does not proceed upon any distinction between real estate and personal estate; but because damages at law may not in the particular case afford a complete remedy. This doctrine is thus laid down by Judge Story in his commentaries, and is fully sustained by the cases cited in support of it. The reasons given for a distinction between real estate and personal estate are not very satisfactory. All, as it seems to me, that can be fairly inferred from the cases on this point is, that in contracts respecting personal estate a compensation in damages is much oftener a complete and satisfactory remedy than it is in those which relate to real estate. But in all cases, if the party has not such a remedy, a court of equity will entertain jurisdiction, and grant relief as justice may require."

[1] Equitable Gas Light Co. *v.* Mfg. Co., 63 Md. 285.

[2] Clarke *v.* Curtis, 11 Leigh, 559; 37 Am. Dec. 625.

[3] 3 Pomeroy's Eq. Jur., sec. 1402, note.

[4] Duncuft *v.* Albrecht, 12 Sim. 189.

[5] Treasurer *v.* Commercial Mining Co., 23 Cal. 390; Todd *v.* Tafft, 7 Allen, 371; Asche *v.* Johnson, 2 Jones Eq. 149; Baldwin *v.* Com., 11 Bush, 417.

[6] 3 Pomeroy's Eq. Jur., sec. 1402, note; Fallon *v.* R. R. Co., 1 Dill. 121; Ross *v.* R. R. Co. 1, Woolw. 26; Lowry *v.* Muldrow, 8 Rich. Eq. 241; Ferguson *v.* Paschall, 11 Mo. 267; Grain *v.* Stebbins, 6 Paige, 124; Bissell *v.* Bank, 5 McLean, 495; Cowles *v.* Whitman, 10 Conn. 121; 25 Am. Dec. 60; Carpenter *v.* Ins. Co., 4 Sand. Ch. 408; Foll's Appeal, 91 Pa. St. 437; 36 Am. Rep. 671; Strasburgh R. R. Co. *v.* Echternach, 21 Pa. St. 220; 60 Am. Dec. 49; Eckstein *v.* Downing, 64 N. H. 248; 10 Am. St. Rep. 404.

when it forms part of a contract for the sale and transfer of real estate, and the suit is brought for the conveyance of the land as well as for the transfer of the shares."[1] So where it appears that the stock has been purchased by defendant with money delivered to him by plaintiff for that purpose, and that the stock is not easily purchasable in open market, and that a judgment in damages would be inadequate.[2] In fine, in case of a sale or transfer of stocks in a merely private business corporation, when from any proper cause it is plain that the remedy at law is inadequate, or damages are impracticable, specific performance may be decreed.[3]

§ 2592. Agreements to Leave Property by Will.—An agreement to make a certain disposition of property by will may be enforced against the estate of a decedent.[4]

§ 2593. When Delivery of Specific Chattels Decreed.—Equity will decree the delivery up of specific goods and chattels the possession of which has a special and peculiar value to the party entitled; or any articles of curiosity, antiquity, or hereditary value, or having a *pretium affectionis;*[5] as where articles of a personal nature are peculiar

[1] Leach *v.* Fobes, 11 Gray, 506; 71 Am. Dec. 732.

[2] Johnson *v.* Brooks, 93 N. Y. 337; Adams *v.* Messinger, 147 Mass. 185; 9 Am. St. Rep. 679.

[3] Goodwin Gas Stove Co.'s Appeal, 117 Pa. St. 514; 2 Am. St. Rep. 696.

[4] Green *v.* Broyles, 3 Humph. 167; 39 Am. Dec. 156; Johnson *v.* Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Rhodes *v.* Rhodes, 3 Sand. Ch. 279; Parsell *v.* Stryker, 41 N. Y. 480; Shakespeare *v.* Markham, 10 Hun, 322; Logan *v.* McGinness, 12 Pa. St. 27; Maddox *v.* Rowe, 23 Ga. 431; 68 Am. Dec. 535; Gupton *v.* Gupton, 47 Mo. 37; Frisby *v.* Parkhurst, 29 Md. 58; 96 Am. Dec. 503; Watson *v.* Mahan, 20 Ind. 223; Bolman *v.* Overall, 80 Ala. 451; 60 Am. Rep. 107.

[5] Leake on Contracts, 1127; Womack *v.* Smith, 11 Humph. 478; 54 Am. Dec. 51. In Lining *v.* Geddes, 1 McCord Ch. 304, 16 Am. Dec. 607, the court say: "The general rule is, that the court will not direct the specific delivery of a chattel. And for reasons before stated, because the party has a plain and adequate remedy at law. Nor would the remedy be considered inadequate, merely because the specific article might be made more convenient or gratifying to the party than damages, for withholding or destroying it. To this rule, however, there are exceptions. In the progress of society cases will necessarily spring up peculiarly applicable to a more advanced state of civilization, while others will be left behind which had their origin in an age comparatively rude and barbarous. Among others might be mentioned articles which have acquired an ideal, or perhaps a real, value from the

or individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, and the like.[1] For the same reasons, the delivery up to the lawful owner of deeds or other instruments of title will be decreed.[2] On these grounds the delivery of the following articles has been decreed, viz.: A valuable picture, vase, or work of art;[3] family pictures and furniture, or heir-looms;[4] an antique horn, used as a symbol of tenure of land;[5] the tobacco-box of a club;[6] the dresses, decorations, papers, and effects of a lodge of Freemasons;[7] a box of jewels;[8] private maps and charts.[9]

§ 2594. Where there is a Trust. — If there be a trust, express or implied, the court will compel the specific performance of the contract, whether the chattels are common or special.[10] If the contract of sale result in a trust, and the seller retain the goods in trust for the buyer or

peculiar situation of the owner, and for the loss of which no damages would be a compensation. Such as the Pusey horn, by which the complainunt held his land: Pusey *v.* Pusey, 1 Vern. 273; or the silver altar-piece, being a matter of antiquity and curiosity, in the case of Duke of Somerset *v.* Cookson, 3 P. Wms. 390. So in the case of Fells *v.* Read, 3 Ves. Jr. 70, Lord Rosslyn decreed the delivery of the silver tobacco-box, which had for a great many years belonged to a society; because, from the nature of the thing, the value was inestimable. A similar decision was made by Lord Eldon in the case of Lady Arundel *v.* Phipps, 10 Ves. 148, which involved a question in relation to family pictures. These are cases which have their foundation in the refinement of society, and those affections of the heart which it would be a reproach to the country not to indulge. But still they depend on the plain, tangible principle that there is no adequate remedy at law, and the principle must not be extended to cases founded in weakness and folly. It would therefore be a perversion of the rule to apply it to the delivery of a favorite spaniel or a lady's lap-dog."

[1] Adams *v.* Messinger, 147 Mass. 185; 9 Am. St. Rep. 679.

[2] 3 Pomeroy's Eq. Jur., sec. 1402, note; Cowles *v.* Whitman, 10 Conn. 121; 25 Am. Dec. 60; Hill *v.* Rockingham Bank, 44 N. H. 457.

[3] Duke of Somerset *v.* Cookson, 3 P. Wms. 389; Lowther *v.* Lowther, 13 Ves. 95; Falcke *v.* Gray, 4 Drew. 651; 29 L. J. Ch. 28.

[4] Lady Arundell *v.* Phipps, 10 Ves. 139; Earl Macclesfield *v.* Davis, 3 Ves. & B. 16.

[5] Pusey *v.* Pusey, 1 Vern. 273.

[6] Fells *v.* Read, 3 Ves. 70.

[7] Lloyd *v.* Loaring, 6 Ves. 773.

[8] Saville *v.* Tankred, 1 Ves. 101.

[9] McGowin *v.* Remington, 12 Pa. St. 56; 51 Am. Dec. 584.

[10] 3 Pomeroy's Eq. Jur., sec. 1402, note; McGowin *v.* Remington, 12 Pa. St. 56; 51 Am. Dec. 584; Abbott *v.* Reeves, 49 Pa. St. 494; 88 Am. Dec. 510; Peer *v.* Kean, 14 Mich. 354; Hill *v.* Bank, 44 N. H. 567; Cowles *v.* Whitman, 10 Conn. 121; 25 Am. Dec. 60; Kimball *v.* Morton, 5 N. J. Eq. 26; 43 Am. Dec. 621.

his transferee, the court will execute the trust by compelling delivery.[1]

§ 2595. Contracts for Personal Services. — Contracts for work and labor, or for personal services, or personal skill or attention, will not be enforced; nor will the putting an end to such contracts, or dismissing a servant or employee, be restrained.[2]

§ 2596. Contracts to Build or Perform Work. — The court will not, in general, undertake to enforce specifically contracts for building,[3] nor will it enforce specifically a contract for the construction of a railroad, either against or at the suit of a railroad company;[4] nor a contract to work all the trains on a railroad, and keep the engines and rolling stock in repair;[5] nor a right, whether derived from a contract or statute, to use a railroad of another company, with engines and trains;[6] nor a covenant in a lease of a coal mine to work it efficiently;[7] nor the work-

[1] Pooley *v.* Budd, 14 Beav. 34.

[2] Wolverhampton R. R. Co. *v.* R. R. Co., L. R. 16 Eq. 439; Kemble *v.* Kean, 6 Sim. 333; Baldwin *v.* Useful Knowledge Co., 9 Sim. 393; Lumley *v.* Wagner, 1 De Gex, M. & G. 604; Stocker *v.* Brockelbank, 3 Macn. & G. 250; Mair *v.* Tea Co., L. R. 1 Eq. 411; Clark's Case, 1 Blackf. 122; 12 Am. Dec. 213; De Rivafinoli *v.* Corsetti, 4 Paige, 264; 25 Am. Dec. 532; Hamblin *v.* Durneford, 2 Edw. Ch. 529; Haight *v.* Badgely, 15 Barb. 501; Randall *v.* Latham, 36 Conn. 48; Richmond *v.* R. R. Co., 33 Iowa, 422; Ford *v.* Jermon, 6 Phila. 6; Marble Co. *v.* Ripley, 10 Wall. 339; Cooper *v.* Pence, 21 Cal. 404; Willingham *v.* Hooven, 74 Ga. 233; 58 Am. Rep. 435.

[3] Wilkinson *v.* Clements, L. R. 8 Ch. 96; 42 L. J. Ch. 38; Soames *v.* Edge, Johns. 669; City of London *v.* Southgate, 38 L. J. Ch. 141. "There is no case of a specific performance decreed of an agreement to build a house; because if A will not do it, B may. A specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way": Per Kenyon, M. R., in Errington *v.* Aynesley, 2 Brown Ch. 343; Flint *v.* Brandon, 8 Ves. 163; Fallon *v.* R. R. Co., 1 Dill. 121; Port Clinton R. R. Co. *v.* R. R. Co., 13 Ohio St. 544; Ross *v.* R. R. Co., 1 Woolw. 26; Gray *v.* Hawkins, 8 Ohio St. 449; 72 Am. Dec. 600.

[4] South Wales R. R. Co. *v.* Wythes, 5 De Gex, M. & G. 880; 24 L. J. Ch. 87; Peto *v.* R. R. Co., 1 Hem. & M. 468; 32 L. J. Ch. 677; Ross *v.* R. R. Co., 1 Woolw. 26; Fallon *v.* R. R. Co., 1 Dill. 121; Oregonian R. R. Co. *v.* Oregon Navigation Co., 11 Saw. 33; McCann *v.* R. R. Co., 2 Tenn. Ch. 173.

[5] Johnson *v.* R. R. Co., 3 De Gex, M. & G. 914; 22 L. J. Ch. 921.

[6] Powell Duffryn Coal Co. *v.* R. R. Co., L. R. 9 Ch. 331; 43 L. J. Ch. 575. See Wilson *v.* R. R. Co., 2 De Gex, J. & S. 475; 34 L. J. Ch. 241; Blackett *v.* Bates, L. R. 1 Ch. 117; 35 L. J. Ch. 324.

[7] Wheatley *v.* Westminster Coal Co., L. R. 9 Eq. 538; 39 L. J. Ch. 175.

ing of quarries;[1] nor covenants to repair, in a lease;[2] nor a contract to allow the use of a dock for the repair of a ship;[3] nor an agreement by a railroad to maintain on its road near plaintiff's land a platform for taking on and discharging freight;[4] or to erect on certain land a station, and to stop the train for freight and passengers there.[5] But where the work to be done is sufficiently definite, and the plaintiff has an interest in its being performed which is not capable of adequate compensation in damages, specific performance is decreed.[6]

§ 2597. **Sale of Good-will of Business.** — A contract for a sale of a business, or the good-will of a trade, consisting in serving or supplying clients or customers, who are at liberty to deal with whom they please, is not *per se* a subject for specific enforcement.[7] But where the good-will is annexed to a place of business, in respect of the position and the habitual use, a contract for the sale of the premises may be specifically enforced, and may effectually carry the good-will.[8] And where the sale of the good-will of a business is secured by a covenant of the seller against carrying on the same business, or any like business, within certain limits, the court will interfere by injunction to restrain a breach of the covenant.[9]

[1] Booth *v.* Pollard, 4 Younge & C. 61; Marble Co. *v.* Ripley, 10 Wall. 339.

[2] Rayner *v.* Stone, 2 Eden, 128. As a covenant in a lease to repair damages by fire: Beck *v.* Allison, 56 N. Y. 366; 15 Am. Rep. 430.

[3] Merchants' Trading Co. *v.* Banner, L. R. 12 Eq. 18.

[4] Atlanta and West Point R. R. Co. *v.* Speer, 32 Ga. 550; 79 Am. Dec. 305.

[5] Blanchard *v.* R. R. Co., 31 Mich. 43; 18 Am. Rep. 142.

[6] Stover *v.* R. R. Co., 2 Younge & C. 48; Sanderson *v.* R. R. Co., 11 Beav. 497; Franklyn *v.* Tuton, 5 Madd. 469; Cubitt *v.* Smith, 10 Jur., N. S., 1123; Phillips *v.* Soule, 9 Gray, 233; Gregory *v.* Ingwerson, 32 N. J. Eq. 199.

[7] Leake on Contracts, 1133.

[8] Darbey *v.* Whitaker, 4 Drew. 139, the court saying: "Specific performance cannot be decreed of a contract to purchase a good-will alone, unconnected with business premises, by reason of the uncertainty of the subject-matter. But when a good-will is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and good-will, there is not the slightest ground for doubt that such a contract is a fit matter for a decree in a suit for specific performance."

[9] See *ante*, § 2403–2408, Contracts in Restraint of Trade.

§ 2598. Partnership Agreements.—Specific performance of a subsisting contract of partnership will not usually be decreed.[1] Certainly a court will not compel the execution of an agreement for a partnership for an indefinite term, which, being at will, might be dissolved immediately.[2] The court may interfere by injunction to restrain a departure from the terms of the contract during the continuance of the partnership;[3] and under an agreement for a partnership for a definite time and upon definite terms, the court will decree the execution of a deed of partnership according to the terms agreed, in order to secure the rights of the parties under it.[4]

§ 2599. Contracts to be Performed in Foreign Country.—Though the act or matter is in a foreign country, the court, acting *in personam*, if the party be within the jurisdiction, may exercise its power, and compel specific performance.[5]

§ 2600. Decreeing Specific Performance Discretionary with the Court.—The application of the remedy of specific performance rests in the discretion of the court; but the discretion is governed, so far as possible, by strict rules and principles, so that where the case meets all the requirements and conditions for applying the remedy, the decree for specific performance is as much a matter of course as a judgment for damages at law;[6] though it is

[1] Const *v.* Harris, Turn. & R. 518.

[2] Hersy *v.* Birch, 9 Ves. 357; Meason *v.* Keane, 63 Pa. St. 335.

[3] Dietrichsen *v.* Cabburn, 2 Phill. Ch. 59; England *v.* Curling, 8 Beav. 129; Watney *v.* Trist, 45 L. J. Ch. 412.

[4] England *v.* Curling, 8 Beav. 129.

[5] Penn *v.* Lord Baltimore, 2 Vern. 444; 2 White and Tudor's Lead. Cas. 837; Toller *v.* Carteret, 2 Vern. 495; Sutphen *v.* Fowler, 9 Paige, 280; Brown *v.* Desmond, 100 Mass. 267; Ward *v.* Arredondo, 1 Hopk. Ch. 213; 14 Am. Dec. 543; Mitchell *v.* Bunch, 2 Paige, 606; 22 Am. Dec. 669; Newton *v.* Robinson, 13 N. Y. 587; 67 Am. Dec. 89; Johnson *v.* Kimbro, 3 Head, 557; 75 Am. Dec. 781; Gardner *v.* Ogden, 22 N. Y. 327; 78 Am. Dec. 192.

[6] See remarks of Professor Pomeroy in 3 Eq. Jur., sec. 1404; Seymour *v.* Delancy, 3 Cow. 445; 15 Am. Dec. 270; Grundy *v.* Edwards, 7 J. J. Marsh. 368; 23 Am. Dec. 409; Pigg *v.* Corder, 12 Leigh, 69; Rogers *v.* Saunders, 16 Me. 92; 33 Am. Dec. 635; Trigg *v.* Read, 5 Humph. 529; 42 Am. Dec. 447; Young *v.* Daniels, 2 Iowa, 126; 63 Am. Dec. 477; Wynn *v.* Garland, 19 Ark. 23; 68 Am. Dec. 190.

said that neither party to a contract is entitled to a decree for specific performance of the contract as a matter of right.[1]

§ 2601. **Grounds for Refusing Specific Performance—In General.**—The general grounds for refusing relief at law in the form of damages are also sufficient objections to the remedy of specific performance. Thus if the contract is defective in the essential elements of a contract, whether in its formation, in its matter, or the parties thereto, or if it be voidable for mistake, fraud, or duress, this is a good defense.[2] So specific performance of an illegal contract will not be decreed.[3] But there are certain grounds peculiar to this remedy, where, although the contract is perfectly valid, equity will refuse a decree. Thus specific performance will not be decreed of a contract requiring the direct superintendence of the court, nor where the contract or duties to be performed are continuous.[4]

§ 2602. **Want of Jurisdiction against Plaintiff—Want of Mutuality.**—The court will not execute a contract in favor of a plaintiff, where it has no jurisdiction to execute the contract against him, if it should be required to do

[1] McComas *v.* Easley, 21 Gratt. 23; Hale *v.* Wilkinson, 21 Gratt. 75.

[2] Kelly *v.* R. R. Co., 74 Cal. 557; 5 Am. St. Rep. 471; Kelly *v.* Kendall, 118 Ill. 650; Edwards *v.* Handley, Hardin, 602; 3 Am. Dec. 745; Clay *v.* Williams, 2 Munf. 105; 5 Am. Dec. 453; Patterson *v.* Martz, 8 Watts, 374; 34 Am. Dec. 474; Frisbie *v.* Ballance, 4 Scam. 287; 39 Am. Dec. 409; Scott *v.* Shiner, 27 N. J. Eq. 185; Harris *v.* Smith, 2 Cold. 306; Clement *v.* Reid, 17 Miss. 535; Rogers *v.* Mitchell, 41 N. H. 154; Osborn *v.* Phelps, 19 Conn. 63; 48 Am. Dec. 133; Philpott *v.* Elliott, 4 Md. Ch. 273; White *v.* R. R. Co., 13 Mich. 356; Boynton *v.* Hazelboom, 14 Allen, 107; 92 Am. Dec. 738; Dom. Tel. etc. Co. *v.* Tel. Co., 39 N. J. Eq. 160.

[3] Bass *v.* Mayor, Meigs, 421; 33 Am. Dec. 154; Dial *v.* Hair, 18 Ala. 798; 54 Am. Dec. 179. A agreed to sell to B for a gross sum a lot and building and a quantity of liquor. The sale of the liquor would have been illegal. Held, that the contract, being indivisible, a suit for specific performance could not be based on it: Gerlach *v.* Skinner, 34 Kan. 86; 55 Am. Rep. 240. Where certain acts are prohibited by statute merely, and the parties concerned in them are not *in pari delicto*, the party upon whom no penalty is imposed may enforce the contract: Carkins *v.* Anderson, 21 Neb. 364.

[4] Danforth *v.* R. R. Co., 30 N. J. Eq. 12. See Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

so.[1] The contract or agreement sought to be enforced must be mutual.[2] He who asks for a specific performance must be in a condition to perform himself.[3] But if everything has been done on the part of the plaintiff, and it only remains for the defendant to perform his part, specific performance may be decreed, although the contract was originally, as regards the performance of the plaintiff, beyond the jurisdiction of the court.[4] And where the contract is binding at law, want of mutuality is no defense.[5] If the mutuality existed when the contract was made, that subsequent events destroyed it is not material.[6] So a defendant charged upon a contract within the statute of frauds, which he has duly signed, cannot set up the want of mutuality of remedy for want of the signature of the plaintiff, because the latter, by suing on the contract, admits it to be legal.[7]

ILLUSTRATIONS. — An agreement was made for a lease of a wharf and premises, and that the lessee should employ the lessor as manager in the business during the tenancy. *Held*, that as the court could not decree specific performance of the personal arrangement against the lessee, it would not give him specific performance as to the lease: *Ogden* v. *Fossick*, 32 L. J. Ch. 73. An agreement was made for a lease of a railroad upon

[illegible] Pomeroy's Eq. Jur., sec. 1405; [illegible] Schieffelin v. Stewart, 1 Johns. Ch. 620; 7 Am. Dec. 484; Harris Co. v. Kinney, 10 Wall. 559; Glover v. Payn, 21 Am. Rep. 404; Wells v. Yates, 3 Sandf. 272; 15 Am. Dec. 290; De Cordova v. Smith, 9 Tex. 129; 58 Am. Dec. 130; [illegible] v. Harding, 21 Pa. St. 50; 59 Am. Dec. 762. The court does not [illegible] a contract, although to [illegible] which he has duly signed, unless he [illegible] from him; [illegible] a contract to [illegible] Cutting v. Dana, 7 [illegible] 482.

[illegible] Peterson v. Ware, 1 Ohio, 74; Cabell v. Vaughan, 1 Wash. (Va.) 31; Goodrich v. Lynch, 4 Johns. Ch. 370; 7 Am. Dec. 484; Ohio v. Bann, 6 Ohio, 383; Jones v. Noble, 3 Bush, 694; Beard v. Lunsmeum, 1 Mac. Ch. 345; Bodine v. Glading, 21 Pa. St. 50; 59 Am. Dec. 749; Geiger v. Green, 4 Fish. 472; Tyson v. Watts, 1 Mac. Ch. 73; Conway v. Warren, 18 N. J. Eq. 224; 90 Am. Dec. 613.

[2] Morgan v. Morgan, 2 Wheat. 290.

[3] Thompson v. Calhoun, 2 Phill. Ch. 32; Johnson v. Clements, 2 B. & P. 10; Wells v. B. B. Co., 70 Am. 780; Wilson v. Wiepley, 12 Mass. 56; 4 Am. Dec. 310.

[4] Rogers v. Saunders, 16 Ala. 22; 73 Am. Dec. 655.

[5] Moore v. Fitz Randolph, 6 Leigh, 176; 29 Am. Dec. 218.

[6] Martin v. Mitchell, 2 Jacob & W. 428; [illegible] v. Hazard, 4 B. & Ad. 37; Am. Dec. 701.

the terms that the lessee should allow the lessor the right of running carriages over the line upon certain terms, and provide the engine-power for them, and should keep the line in repair during the term. The court refused to compel the lessor to execute the lease, because it could not give specific performance of the duties stipulated from the lessee: *Blackett* v. *Bates*, L. R. 1 Ch. 125. Plaintiff and defendant agreed to go into partnership, to which plaintiff was to contribute his personal services, and defendant a certain sum of money. *Held*, that the agreement could not be specifically enforced by plaintiff: *Buck* v. *Smith*, 29 Mich. 166; 18 Am. Rep. 84.

§ 2603. **Incapacity of Plaintiff.** — Nor will the court execute a contract in favor of a person who is incapable or disqualified from performing the contract on his own part.[1] Thus it will not decree performance where the plaintiff is insolvent or bankrupt,[2] or cannot do what he has agreed to do without a breach of trust.[3]

ILLUSTRATIONS. — A agreed to sell to B a leasehold interest. Before the time for B's entry arrived, a part of the land was carried away by the sea. *Held*, that A could not compel specific performance of the contract: *Huguenin* v. *Courtenay*, 21 S. C. 403; 53 Am. Rep. 688.

§ 2604. **Default of Plaintiff in Performance.** — Specific performance will be refused to a plaintiff who has committed a breach of the contract, or a material default in performance on his part.[4] The plaintiff must show per-

[1] Bryant *v.* Busk, 4 Russ. 1; Tarr *v.* Scott, 4 Brewst. 49; Griffin *v.* Cunningham, 19 Gratt. 571; McHugh *v.* Wells, 39 Mich. 175.

[2] Lowes *v.* Lush, 14 Ves. 547; Willingham *v.* Joyce, 3 Ves. 168. But the insolvency of a person agreeing to lease property is no reason for not decreeing specific performance when he has offered abundant security for the rent: McFarlane *v.* Williams, 107 Ill. 33.

[3] Tolson *v.* Sheard, L. R. 5 Ch. Div. 19.

[4] Leake on Contracts, 1144; Ramsay *v.* Brailsford, 2 Desaus. Ch. 582; 2 Am. Dec. 698; Bowman *v.* Irons, 2 Bibb, 78; 4 Am. Dec. 686; Johnston *v.* Mitchell, 1 A. K. Marsh. 2257; 10 Am. Dec. 727; Moore *v.* Skidmore, Litt. Sel. Cas. 453; 12 Am. Dec. 333; Breckenridge *v.* Clinkinbeard, 2 Litt. 127; 13 Am. Dec. 261; Tiernan *v.* Beam, 2 Ohio, 383; 15 Am. Dec. 557; Wells *v.* Smith, 7 Paige, 22; 31 Am. Dec. 275; Rogers *v.* Saunders, 16 Me. 92; 33 Am. Dec. 635; Lewis *v.* Woods, 4 How. (Miss.) 86; 34 Am. Dec. 110; Hoen *v.* Simmons, 1 Cal. 119; 52 Am. Dec. 291; Kirby *v.* Harrison, 2 Ohio St. 326; 59 Am. Dec. 677; Smith *v.* Sturgess, 65 How. Pr. 360; Brown *v.* Hayes, 33 Ga. 136.

formance, or readiness to perform, on his part.[1] A vendor applying for a specific execution of a contract for the sale of land ought to show a perfect and complete title to the land.[2] But it is sufficient that the vendor is able to give a good title at the time of the decree, though before that his title was imperfect.[3] Bringing an action to recover back the consideration will prevent the vendee from obtaining specific performance.[4] By refusing to pay at maturity a note given for the purchase price, the vendee forfeits his right to specific performance.[5] Where a contract for the purchase of land is made in a currency already depreciated and constantly going down in value, specific execution will not be decreed in favor of a vendee who is in default, upon his merely paying the purchase-money called for by the contract, with interest.[6] But the plaintiff need not aver tender if the defendant has repudiated the contract, and expressly waived tender;[7] or the defendant may have waived the plaintiff's default, in which case specific performance may be decreed.[8] Where, by their acts, the parties have waived a provision making time of the essence of the contract for the sale of land, specific performance may be decreed.[9] If the plaintiff has made default in a collateral agreement or representa-

[1] Chess's Appeal, 4 Pa. St. 52; 45 Am. Dec. 668; Garretson *v.* Van Loon, 3 G. Greene, 128; 54 Am. Dec. 492; Laverty *v.* Hall, 19 Iowa, 529; Young *v.* Daniels, 2 Iowa, 126; 63 Am. Dec. 477; Green *v.* Covillaud, 10 Cal. 317; 70 Am. Dec. 725; Boone *v.* Iron Co., 19 How. 340; Vennuni *v.* Babcock, 13 Iowa, 194; Greenup *v.* Strong, 1 Bibb, 590; Bearden *v.* Wood, 1 A. K. Marsh. 450; Rogers *v.* Saunders, 16 Me. 92; 33 Am. Dec. 635; Stewart *v.* Raymond, 15 Miss. 568; Tyler *v.* McCardle, 17 Miss. 230; Earl *v.* Halsey, 14 N. J. Eq. 332; Thorp *v.* Pettit, 16 N. J. Eq. 488.

[2] Bartlett *v.* Blanton, 4 J. J. Marsh. 426; Jarman *v.* Davis, 4 T. B. Mon. 115; Hightower *v.* Smith, 5 J. J. Marsh. 542; Beckwith *v.* Kouns, 6 B. Mon. 222; Stames *v.* Allison, 2 Head, 221.

[3] Seymour *v.* Delancey, 3 Cow. 445; 15 Am. Dec. 270; Reformed Dutch Church *v.* Moot, 7 Paige, 77; 32 Am. Dec. 613; Mason *v.* Caldwell, 5 Gilm. 196; 48 Am. Dec. 330.

[4] Herrington *v.* Hubbard, 1 Scam. 569; 33 Am. Dec. 427.

[5] Pearis *v.* Covillaud, 6 Cal. 617; 65 Am. Dec. 543.

[6] White *v.* Atkinson, 2 Wash. (Va.) 94; 1 Am. Dec. 470; Lohman *v.* Crouch, 19 Gratt. 342; Meanx *v.* Helm, Sneed, 252; 2 Am. Dec. 716.

[7] Martin *v.* Merritt, 57 Ind. 34; 26 Am. Rep. 45.

[8] Ramsay *v.* Brailsford, 2 Desaus. Ch. 582; 2 Am. Dec. 698.

[9] Kansas Lumber Co. *v.* Horrigan, 36 Kan. 387.

tion, upon the faith of which the contract was made, the court will, in general, refuse specific performance.[1] Thus where land is purchased or rented upon representations by the vendor as to improvements that are to be made upon the adjoining lands, which would increase its value, a court will not give the vendor its assistance unless he makes good his representations.[2] Where a written contract is executed upon the faith of a parol agreement making some addition or variation in the terms, the court may refuse specific performance of the written contract, unless the plaintiff submits to carry out the parol agreement.[3] But in the case of independent covenants and agreements that are not intended to be conditions precedent in regard to performance, but to rest in contract only, a breach of one may not afford any answer to the claim for specific performance of another by the other party.[4]

§ 2605. Incapacity of Defendant. — The specific performance of a contract which the defendant is incapable or disqualified to perform will not be decreed.[5] But where

[1] Leake on Contracts, 1145. "One of the most ordinary cases in which the court remains passive is, where, though there is no doubt as to the contract itself, and as to the plaintiff's legal right under it, yet the defendant has been induced to enter into it in consequence of some independent engagement by the plaintiff to do some other act which he has failed to perform. There, if the plaintiff fails to do that which he has undertaken to do, even though it may have been an engagement incapable of being legally enforced, this court will leave the plaintiff to obtain such redress as he may be entitled to at law": Myers *v.* Watson, 1 Sim., N. S., 523.

[2] Myers *v.* Watson, 1 Sim., N. S., 523.

[3] Clarke *v.* Grant, 14 Ves. 519.

[4] Gibson *v.* Goldsmid, 5 De Gex, M. & G. 757.

[5] Leake on Contracts, 1147; McQueen *v.* Chouteau, 20 Mo. 222; 64 Am. Dec. 178; Gupton *v.* Gupton, 47 Mo. 47; Brewer *v.* Wall, 23 Tex. 585; 76 Am. Dec. 76. In Love *v.* Camp, 6 Ired. Eq. 209, 51 Am. Dec. 419, the court say: "The defendant says he owns one-sixth part in fee, and a life estate in one other sixth part, and this he is willing to convey; but he says he does not own the other shares, and 'after reasonable exertion, since he made the contract, has been unable to procure the title of the other tenants in common, who are unwilling to sell,' and he is therefore unable to comply with his contract. The question is, under these circumstances, Will a court of equity decree a specific performance, or decline to interfere, and leave the plaintiffs to their remedy at law? One who, for a valuable consideration, enters into an agreement is bound in conscience to perform it. A court of law can only give damages for a breach. This remedy is in many cases inadequate. A court of equity

the court is able to decree part of the contract, the plaintiff may take specific performance of that part and waive the rest, or he may claim damages or compensation for the part of which he cannot have specific performance.[1]

will do full justice, and, addressing itself to the conscience of the party, will require a specific performance of the agreement. This jurisdiction forms one of the great heads of equity, and, in the opinion of Lord Hardwicke, 'the most useful one': Penn *v.* Lord Baltimore, 1 Ves. Sr. 446. Nothing should prevent the exercise of this most useful and well-established jurisdiction but the strongest and most controlling considerations. If a husband agrees to procure his wife to join with him in a conveyance of her land, and the wife refuses to do so, it seems, by the modern cases, that a court of equity will not decree a specific performance: 1 Maddock's Chancery Practice, 339; Sugden on Vendors, 151. There are cases in which the husband has been confined to the Fleet until the wife agreed to join in the conveyance; and in one case the husband, after being confined for many years, was discharged, it appearing that the wife could not be induced to make the conveyance: Emery *v.* Wase, 5 Ves. 848; 8 Ves. 505. These cases show with what reluctance courts of equity stand by and permit a party to deprive another of the benefit of his contract. But it has recently been held that the court will not interfere, upon two considerations. The vendee knew, at the time of the contract, that the husband did not own the land, and might not be able to perform his agreement; he therefore has no right to complain, if he is left to his remedy at law, upon its appearing that, after a *bona fide* effort, the husband is not able to procure the wife's consent. And in the second place, because, if the husband be decreed to perform, he will compel the wife, who is under his power, to convey; and the wife ought not to be exposed to this compulsion on the part of her husband. It may be, but upon this we give no opinion, that where the vendee knows that the vendor has not the title, and takes a bond or covenant that a third person will be procured to make a conveyance, equity will not decree a specific performance, if it appears that the vendor has made proper exertions to procure the conveyance from such third person; because the first consideration, above referred to, applies with full force. As if a father, seised as tenant by the curtesy, sells in fee-simple, and covenants that he will procure conveyances from his children when they come of age. If they refuse, after proper efforts on the part of the father, equity may decline to decree a specific performance, and leave the vendee to his remedy at law, this being a state of things which he might have expected, and as to which he took the chances. This result would seem to follow from the reason of the thing, but in respect to that we give no opinion upon it. No case makes such an exception to the general jurisdiction to decree specific performance, and it is only adverted to for the purpose of illustrating the next proposition, upon which this cause turns: Oliver *v.* Dix, 1 Dev. & B. Eq. 158. If the vendee does not know that the vendor has not the title, there is then no reason why he should not be decreed to perform his agreement; and if he is put to great inconvenience and expense to enable him to obey the decree, it will be the consequence of his own act, and he will not be allowed to offer such an excuse for not doing justice. When a vendee seeks to rescind a contract because of a defect of title in the vendor, the latter is allowed time to complete his title until the hearing: Clanton *v.* Burges, 2 Dev. Eq. 13. As a defect of the title will not excuse a vendee, provided it can be made good, upon ground of mutuality, it should not excuse a vendor. As the vendee cannot discharge himself should the land depreciate in value, so the vendor should not be allowed to discharge himself if the value is enhanced."

[1] Leake on Contracts, 1147.

ILLUSTRATIONS. — A vendor, having contracted to sell to one person, afterwards sold and conveyed the same property to another person, who paid a full consideration, and had no notice of the former contract. *Held*, that the original purchaser could not have specific performance of his contract: *Denton* v. *Stewart*, 1 Cox, 258. A plaintiff claimed against a company to have an allotment of shares which he has contracted to take. *Held*, that he cannot have specific performance if all the shares have been already validly allotted to others: *Ferguson* v. *Wilson*, L. R. 2 Ch. 77. The plaintiff agreed in writing to purchase certain lands of the defendant, "the title on investigation to be satisfactory." The plaintiff notified defendant that the title was not satisfactory, whereupon the defendant's agent said that the defendant would perfect the title. *Held*, not to be a case for specific performance: *Taylor* v. *Williams*, 45 Mo. 80. A tenant for life only contracted to give a lease for twenty-one years. *Held*, that the lessee was entitled to have such a lease executed, to the extent of the lessor's interest: *Neale* v. *Mackenzie*, 1 Keen, 474. The defendant had contracted to build a house upon certain land, and to accept a lease of the land upon certain terms. *Held*, that the plaintiff might take a decree as to the lease, and claim damages for the breach of contract in not building the house: *Mayor of London* v. *Southgate*, 38 L. J. Ch. 141.

§ 2606. Performance Hard on Defendant. — The court will not grant specific performance where doing so would operate unreasonably hard upon the defendant;[1] or the agreement itself is unreasonable;[2] or where the decree would produce injustice, or would be inequitable under all the circumstances.[3] Specific performance will not be granted where it would impose on the defendant the risk of a forfeiture.[4] But that the land has since become more

[1] Hylton *v.* Biscoe, 2 Ves. Sr. 307; Wedgwood *v.* Adams, 6 Beav. 605; Margraf *v.* Muir, 57 N. Y. 155; Clarke *v.* R. R. Co., 18 Barb. 350; Coe *v.* R. R. Co., 31 N. J. Eq. 105; Weise's Appeal, 72 Pa. St. 351; Chicago etc. R. R. Co. *v.* Schoeneman, 90 Ill. 258; Tobey *v.* Bristol, 3 Story, 800; Canady *v.* Shepherd, 2 Jones Eq. 224; Barnett *v.* Spratt, 4 Ired. Eq. 171; Cathcart *v.* Robinson, 5 Pet. 263; Marble Co. *v.* Ripley, 10 Wall. 339; Bryan *v.* Lofftus, 1 Rob. (Va.) 12; 39 Am. Dec. 242; Stames *v.* Newson, 1 Tenn. Ch. 244; McCarty *v.* Kyle, 4 Cold. 357; Old Colony R. R. Co. *v.* Evans, 6 Gray, 25; 66 Am. Dec. 394; Johnson *v.* Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Swint *v.* Carr, 76 Ga. 322; 2 Am. St. Rep. 44.

[2] Higgins *v.* Butler, 78 Me. 520.

[3] Margraf *v.* Muir, 57 N. Y. 155; Chicago etc. R. R. Co. *v.* Schoeneman, 90 Ill. 258.

[4] Leake on Contracts, 1149.

valuable is not a circumstance of hardship which will prevent performance being ordered.[1]

§ 2607. Contracts without Consideration—Inadequacy. —The court will refuse specific performance of a voluntary or gratuitous contract or a covenant that is not supported by a valid legal consideration.[2] But an agreement under seal imports a consideration, and will be enforced in equity.[3] But it is permissible to show that there was no actual consideration, and if this be proved, the contract will not be enforced.[4] An agreement founded upon a meritorious consideration will be enforced in equity.[5] Mere inadequacy of consideration is not alone regarded as material, either at law or in equity, with reference to the validity of agreements, nor even with reference to the claim for specific performance.[6] But great inadequacy, as evidence of fraud, or mistake, or unfairness, or hardship, may materially influence the discretion of the court in

[1] Young *v.* Wright, 4 Wis. 144; 65 Am. Dec. 303.

[2] In re Webb, 49 Cal. 541; Butman *v.* Porter, 100 Mass. 337; Burling *v.* King, 66 Barb. 633; Minturn *v.* Seymour, 4 Johns. Ch. 497; Vassar *v.* Vassar, 23 Miss. 378; Hickman *v.* Grimes, 1 A. K. Marsh. 86; 10 Am. Dec. 714; Shackelford *v.* Handley, 1 A. K. Marsh. 496; 10 Am. Dec. 753; Mercer *v.* Stark, Walk. (Miss.) 451; 12 Am. Dec. 583; Woodcock *v.* Bennet, 1 Cow. 711; 13 Am. Dec. 568; Owing's Case, 1 Bland, 370; 17 Am. Dec. 311; Anderson *v.* Green, 7 J. J. Marsh. 448; 23 Am. Dec. 417; Berry *v.* Waring, 1 Har. & G. 100; Shepherd *v.* Shepherd, 1 Md. Ch. 244; Curlin *v.* Hendricks, 35 Tex. 225; Forward *v.* Armstead, 12 Ala. 124; 46 Am. Dec. 246; Taylor *v.* Staples, 8 R. I. 170; 5 Am. Rep. 556; Moon *v.* Crowder, 72 Ala. 79.

[3] Beard *v.* Newhall, 1 Vern. 427.

[4] Short *v.* Price, 17 Tex. 403; Jeffreys *v.* Jeffreys, Craig & P. 138.

[5] Anderson *v.* Green, 7 J. J. Marsh. 448; 23 Am. Dec. 417; Young *v.* Glendenning, 6 Watts, 509; 31 Am. Dec. 492. In some states it is held that such agreements, to be enforceable, must be under seal: Caldwell *v.* Williams, 1 Bail. Eq. 175; Kennedy *v.* Ware, 1 Pa. St. 445; 44 Am. Dec. 145. A voluntary conveyance made with a view to a family settlement will be enforced in equity: Jones *v.* Jones, 6 Conn. 111; 16 Am. Dec. 35. Where a donor destroyed a voluntary deed, fairly obtained, before it was registered, but after it was delivered to the grantee, it was held that he would be ordered to convey the same property to the donee: Tolar *v.* Tolar, 1 Dev. Eq. 456; 18 Am. Dec. 598.

[6] See *ante*, Chapter Consideration; Seymour *v.* Delancy, 3 Cow. 445; 15 Am. Dec. 270; Coles *v.* Trecothick, 9 Ves. 246; Davidson *v.* Little, 22 Pa. St. 245; 60 Am. Dec. 81; Hale *v.* Wilkinson, 21 Gratt. 75; Parmelee *v.* Cameron, 41 N. Y. 392; Western R. R. Co. *v.* Babcock, 6 Met. 357; Bean *v.* Valle, 2 Mo. 126; Losee *v.* Morey, 57 Barb. 567; Lee *v.* Kirby, 104 Mass. 420; Westervelt *v.* Mathewson, 1 Hoff. Ch. 37; Curlin *v.* Hendricks, 35 Tex. 225; Corraway *v.* Sweeney, 24 W. Va. 643.

refusing specific performance, and leaving the parties to their strict legal rights.[1]

§ 2608. **Contract Incomplete or Uncertain.**—The court will refuse specific performance upon the ground of incompleteness of the terms, or of uncertainty in the construction or in the application of the terms of the contract.[2] If the parties have not made a definite and certain contract, the court will not make a contract for them *ex æquo et bono*.[3] Specific performance will not be decreed where there is strong doubt whether the parties understood the contract alike;[4] as where they appear to have had a different understanding at the time of its execution as to the extent of the tract covered by the description.[5] Nor will it be decreed unless the plaintiff establishes the fact of the contract by clear and satisfactory evidence.[6]

Uncertainty in the following particulars has been held to defeat a claim for specific performance, viz.: Uncertainty and indefiniteness as to the promise itself;[7] as to

[1] See *ante*, Chapter Consideration; Viele *v.* R. R. Co., 21 Barb. 381; Clitherall *v.* Ogilvie, 1 Desaus. Ch. 250; In re Brady, 66 Pa. St. 277; Seymour *v.* Delancey, 6 Johns. Ch. 222; Fripp *v.* Fripp, Rice Ch. 84; Seymour *v.* Delancy, 3 Cow. 445; 15 Am. Dec. 270; Garnett *v.* Macon, 2 Brock. 185; Rodman *v.* Zilley, 1 N. J. Eq. 320; White *v.* Thompson, 1 Dev. & B. 493; Bean *v.* Valle, 2 Mo. 126.

[2] Magee *v.* McManus, 70 Cal. 553; Higginson *v.* Clowes, 15 Ves. 516; Stanton *v.* Miller, 58 N. Y. 192; Lynes *v.* Hayden, 119 Mass. 482; Agard *v.* Valencia, 39 Cal. 292; Nichols *v.* Williams, 22 N. J. Eq. 63; Carr *v.* Passaic Co., 22 N. J. Eq. 85; Odell *v.* Morin, 5 Or. 96; Mastin *v.* Halley, 61 Mo. 196; Long *v.* Duncan, 10 Kan. 294; Hyde *v.* Cooper, 13 Rich. Eq. 250; Reese *v.* Reese, 41 Md. 554; Hardesty *v.* Richardson, 44 Md. 617; 22 Am. Rep. 57; Miller *v.* Campbell, 52 Ind. 125; Wright *v.* Wright, 31 Mich. 380; Tiernan *v.* Gibney, 24 Wis. 190; Pierce *v.* Catron, 23 Gratt. 588; Allen *v.* Webb, 64 Ill. 342; Bowman *v.* Cunningham, 78 Ill. 48; McComack *v.* Sage, 87 Ill. 484; Bell *v.* Bruen, 1 How. 169; McGuire *v.* Stevens, 42 Miss. 724; 2 Am. Rep. 649; Rankin *v.* Maxwell, 2 A. K. Marsh. 488; 12 Am. Dec. 431; Hanly *v.* Blackford, 1 Dana, 1; 25 Am. Dec. 114; Colson *v.* Thompson, 2 Wheat. 336; Carr *v.* Duval, 14 Pet. 77; Foster *v.* Kimmons, 54 Mo. 488; Hammer *v.* McEldowney, 46 Pa. St. 334; Preston *v.* Preston, 95 U. S. 200; Buckmaster *v.* Thompson, 36 N. Y. 558; Pigg *v.* Corder, 12 Leigh, 69; Patrick *v.* Horton, 3 W. Va. 23; Robbins *v.* McKnight, 5 N. J. Eq. 642; 45 Am. Dec. 406; Hazelton *v.* Putnam, 3 Pinn. 107; 54 Am. Dec. 158; Hamilton *v.* Harvey, 121 Ill. 469; 2 Am. St. Rep. 118; Wollensak *v.* Briggs, 20 Ill. App. 50.

[3] Blanchard *v.* McDougal, 6 Wis. 167; 70 Am. Dec. 458.

[4] Coles *v.* Bowne, 10 Paige, 526.

[5] Cortelyou's Appeal, 102 Pa. St. 576.

[6] Strange *v.* Crowley, 91 Mo. 287; Magee *v.* McManus, 70 Cal. 553.

[7] Minturn *v.* Bayles, 33 Cal. 129; Jordan *v.* Deaton, 23 Ark. 704.

agreement to convey land provided that the vendees should prospect for coal, and if they found enough to warrant it, should organize a company, and give the vendor a certain amount of stock, but if not, the vendees might abandon the contract on giving notice in writing.[1] Specific performance of a contract will not be decreed where performance is obviously impossible;[2] nor will specific performance of an optional contract be decreed;[3] nor where the vendor has no title;[4] nor where the vendor cannot convey without violating a prior equity which he has created.[5]

§ 2610. **Specific Performance with Compensation for Deficiencies.** — Equity has jurisdiction where an exact performance of the contract, in point of time or title, quantity or quality, or in some other matter, cannot be had, and it is sought to enforce such performance as may be had with compensation, if necessary, for deficiency in the performance.[6] As to delay, as we have seen in a previous chapter,[7] time is not in equity, as a rule, considered as of the essence of the contract.[8] Deficiencies in performance in other points than mere delay, as in point of quantity, or quality, or title, or any other matter, may be met as far as possible by compensation, if the substantial matter of the contract can be executed.[9] The rule applies equally on both sides of the contract: against a vendor who is compelled to perform the contract as far as he is able,

[1] Sturgis *v.* Galindo, 59 Cal. 28; 43 Am. Rep. 239.

[2] Pack *v.* Gaither, 73 N. C. 95; Snell *v.* Mitchell, 65 Me. 48; In re Burk, 75 Pa. St. 141; 15 Am. Rep. 587.

[3] Barker *v.* Critzer, 35 Kan. 459.

[4] Fitzpatrick *v.* Featherstone, 3 Ala. 40; Stevenson *v.* Buxton, 15 Abb. Pr. 352; Nicol *v.* Carr, 35 Pa. St. 381.

[5] Russell *v.* Moffitt, 7 Miss. 303.

[6] Leake on Contracts, 1153.

[7] *Ante*, Chapter CXVIII., Performance.

[8] Tyree *v.* Williams, 3 Bibb, 365; 6 Am. Dec. 663; Bellas *v.* Hays, 5 Serg. & R. 427; 9 Am. Dec. 385; Craig *v.* Martin, 3 J. J. Marsh. 50; 19 Am. Dec. 157; Andrews *v.* Sullivan, 2 Gilm. 327; 43 Am. Dec. 53; Murphy *v.* Lockwood, 21 Ill. 619.

[9] "It is now settled that wherever it is possible to compensate the purchaser for any article which diminishes the value of the subject-matter, he must be satisfied with such compensation; or, to speak in the usual terms, wherever the matter lies in compensation": Howland *v.* Norris, 1 Cox, 61.

and against a purchaser who is bound to accept a substantial performance. But it is subject to different considerations in the two cases; for the purchaser is entitled to take, if he please, performance with a defect, which the vendor would not be able to enforce against him. The two cases of compensation against a purchaser and against a vendor will therefore here be considered separately.

§ 2611. Compensation on Decree against Purchaser. —Specific performance will be decreed against a purchaser, with compensation for a small and inconsiderable part of the subject of sale which the vendor is unable to convey.[1] But only where the deficiency is small.[2] Where the defective part is material to the enjoyment of the rest, the purchaser will not be compelled to take the rest.[3] Thus on the sale of a wharf with a jetty, the purchaser will not be compelled to take the wharf without the jetty.[4] The purchaser may be compelled to take the property, with compensation for a small deficiency in the estate or interest of the vendor.[5] But a purchaser could not, in general, be compelled to take a different quality of estate than that contracted for.[6] Thus having contracted for a freehold, he cannot be compelled to take a leasehold, however long.[7] And the vendor cannot force specific performance upon the purchaser when he is unable to give a good title to the subject-matter of the con-

[1] McQueen *v.* Farquhar, 11 Ves. 467; Stoddard *v.* Smith, 5 Binn. 355; Foley *v.* Crow, 37 Md. 51; Evans *v.* Kingsberry, 2 Rand. 120; 14 Am. Dec. 779.

[2] McKean *v.* Read, Litt. Sel. Cas. 395; 12 Am. Dec. 318.

[3] Perkins *v.* Ede, 16 Beav. 193; Knatchbull *v.* Grueber, 1 Madd. 153; Howard *v.* Kimball, 65 N. C. 175; 6 Am. Rep. 739; Taylor *v.* Williams, 45 Mo. 80; Holland *v.* Holmes, 14 Fla. 390; Havens *v.* Bliss, 25 N. J. Eq. 363; Bogan *v.* Drangbrill, 51 Ala. 312; Smith *v.* Turner, 50 Ind. 367; Botsford *v.* Wilson, 75 Ill. 132; Gregory *v.* Perkins, 40 Iowa, 82; Walsh *v.* Barton, 24 Ohio St. 28.

[4] Peers *v.* Lambert, 7 Beav. 546.

[5] A contract is for a term of ninety-nine years. The vendor has only ninety-seven. Held, that the purchaser must take it: Mortlock *v.* Butler, 10 Ves. 306, per Chancellor Eldon; Calcraft *v.* Roebuck, 1 Ves. 221; King *v.* Bardeau, 6 Johns. Ch. 38; 10 Am. Dec. 312.

[6] Leake on Contracts, 1156.

[7] Drewe *v.* Corp, 9 Ves. 368.

tract.[1] Charges and encumbrances upon the land may be treated in the same way with compensation.[2] So with defects in the quality and condition of the land sold, a purchaser will, in general, be compelled to take an estate, with compensation for defects in repairs of buildings, or in the state of cultivation of the land, as compared with the description under which it was sold.[3] Compensation will not be allowed for a defect in the description of which the purchaser has full knowledge at the time of contracting the purchase.[4]

§ 2612. Compensation on Decree against Vendor. — A purchaser is entitled to specific performance against the vendor, so far as the latter may be able to complete the contract, with compensation for any deficiency.[5] So in the case of a total defect of title to part of the land sold, the purchaser may take specific performance for the residue, with compensation.[6]

[1] Ross *v.* Grimball, 1 T. U. P. Charlt. 268; 4 Am. Dec. 711; Dobbs *v.* Norcross, 24 N. J. Eq. 327; King *v.* Knapp, 59 N. Y. 462; Jenkins *v.* Fahey, 73 N. Y. 355; Bensel *v.* Grey, 80 N. Y. 517; Mitchell *v.* Steinmetz, 97 Pa. St. 251; Swepson *v.* Johnson, 84 N. C. 449; Hoover *v.* Calhoun, 16 Gratt. 109; Jeffries *v.* Jeffries, 117 Mass. 184; Christman *v.* Partee, 38 Ark. 31; Rader *v.* Neal, 13 W. Va. 373; Hymers *v.* Branch, 6 Mo. App. 511; Cunningham *v.* Sharp, 11 Humph. 116; Kelly *v.* Bradford, 3 Bibb, 317; 6 Am. Dec. 656; Lewis *v.* Herndon, 3 Litt. 358; 14 Am. Dec. 68; Seymour *v.* De Lancey, 1 Hopk. Ch. 436; 14 Am. Dec. 553; Jackson *v.* Murray, 5 T. B. Mon. 184; 17 Am. Dec. 53; Morrison *v.* Caldwell, 5 T. B. Mon. 426; 17 Am. Dec. 85; Morris *v.* Mowatt, 2 Paige, 586; 22 Am. Dec. 661; Brown *v.* Haff, 5 Paige, 235; 28 Am. Dec. 425; Bowen *v.* Vickers, 2 N. J. Eq. 520; 35 Am. Dec. 517.

[2] Leake on Contracts, 1157; Tiernan *v.* Roland, 15 Pa. St. 411; Thompson *v.* Carpenter, 4 Pa. St. 132; 45 Am. Dec. 681.

[3] Dyer *v.* Hargrave, 10 Ves. 505.

[4] Leake on Contracts, 1158; Dyer *v.* Hargrave, 10 Ves. 505.

[5] Leake on Contracts, 1159; Walling *v.* Kinnard, 10 Tex. 508; 60 Am. Dec. 216; Harbers *v.* Gadsden, 6 Rich. Eq. 284; 62 Am. Dec. 390; Tonn *v.* Ticknor, 112 Ill. 217; Stockton *v.* Union Oil Co., 4 W. Va. 273.

[6] Western *v.* Russell, 3 Ves. & B. 187; McConnell *v.* Dunlap, Hardin, 41; 3 Am. Dec. 723. "If a man, having partial interests in an estate, enter into a contract representing it and agreeing to sell it as his own, it is not competent for him afterwards to say he has not the entirety, and therefore the purchaser shall not have the benefit of the contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement": Mortlock *v.* Buller, 10 Ves. 316.

ILLUSTRATIONS. — A vendor contracted to sell the entirety of certain property at a certain price, and it was found that he was entitled to an undivided moiety only. *Held*, that the purchaser was entitled to have that moiety, with an abatement of one half of the purchase-money: *Hooper* v. *Smart*, L. R. 18 Eq. 683. A person possessed of a term contracts to sell the fee. Although he cannot compel the purchaser to take, the purchaser can compel him to convey, the term upon equitable conditions: *Wood* v. *Griffith*, 1 Swanst. 54. Property was sold as renewable leasehold. *Held*, the purchaser was entitled to specific performance, with compensation for the right of renewal which was found not to exist: *Painter* v. *Newby*, 11 Hare, 26. A promises to convey land, but his wife refuses to join in the deed. The court will decree against the husband, diminishing the purchase price by the value of the wife's interest: *Martin* v. *Merritt*, 57 Ind. 34; 26 Am. Rep. 45; *contra*, *Burk's Appeal*, 75 Pa. St. 141; 15 Am. Rep. 587.

§ 2613. **Specific Performance with Indemnity.** — Where an abatement from the price cannot for any reason be given as compensation, the court will order an indemnity from the defendant to make up the deficiency.[1] Thus in decreeing specific performance of a contract for the sale of land, the court cannot compel the wife of the defendant to join in the deed and convey her dower;[2] but it will compel the husband to give an indemnity against her claim for dower.[3]

§ 2614. **Statute of Frauds — Part Performance.** — An unwritten contract for the sale of land is void by the express declaration of the statute of frauds, and a court of equity has no power to enforce a specific performance of it.[4] So, also, of a contract of sale infringing any other of the provisions of the statute.[5] But in equity part performance of the contract may take the case out of the

[1] Leake on Contracts, 1162.

[2] Hopper *v.* Hopper, 16 N. J. Eq. 149.

[3] Hawralty *v.* Warren, 18 N. J. Eq. 124; Pinner *v.* Sharp, 23 N. J. Eq. 282; Young *v.* Paul, 10 N. J. Eq. 404; 64 Am. Dec. 456. *Contra*, Burk's Appeal, 75 Pa. St. 141; 15 Am. Rep. 587.

[4] Abel *v.* Calderwood, 4 Cal. 90; Patterson *v.* Yeaton, 47 Me. 308; Beaman *v.* Buck, 17 Miss. 207; Skipwith *v.* Dodd, 24 Miss. 487.

[5] Strehl *v.* D'Evers, 66 Ill. 77.

statute.[1] Delivery of possession pursuant to the contract is a part performance,[2] and so is the spending of money on improvements on the property;[3] or choosing a person to divide the property, taking part in the division, delivering possession of the property set off, and permitting the other party to lease the land and receive the rents and pay taxes thereon.[4] But possession, in order to be a part performance, must be continuous,[5] exclusive,[6] notorious,[7] and with the consent of the ven-

[1] Buckmaster *v.* Harrop, 7 Ves. 340; Mundy *v.* Jolliffe, 5 Mylne & C. 167; Lester *v.* Foxcroft, 1 White and Tudor Lead. Cas. 693; Fry on Specific Performance, 173; Overstreet *v.* Rice, 4 Bush, 1; 96 Am. Dec. 279; 3 Pomeroy's Eq. Jur., sec. 1409; Somerville *v.* Trueman, 4 Har. & McH. 43; 1 Am. Dec. 389; Simmons *v.* Hall, 4 Har. & McH. 252; 1 Am. Dec. 398; Wetmore *v.* White, 2 Caines Cas. 87; 2 Am. Dec. 323; Parkhurst *v.* Van Cortland, 14 Johns. 15; 7 Am. Dec. 427; Glass *v.* Hulburt, 102 Mass. 35; 3 Am. Rep. 418; Weed *v.* Terry, 2 Doug. (Mich.) 344; 45 Am. Dec. 257; Robbins *v.* McKnight, 5 N. J. Eq. 642; 45 Am. Dec. 406; Neale *v.* Neale, 9 Wall. 1; Printup *v.* Mitchell, 17 Ga. 558; 63 Am. Dec. 258; Maddox *v.* Rowe, 23 Ga. 431; 68 Am. Dec. 535; Bigelow *v.* Armes, 108 U. S. 10; Ryan *v.* Dox, 34 N. Y. 307; 98 Am. Dec. 696. *Contra*, Box *v.* Stanford, 13 Smedes & M. 93; 51 Am. Dec. 142.

[2] Pugh *v.* Good, 3 Watts & S. 56; 37 Am. Dec. 534; Wade *v.* Greenwood, 2 Rob. (Va.) 474; 40 Am. Dec. 759; Dugan *v.* Gittings, 3 Gill, 138; 43 Am. Dec. 306; Eaton *v.* Whittaker, 18 Conn. 222; 44 Am. Dec. 586; McMahan *v.* McMahan, 13 Pa. St. 376; 53 Am. Dec. 481; Seaman *v.* Ascherman, 51 Wis. 678; 37 Am. Rep. 849; Danforth *v.* Laney, 28 Ala. 274; Arrington *v.* Potter, 47 Ala. 714; Jefferson *v.* Jefferson, 96 Ill. 551; Anderson *v.* Simpson, 21 Iowa, 399; Rucker *v.* Steelman, 73 Ind. 376; Arnold *v.* Stephenson, 79 Ind. 126; McCarger *v.* Rood, 47 Cal. 138; Lamb *v.* Human, 46 Mich. 112; Harris *v.* Crenshaw, 3 Rand. 14; Reynolds *v.* Johnson, 13 Tex. 214; Jamison *v.* Dimock, 95 Pa. St. 52; Murnay *v.* Jane, 8 Barb. 612; Harris *v.* Knickerbacker, 5 Wend. 638; Wood *v.* Thornby, 58 Ill. 464; Judy *v.* Gilbert, 77 Ind. 96; 40 Am. Rep. 289; Barnes *v.* R. R. Co., 130 Mass. 388; Armstrong *v.* Katterhorn, 11 Ohio, 265; Peckham *v.* Barker, 8 R. I. 17; Cole *v.* Potts, 10 N. J. Eq. 67; Rosenthal *v.* Freeberger, 26 Md. 75; Ham *v.* Goodrich, 33 N. H. 32; Freeman *v.* Freeman, 43 N. Y. 34; 3 Am. Rep. 657; Rankin *v.* Simpson, 19 Pa. St. 471; 57 Am. Dec. 668; Parrill *v.* McKinley, 9 Gratt. 1; 58 Am. Dec. 212; Blanchard *v.* McDougall, 6 Wis. 167; 70 Am. Dec. 458; Wentworth *v.* Wentworth, 2 Minn. 277; 72 Am. Dec. 97; Workman *v.* Guthrie, 29 Pa. St. 495; 72 Am. Dec. 654; Ryan *v.* Dox, 34 N. Y. 307; 90 Am. Dec. 696. But possession of land under a parol contract of sale, to amount to part performance, must be connected with the contract of sale, and in consequence and pursuance of it, and be intended to be in execution of it: McNeill *v.* Jones, 21 Ark. 277; Danforth *v.* Laney, 28 Ala. 274; Charpiot *v.* Sigerson, 25 Mo. 63; Cole *v.* Potts, 10 N. J. Eq. 67; Knoll *v.* Harvey, 19 Wis. 99.

[3] Glass *v.* Hulbert, 102 Mass. 35; 3 Am. Rep. 418; Moore *v.* Pierson, 6 Iowa, 279; 71 Am. Dec. 409; Kurtz *v.* Hibner, 55 Ill. 514; 8 Am. Rep. 665.

[4] Weed *v.* Terry, 2 Doug. (Mich.) 344; 45 Am. Dec. 257.

[5] Chambliss *v.* Smith, 30 Ala. 366; Davis *v.* Moore, 9 Rich. 215; Rankin *v.* Simpson, 19 Pa. St. 471; 57 Am. Dec. 668; Dougan *v.* Blocher, 24 Pa. St. 28.

[6] Haslet *v.* Haslet, 6 Watts, 464; Frye *v.* Shepler, 7 Pa. St. 91; Moore *v.* Small, 19 Pa. St. 461.

[7] Charpiot *v.* Sigerson, 25 Mo. 63; Brawdy *v.* Brawdy, 7 Pa. St. 157; Moore *v.* Small, 19 Pa. St. 461.

dor.[1] Acts done prior to the making of the agreement cannot be considered as in part performance,[2] nor acts which are merely preparatory, introductory, or ancillary to the agreement.[3] Thus the following acts have been held not a part performance, viz.: Giving orders to have the papers drawn, and going to view the property;[4] going on the land and measuring it;[5] preparing a lease;[6] tendering a deed;[7] delivering an abstract of title, and giving instructions to prepare a deed.[8]

In a few early cases it is said that payment of the whole or a part of the purchase-money is such a part performance of a parol contract for the sale of lands as will take it out of the statute of frauds, and warrant a decree of specific performance.[9] But according to the decided weight of authority such is not the law.[10]

[1] Pomeroy on Specific Performance, sec. 119; Purcell *v.* Miner, 4 Wall. 513; Howe *v.* Rogers, 32 Tex. 218; Jacobs *v.* R. R. Co., 8 Cush. 223; Moore *v.* Higbee, 45 Ind. 487; Sage *v.* McGuire, 4 Watts & S. 228. But where the vendor knows that the vendee has taken possession and makes no objection, his consent is presumed: Lord *v.* Underdunck, 1 Sand. Ch. 46; Thompson *v.* Scott, 1 McCord Eq. 32; Jervis *v.* Smith, Hoff. Ch. 470; Goucher *v.* Martin, 9 Watts, 106.

[2] Eckert *v.* Eckert, 3 Penr. & W. 332; Dougan *v.* Blocher, 24 Pa. St. 23.

[3] Reeves *v.* Pye, 1 Cranch C. C. 219; Givens *v.* Calder, 2 Desaus. Ch. 171; 2 Am. Dec. 686; Gratz *v.* Gratz, 4 Rawle, 411; Colgrove *v.* Sullivan, 34 Mich. 494.

[4] Clerk *v.* Wright, 1 Atk. 12.

[5] Gratz *v.* Gratz, 4 Rawle, 411.

[6] Phillips *v.* Edwards, 33 Beav. 440.

[7] Graham *v.* Theiss, 47 Ga. 470; Sands *v.* Thompson, 43 Ind. 18.

[8] Smith *v.* Smith, 1 Rich. Eq. 130.

[9] Townshend *v.* Houston, 1 Harr. (Del.) 532; 27 Am. Dec. 732; Whitbeck *v.* Whitbeck, 9 Cow. 266; 18 Am. Dec. 503. Equity will enforce a parol agreement for a joint interest in land at the instance of a party to it who has fulfilled his part by full payment, and where it may be inferred that fraud would result from a refusal to decree performance: Fannin *v.* McMullen, 2 Abb. Pr., N. S., 224; Ryan *v.* Dox, 34 N. Y. 307; 90 Am. Dec. 696.

[10] Johnston *v.* Glancy, 4 Blackf. 94; 28 Am. Dec. 45; Pinnock *v.* Clough, 16 Vt. 500; 42 Am. Dec. 521; Blanchard *v.* McDougal, 6 Wis. 167; 70 Am. Dec. 458; Cronk *v.* Trumble, 66 Ill. 428; Poland *v.* O'Connor, 1 Neb. 50; 93 Am. Dec. 327. Mr. Pomeroy (Specific Performance, sec. 112) says: "Payment of the purchase price, either in whole or in part, is not an act of part performance, ... and does not take a verbal contract out from the operation of the statute: Clinan *v.* Cooke, 1 Schoales & L. 40; O'Herlihy *v.* Hedges, 1 Schoales & L. 123; Hughes *v.* Morris, 2 De Gex, M. & G. 356; Leak *v.* Morrice, 2 Ch. Cas. 135; Alsopp *v.* Patten, 1 Vern. 472; Lord Pengall *v.* Ross, 2 Eq. Cas. Abr. 46, pl. 12; Seagood *v.* Meale, Prec. Ch. 560; Buckmaster *v.* Harrop, 7 Ves. 341; Coles *v.* Trecothick, 9 Ves. 234; Frame *v.* Dawson, 14 Ves. 388; Ham *v.* Goodrich, 33 N. H. 32, 39; Kidder *v.* Barr, 35 Ves. 235; Underhill *v.* Allen, 18 Ark. 466; Thompson *v.* Gould, 20 Pick. 134; Glass *v.* Hulburt, 102 Mass. 24; 3 Am. Rep. 418; Eaton *v.* Whitaker, 18 Conn.

The following have been held not sufficient part performance to take the case out of the statute, viz.: Taking possession of the land without the permission of the vendor;[1] where the person agreeing to purchase deposited part of the purchase-money with her agent to pay the vendor as soon as he executed the deed.[2] Marriage is not part performance of a parol contract made in consideration of marriage.[3] The statute is a good defense where specific performance of a parol contract is sought against the vendor; but if the vendor is willing to perform, the part paid cannot be recovered back.[4] So the statute will not prevent a decree where the agreement in

222, 229; 44 Am. Dec. 586; Cole *v.* Potts, 10 N. J. Eq. 67; Allen's Estate, 1 Watts & S. 383, 389; McKee *v.* Phillips, 9 Watts, 85; Parker *v.* Wells, 6 Whart. 153, 161; Gangwer *v.* Fry, 17 Pa. St. 491; 55 Am. Dec. 578; Rankin *v.* Simpson, 22 N. J. L. 471; 57 Am. Dec. 668; Jackson *v.* Cutright, 5 Munf. 308; Hyde *v.* Cooper, 13 S. C. Eq. 250; Anderson *v.* Chick, Bail. Eq. 118; Church of the Advent *v.* Farrow, 7 Rich. Eq. 378; Givens *v.* Calder, 2 Desaus. Ch. 174; 2 Am. Dec. 686; Smith *v.* Smith, 1 Rich. Eq. 130, 132, 135; Finucane *v.* Kearney, 1 Freem. Ch. 65, 68; Hood *v.* Bowman, 1 Freem. Ch. 290, 294; Black *v.* Black, 15 Ga. 445; Miahli *v.* Lassabe, 4 Ala. 712; Hart *v.* McClellan, 41 Ala. 251; Garner *v.* Stubblefield, 5 Tex. 561; Wood *v.* Jones, 35 Tex. 64; Wilbur *v.* Paine, 1 Hamm. 252; Sites *v.* Keller, 6 Hamm. 528; Letcher *v.* Cosby, 2 A. K. Marsh. 106; Johnson *v.* Glancy, 4 Blackf. 94; Park *v.* Leewright, 20 Mo. 85; Purcell *v.* Miner, 4 Wall. 513; Thompson *v.* Tod, Pet. C. C. 380; Cronk *v.* Trumble, 66 Ill. 428; Wood *v.* Jones, 35 Tex. 64; Lanz *v.* McLaughlin, 14 Minn. 72; Cuppy *v.* Hixon, 29 Ind. 522. The statute of frauds of Iowa, however, in express terms declares that the acceptance of the purchase price, or a part thereof, by a vendor of land, shall make a verbal contract of sale binding, — shall, in effect, be equivalent to a written memorandum: Fairbrother *v.* Shaw, 4 Iowa, 570. In the earliest cases it was held that the payment of a considerable portion of the purchase price would take a verbal contract for the sale of land out from the operation of the statute, while the payment of a small portion would not have that effect: Lacon *v.* Mertins, 3 Atk. 4, per Lord Hardwicke, who held generally that part payment was a good part performance: Child *v.* Comber, 3 Swanst. 423, note; Owen *v.* Davies, 1 Ves. Sr. 82; Hales *v.* Van Berchem, 2 Vern. 618; Skett *v.* Whitmore, Freem. Ch. 281; Main *v.* Melbourn, 4 Ves. 720, 724, per Lord Roslyn, who held as stated in the text; Wetmore *v.* White, 2 Cai. Cas. 87, 109; Townsend *v.* Houston, 1 Harr. 532, 541; 27 Am. Dec. 732; Jones *v.* Peterman, 3 Serg. & R. 543; 8 Am. Dec. 672; Frieze *v.* Glenn, 2 Md. Ch. 361; Harwood *v.* Jones, 10 Gill & J. 404. But this distinction was long ago rejected as being based upon no sound principle."

[1] Givens *v.* Calder, 2 Desaus. Ch. 172; 2 Am. Dec. 687.

[2] Givens *v.* Calder, 2 Desaus. Ch. 172; 2 Am. Dec. 687.

[3] Caton *v.* Caton, L. R. 1 Ch. App. 137; Ungley *v.* Ungley, L. R. 4 Ch. Div. 73; Finch *v.* Finch, 10 Ohio St. 501; Bowen *v.* Conger, 8 Hun, 625; Flenner *v.* Flenner, 29 Ind. 564; Welch *v.* Whelpley, 62 Mich. 15; 4 Am. St. Rep. 810.

[4] Sims *v.* Hutchins, 8 Smedes & M. 328; 47 Am. Dec. 90.

the bill is admitted, and the statute is not relied on as a bar.[1]

§ 2615. **Delay and Laches.**—The plaintiff may lose his right to ask specific performance by unnecessary delay on his part.[2] The rule is, that if a party seeking a specific execution has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if in the intermediate period there has arisen a material change of circumstances, affecting the rights, interests, and obligations of the parties, a court of equity will refuse to decree a specific performance.[3] The rule is the same, whether the party seeking the aid of the court has been guilty of great delay in performing it, or in filing his bill, or in prosecuting his suit after the bill is filed.[4] Thus specific performance has been refused in the following, among other cases: Where the complainant, seeking to have enforced an agreement to execute a mortgage, has slept upon his rights for three years before the mortgagor's death, and for eight years afterwards;[5] where a party suffered more than twenty years to elapse before bringing a suit on an agreement for land;[6] where a bill was filed for specific performance of a contract thirty-seven years after it was alleged to have been made, no effort having been made in the mean time to enforce it, and the rights of subsequent *bona fide* purchasers without notice had

[1] Baker *v.* Hollobaugh, 15 Ark. 322; Woods *v.* Dille, 11 Ohio, 455; Houser *v.* Lamont, 55 Pa. St. 311; 93 Am. Dec. 755.

[2] Boston etc. R. R. Co. *v.* Bartlett, 10 Gray, 384; Green *v.* Covillaud, 10 Cal. 317; 70 Am. Dec. 725; Rogers *v.* Saunders, 16 Me. 92; 33 Am. Dec. 635; Patterson *v.* Martz, 8 Watts, 374; 34 Am. Dec. 474; Johnson *v.* Somerville, 33 N. J. Eq. 152; Watts *v.* Waddle, 6 Pet. 389; Preston *v.* Preston, 95 U. S. 200; Smith *v.* Hampton, 13 Tex. 459; Campbell *v.* Hicks, 19 Ohio St. 433; Dubois *v.* Baum, 46 Pa. St. 537; Hubbell *v.* Shoening, 58 Barb. 498; Bracken *v.* Martin, 3 Yerg. 55; Henderson *v.* Hicks, 58 Cal. 364; Marshall *v.* Perry, 90 Ill. 289; De Cordova *v.* Smith, 9 Tex. 129; 58 Am. Dec. 136; Young *v.* McNutt, 16 Tex. 13; McAusland *v.* Pundt, 1 Neb. 21; 83 Am. Dec. 358.

[3] Callen *v.* Ferguson, 29 Pa. St. 247; Madox *v.* McQuean, 3 A. K. Marsh. 400; Miller *v.* Henlan, 51 Pa. St. 265; Childress *v.* Holland, 3 Hayw. (Tenn.) 274.

[4] Alexander *v.* Hoffman, 70 Ill. 114; Hedenberg *v.* Jones, 73 Ill. 149; Fitch *v.* Willard, 73 Ill. 92.

[5] Nelson *v.* Bank, 27 Md. 51.

[6] Baird *v.* Baird, 5 J. J. Marsh. 580.

intervened;[1] where the purchaser has never taken possession or expended anything on the premises, but has waited for several years after the payments were due, and until there has been a rise in value;[2] where for seventeen months the complainant had done nothing to perform her part of the contract, although she had previous to that paid money on the contract, and she had not before suit tendered herself ready to perform, and demanded performance of the contract;[3] where a purchaser of land failed to make any payments therefor, and for thirty years allowed others to make costly improvements thereon without objection, asked no rent from the occupants, asserted no legal right, and paid no taxes nor assessments;[4] where a vendor of land brought an action for specific performance three years and a half after the time fixed for performance, without having given any notice in the interim of his intention to insist on a performance of the contract;[5] where the complainant neglected for twenty years to call on a railroad company to perform a stipulation in a deed to erect a bridge across the granted premises;[6] where twenty-three years elapsed from the date of a contract for the purchase of real estate, during thirteen years of which no payments were made by the purchaser;[7] where a married woman for two years repudiated and refused to perform an agreement for the sale of land made in her behalf by her husband, the property, during the time, having depreciated in value;[8] where there was an acquiescence for five years in the non-performance of a building contract;[9] where the vendee had failed to pay any part of the purchase price of land except a portion of the interest for a period of over six years from the execution of the contract.[10]

[1] Ewing *v.* Beauchamp, 6 B. Mon. 422.
[2] O'Fallon *v.* Kennerly, 45 Mo. 124.
[3] Bullock *v.* Adams, 20 N. J. Eq. 367.
[4] Warder *v.* Cornell, 105 Ill. 169.
[5] Delavan *v.* Duncan, 49 N. Y. 485.
[6] Williams *v.* Hart, 116 Mass. 513.
[7] Bennett *v.* Welch, 25 Ind. 140; 87 Am. Dec. 354.
[8] Holgate *v.* Eaton, 116 U. S. 33.
[9] Davison *v.* Jersey Company Associates, 71 N. Y. 333.
[10] Henderson *v.* Hicks, 58 Cal. 364.

Lapse of time will not defeat specific performance, if it arose from the state of the vendor's title, and the delay was consented to by both parties, or when the vendee was insane;[1] or where there has been continued acquiescence on both sides;[2] or where the negligence was owing to a mistake of legal rights;[3] or where the defendant has prevented, by his representations, the bringing of a suit for specific performance;[4] or where it appears that the complainant has been in no default, and has been reasonably active during the whole time in asserting his rights under it, and attempting to enforce its performance.[5] One who seeks specific performance must have done all in his power to fulfill the contract on his part.[6] A court of equity will not specifically enforce a contract at the instance of one of the parties who has repeatedly broken it, even if the other party has been guilty of the first breach.[7]

ILLUSTRATIONS. — A contracted with the proprietors of the town of B for the purchase of a lot in said town, binding himself to build a house on the same within two years; otherwise the agreement to be void, and the lot to revert to the proprietors. A failed to build the house. *Held*, that after a lapse of eleven years, specific performance should not be decreed: *Broaddus* v. *Ward*, 8 Mo. 217. By a contract for the sale of land the vendor was to convey at a time specified, and the vendee was "at the same time" to secure the purchase-money. The vendee took possession under the contract, but no conveyance was executed, and the purchase-money was not paid for fifteen years. *Held*, that the lapse of time was no objection to a decree for specific performance at the suit of the vendee: *Waters* v. *Travis*, 9 Johns. 450. A agreed to buy land and to pay therefor in a week. *Held*, that his inability to get the title examined within that time justified him in requiring a further delay, and that a month after the agreement was made he could maintain a suit for specific performance: *Willis* v. *Dawson*, 34 Hun, 492.

[1] Craig *v.* Leiper, 2 Yerg. 193; 24 Am. Dec. 479.
[2] Welch *v.* Whelpley, 62 Mich. 15; 4 Am. St. Rep. 810.
[3] Estes *v.* Browning, 11 Tex. 237; 60 Am. Dec. 238.
[4] Belt *v.* Ins. Co., 12 Mo. App. 100.
[5] Coulson *v.* Walton, 9 Pet. 62.
[6] Vawter *v.* Bacon, 89 Ind. 565.
[7] Ohio Steel Barb Fence Co. *v.* Washburn and Moen Mfg. Co., 26 Fed. Rep. 702.

CHAPTER CXXV.

DAMAGES.

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§ 2641. Damage on bonds restricted to amount of penalty.
§ 2642. Aliter as to other instruments.
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§ 2616. General Damages Defined. — General damages are the consequence of the breach of contract, or other injurious act, irrespective of any special circumstances; as the loss of money caused by the non-payment of a debt, or the deprivation of goods caused by a failure to deliver under a contract of sale.[1]

[1] Vanderlice *v.* Newton, 4 N. Y. 130.

§ 2617. Special Damages Defined. — Special damages are the further consequence caused by the breach of contract happening under special circumstances, as where goods are contracted to be delivered for a special purpose, which fails by reason of the default in delivery.[1]

§ 2618. Measure of Damages Ordinarily on Breach of Contract. — Damages are ordinarily to be assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract, and what it would have been if the contract had been performed; that is to say, the measure of damages is the benefit that the plaintiff would have received if the contract had been performed, and his pecuniary loss resulting from the breach.[2] The measure of damages where property is in question is the value of the article as nearly as it can be ascertained, and from this rule the jury are not at liberty to depart.[3] In an action on a written contract for a sum certain, the contract itself furnishes the rule of damages.[4] But if an agreement be unconscionable, the court will render such damages as may appear reasonable, without being bound by the terms of the contract.[5] In an action for damages on a contract, which plaintiff was prevented from completing through the fault of defendant, the measure of damages is not the price agreed to be paid in full performance, but recompense for the part performed, together with indemnity for the loss to plaintiff in respect to the part unperformed.[6] Where a part only of a contract has been executed, the contract price shall govern the measure of compensation, wherever it

[1] Leake on Contracts, 1043; Smith v. Sherman, 4 Cush. 408.

[2] Robinson v. Harman, 1 Ex. 855; Eckel v. Murphy, 15 Pa. St. 488; 53 Am. Dec. 607; Jones v. Van Patten, 3 Ind. 107; Royalton v. Tp. Co., 14 Vt. 311; Kaiser v. New Orleans, 17 La. Ann. 178; Osborne v. Slassen, 25 Kan. 736; King v. Gilson, 32 Ill. 348; 83 Am. Dec. 269.

[3] Hillebrant v. Brewer, 6 Tex. 45; 55 Am. Dec. 757.

[4] Tyler v. Marsh, 1 Day, 1.

[5] Cutler v. How, 8 Mass. 257; Baxter v. Wales, 12 Mass. 365.

[6] Friedlander v. Pugh, 43 Miss. 111.

can be made to apply.[1] The law imposes on one subjected to injury from a breach of contract the active duty to make reasonable exertions to render the injury as light as possible; and if, instead of so doing, he, through his negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss falls upon him.[2] Thus where one has employed an agent to procure insurance on his property, and knows of his neglect to do so in ample time to procure it himself, he cannot hold the agent for a loss by such neglect.[3]

§ 2619. Remote Damages not Recoverable. — The proximate, and not the remote, consequences of the breach of contract are to be regarded. "To entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. It must be something immediately flowing out of the breach of contract complained of, something immediately connected with the breach of contract, and not merely connected with it through a series of causes intervening between the immediate consequences of the breach of contract and the damage or injury complained of."[4] Thus damages for the loss of profits and delays of voyages by reason of defects in the construction of a steamboat cannot be deducted, where the case is free from fraud, in an action to recover the price agreed on for the construction of such steamboat, such damages being too remote.[5] The value of rice

[1] McClelland *v.* Snider, 18 Ill. 58.

[2] Hamilton *v.* McPherson, 28 N. Y. 72; 84 Am. Dec. 330; Wright *v.* Metropolis Bank, 110 N. Y. 237; 6 Am. St. Rep. 356.

[3] Brant *v.* Gallup, 111 Ill. 487; 53 Am. Rep. 638.

[4] Hobbs *v.* R. R. Co., L. R. 10 Q. B. 177; Jackson *v.* Adams, 9 Mass. 484; 6 Am. Dec. 94; Bond *v.* Quattlebaum, 1 McCord, 584; 10 Am. Dec. 702; Ashe *v.* De Rossett, 5 Jones, 299; 72 Am. Dec. 552; Milhels Mfg. Co. *v.* Day, 50 Iowa, 250; Bellmeyer *v.* Wagner, 91 Pa. St. 92; Finstenburg *v.* Fawsett, 61 Md. 184. See Title Negligence — Proximate and Remote Cause.

[5] Blanchard *v.* Ely, 21 Wend. 342; 34 Am. Dec. 250.

burned in a mill cannot be recovered as damages for breach of contract by the mill-owner to beat the rice at a particular time, which was before the mill was burned.[1] In an action for the breach of a warranty of a safe sold by an agent, the value of articles stolen from the safe by burglars is not recoverable.[2] In an action for breach of an agreement "to put a harvester in first-class order, to enable the owner to cut and bind his grain therewith," damages from loss of crops by reason of not having the machine in condition to cut and save them are too remote.[3] In an action for a breach of a contract to sell timber on land, the purchaser also being given by the contract a right of way to the timber, the cost of constructing a road to it is not an element of damages.[4] A loss resulting to the vendee in a contract of sale from a failure to realize upon a contract with a third person, which was known to the vendor at the time of the sale, is too remote to be recovered as damages from the vendor for a delay in delivering the goods, although the delay was the cause of the vendee's failure to realize upon his contract.[5] There is no connection between a broken contract of towage and subsequent loss of plaintiff's boat by flood and drifting raft.[6] Legal injury cannot be claimed from another because the latter has injured a third person in such a manner that the plaintiff's contract liabilities are thereby affected.[7]

ILLUSTRATIONS. — A agreed to send a cider-press to B immediately. He delayed, whereby loss ensued to B. *Held*, that for all damages resulting directly from the delay A was liable, but not for loss of custom: *Dennis* v. *Stoughton*, 55 Vt. 371. By reason of the negligence of the lessors, an opera-house was not completed in season, whereby one of the singers took cold, and

[1] Ashe *v.* De Rossett, 5 Jones, 299; 72 Am. Dec. 552.
[2] Herring *v.* Skaggs, 62 Ala. 180; 34 Am. Rep. 4.
[3] Osborne *v.* Poket, 33 Minn. 10.
[4] Mackey *v.* Olssen, 12 Or. 429.
[5] Friend and Terry Lumber Co. *v.* Miller, 67 Cal. 464.
[6] McGovern *v.* Lewis, 56 Pa. St. 231; 94 Am. Dec. 60.
[7] Connecticut M. L. Ins. Co. *v.* R. R. Co., 25 Conn. 265; 65 Am. Dec. 571.

the lessee lost the anticipated receipts of the performance. *Held*, that the sickness of the performer was too remote to be the subject of damages: *Academy of Music* v. *Hackett*, 2 Hilt. 217.

§ 2620. **Intention of Parties.**—The damages recoverable for a breach of contract, while they are restricted to, may also include, such matters as both parties, in making the contract, might reasonably expect to be the consequence in the particular case; and in regard to which, therefore, they must be taken to have intended to contract.[1] Thus it was held that a planter is entitled to recover damages for loss of crop and extra wages paid in consequence of the delay through the fault of the manufacturers, but without any bad faith or fraud on their part, in putting in operation a sugar-mill and steam-engine, which the manufacturers undertook to build and put up on the plantation of the planter within a certain time, where it was evident that it entered into the contemplation of the parties that the mill and engine were to grind a certain crop of sugar-cane.[2] So where a landlord agreed in a lease of a farm to repair the fences so as to secure the crop, and failed to do this, and cattle broke in and injured the crops, it was held that he was liable therefor.[3]

§ 2621. **Damages for Injuries to Feelings.**—The general rule in actions for breach of contract is, that no damages can be awarded for mere disappointment, or injury to the feelings, or vexation of mind, caused by the

[1] Leake on Contracts, 1046. "The damages in respect of a breach of contract should be either such as fairly and reasonably may be considered arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it": Hadley v. Baxendale, 9 Ex. 341.

[2] Goodloe v. Rogers, 9 La. Ann. 273; 61 Am. Dec. 205.

[3] Culver v. Hill, 68 Ala. 66; 44 Am. Rep. 134.

breach.[1] But the contract to marry is an exception to this rule.[2]

§ 2622. **Damages for Personal Inconvenience.**—Personal trouble and inconvenience is a proper subject of damage when caused by a breach of contract.[3]

§ 2623. **Future and Probable Losses—Profits.**—Damages may be claimed and assessed not only in respect of the loss in fact accrued at the time of action, but also for all the prospective and probable loss which it is reasonably certain will happen in future.[4] Profits are recoverable where their loss is the natural and necessary result of the breach;[5] where, as has been said, their loss results directly from the breach of the contract itself, or is such as might reasonably be supposed to have been in the contemplation of both parties, at the time of the making of the contract, as the result of non-performance, provided that the profits to be compensated for are such as are capable of being ascertained by the rules of evidence, to a reasonable degree of certainty.[6] One who, without fault on his part, has been prevented by the other party to a contract from performing labor under it, may recover damages based upon his prospective profits, where they can be proven.[7] On the breach of an executory contract

[1] Houston etc. R. R. Co. *v.* Shirley, 54 Tex. 125. *Aliter* of cause in actions of tort: Hamlin *v.* R. R. Co., 1 Hurl. & N. 408. See Title Torts in General.

[2] Berry *v.* Da Costa, L. R. 1 Com. P. 331; Frost *v.* Knight, L. R. 7 Ex. 116. See *ante*, Title Husband and Wife.

[3] Hobbs *v.* R. R. Co., L. R. 10 Q. B. 111; Lord Manners *v.* Johnson, L. R. 1 Ch. Div. 673.

[4] Leake on Contracts, 1048.

[5] Hoy *v.* Gronoble, 34 Pa. St. 9; 75 Am. Dec. 628; Simmons *v.* Brown, 5 R. I. 299; 73 Am. Dec. 66; Adams Ex. Co. *v.* Egbert, 36 Pa. St. 360; 78 Am. Dec. 382; Field *v.* U. S., 16 Ct. of Cl. 434; Pitts. Steel Co. *v.* Hinckley, 17 Fed. Rep. 584; Goodrich *v.* Hubbard, 51 Mich. 63; Wisner *v.* Barber, 10 Or. 342; Fairchild *v.* Rogers, 32 Minn. 269; Donnell *v.* Jones, 17 Ala. 689; 52 Am. Dec. 194. A party recovering for breach of a contract is entitled to the profits, however large, which he would have realized therefrom: Hitchcock *v.* Galveston, 3 Woods, 287.

[6] Wolcott *v.* Mount, 36 N. J. L. 262; 13 Am. Rep. 438; 38 N. J. L. 496; 20 Am. Rep. 425; Wakeman *v.* Wheeler and Wilson S. M. Co., 101 N. Y. 205; 54 Am. Rep. 676; Miss. etc. Boom Co. *v.* Prince, 34 Minn. 71.

[7] United States *v.* Behan, 110 U. S. 338.

for erecting a building, the contractor may recover as damages the profits he would have realized if he had been allowed to complete the contract.[1] So on the breach of a contract made for the engraving and printing of certain bonds, it was held that plaintiff was entitled, as damages, to reasonable compensation for work done, to repayment of all money expended for defendant on account of the contract, and to prospective profits, with interest.[2]

But though damages recoverable for a breach of contract include profits which the plaintiff certainly would have realized but for defendant's default, yet speculative or contingent profits are not recoverable;[3] nor loss of profits or other damages arising out of collateral undertakings entered into on the faith of the contract.[4] On breach of a contract to construct a levee for the purpose of reclaiming swamp-land, the loss of possible profits under a lease of the land executed by the plaintiff without the defendant's knowledge after the breach of the contract is not recoverable;[5] nor on a breach of contract to repair the machinery of a cotton factory are the prospective profits of the cotton factory recoverable;[6] nor on breach of a contract to furnish the materials and construct two boilers, "complete and all connected in the mill" of the purchaser by a specified date, the contract not showing the purpose for which they were to be used, and there being no proof of the existence of the other conditions necessary to the use, can there be recovery for possible profits from such use, although the party in default knew the intended purpose;[7] nor on breach of a contract for building a flume can there

[1] Boyd *v.* Meighan, 48 N. J. L. 404.

[2] Kendall Bank Note Co. *v.* Sinking Fund Comm'rs, 79 Va. 563.

[3] Griffin *v.* Colver, 16 N. Y. 489; 69 Am. Dec. 718; Muldrow *v.* Norris, 2 Cal. 74; 56 Am. Dec. 313; Bergen *v.* New Orleans, 35 La. Ann. 523; Jones *v.* Nothrop, 7 Col. 1; Harwood *v.* Tappan, 2 Spears, 536; Allis *v.* McLean, 48 Mich. 423.

[4] Masterton *v.* Mayor of Brooklyn, 7 Hill, 61; 42 Am. Dec. 38; Horner *v.* Wood, 16 Barb. 386.

[5] Wallace *v.* Ah Sam, 71 Cal. 197; 60 Am. Rep. 534.

[6] Coweta Falls Mfg. Co. *v.* Rogers, 19 Ga. 416; 65 Am. Dec. 602. See Fleming *v.* Buck, 48 Pa. St. 309.

[7] McKinnon *v.* McEwan, 48 Mich. 106; 42 Am. Rep. 458.

be recovery for loss of profits of a mill which the other party was thus prevented from erecting;[1] nor on breach of a contract to adjust a raker to a reaping-machine according to contract are damages for loss of part of the crop recoverable.[2] The supposed profits which an agent might have realized from the sale of goods during the unexpired term of a contract broken by the principal are speculative, and not an element of damage in an action for the breach.[3] And anticipated profits on the sale of goods purchased will not be allowed in an action against the vendor for failure to deliver the same, where the vendor notified the purchaser promptly of his refusal, and where no reason is assigned why the purchaser could not have bought the same class of goods immediately in the same market.[4]

ILLUSTRATIONS.—A promised to procure B the command of a ship. *Held*, that A was entitled to recover the full value of the command, though liable to dismissal, the probability being that he would have continued as master: *Richardson* v. *Mellish*, 2 Bing. 229. A commercial traveler was engaged to serve for three years at a commission upon the orders for goods obtained by him. *Held*, that he was entitled to claim compensation for the loss of commission by the abandonment of the business before the end of his term: *In re Patent Floor Cloth Co.*, 41 L. J. Ch. 476. Defendant, an advertising agent, sold to plaintiff space in newspapers to sell again. *Held*, in a action for breach of contract, that plaintiff was entitled to the profit that he would have received from responsible parties to whom he had sold the space: *Hubbard* v. *Rowell*, 51 Conn. 423. An express company failed to deliver architectural plans by which the sender was prevented from competing for a premium. *Held*, that, for the loss of opportunity to compete, the sender may recover damages: *Adams Ex. Co.* v. *Egbert*, 36 Pa. St. 360; 78 Am. Dec. 382. A had a contract with the United States to erect a public building of sandstone; Congress ordered, afterwards, that the building should be of marble, and A stopped work. *Held*, that he was entitled to prospective profits on his contract: *Schneider* v. *United States*, 19 Ct. of Cl. 547. Defendants contracted to

[1] Bridges *v.* Lanham, 14 Neb. 369; 45 Am. Rep. 121.

[2] Fuller *v.* Curtis, 100 Ind. 237; 50 Am. Rep. 786.

[3] Union Refining Co. *v.* Barton, 77 Ala. 148.

[4] Barker *v.* Mann, 5 Bush, 672; 96 Am. Dec. 373.

purchase for plaintiff on his specifications all the material required for use in operating his factory, but failed to do so. *Held*, that the estimated net profits of the operation of the factory during the time it was idle in consequence were proper elements of damage: *Taft* v. *Tiede*, 55 Iowa, 370. Plaintiff, under his contract with defendant to sell for eight months, was to have a precentage on sales. Defendant refused to let plaintiff sell. *Held*, that a precentage on sales which it was probable that plaintiff might have made, determined on conjecture wholly, was too speculative to be made an element of damages: *Brigham* v. *Carlisle*, 78 Ala. 243; 56 Am. Rep. 28. Plaintiff agreed to sell goods for defendant, to procure a team and other necessary means for the business, and to devote all his time to it; and defendant agreed to furnish him all the goods he could sell at a price below the retail price. Defendant failed to furnish the goods. *Held*, that plaintiff could recover only the value of the time lost as a result of the breach, and his reasonable expenditures, but not the profits he might have made had the goods been supplied as agreed: *Howe Machine Co.* v. *Bryson*, 44 Iowa, 159; 24 Am. Rep. 735.

§ 2624. Assessment of Damages Conclusive — Subsequent Damages from Same Cause not Recoverable. — When the damages have been finally assessed in an action, the amount is conclusive, and no future loss subsequently arising from the same cause can be made the ground of a new action.[1] So if the action be barred, as by lapse of time, or by a satisfaction or discharge, all claim for damages subsequently arising from the same cause, although then existing only in probability, is also barred with the action.[2] One who has failed to recover all the damages occasioned him by a single breach of a contract, because he did not properly declare for a portion of them in the first suit, cannot maintain a second suit for the recovery of such portion.[3] The party injured is entitled to recover for all damages previous to the trial, whenever it can be shown that the injury is continuous in its nature.[4] When there has been a total breach of

[1] Gibbs *v.* Cruikshank, L. R. 8 Com. P. 454.
[2] Howell *v.* Young, 5 Barn. & C. 259.
[3] Morey *v.* King, 51 Vt. 383.
[4] Puckett *v.* Smith, 5 Strob. 26; 53 Am. Dec. 686.

contract, the plaintiff may, if he demands it, recover full and final damages for the future as well as the past, although the period for full performance has not elapsed.[1] The true criterion whether damages for the non-performance of the whole contract, including damages not sustained when the action is brought and the suit is tried, can be recovered in an action for a breach of contract is, whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely putting an end to the contract.[2]

§ 2625. **Exception — New Cause of Action.** — But damages cannot be assessed in respect of any matter that would be ground for a new cause of action; as in the case of a continuing breach of a convenant to keep premises in repair, no damage can be given in respect of the probable continuance of the breach; but the damage for a continued breach must be sought in a new action, to which, therefore, the judgment recovered in a former action, including damages for the breach up to the time of that action only, would be no bar.[3]

§ 2626. **Expenses of Promisee Carrying out Broken Contract, when Recoverable.** — If the party bound to perform a contract do not perform it, the other party may supply the performance as nearly as he can, and charge as damages the reasonable expense incurred in so doing.[4] Thus damages for breach of a contract to sell goods, where the purchaser could have supplied the like goods in the same market, would include the purchaser's necessary expenses and compensation for his time and trouble in making the purchase and any advanced price which he was forced to pay.[5]

[1] Tippin *v.* Ward, 5 Or. 450.
[2] Remelee *v.* Hall, 31 Vt. 582; 76 Am. Dec. 140.
[3] Coward *v.* Gregory, L. R. 2 Com. P. 153.
[4] Leake on Contracts, 1050.
[5] Barker *v.* Mann, 5 Bush, 672; 96 Am. Dec. 373.

§ 2627. Nominal Damages Always Recoverable for Breach of Contract. — Every breach of contract being an infringement of a right imports some damage in law, consequently, if a plaintiff succeed in establishing a breach of contract, but fail in showing any appreciable damage in fact, he is nevertheless entitled in law to judgment for nominal damages.[1]

§ 2628. Damages on Contracts for Sale of Goods — Against Buyer for not Paying Price. — In an action for the price, the amount recoverable is that fixed in the contract; and if no price be fixed, it is the value of the goods at the time of delivery. The damages for detaining the price beyond the day of payment are nominal, unless interest be recoverable by way of damages.[2]

§ 2629. Against Buyer for not Accepting Goods Sold. — Here the measure of damages is the difference between the contract price and the market price of similar goods at the time they ought to have been accepted.[3] The seller may bring his action for breach of the contract; or he may sell the goods, and recover as damages the difference between the contract price and the price for which they were sold in good faith.[4] On a refusal to take goods sold at auction, the measure of damages is the difference between the price at which they were knocked down and the price obtained upon a resale of them.[5] But this is

[1] Heichew *v.* Hamilton, 4 G. Greene, 317; 61 Am. Dec. 122; First National Bank *v.* Tel. Co., 30 Ohio St. 555; 27 Am. Rep. 485; Fulkerson *v.* Eads, 19 Mo. App. 620.

[2] Leake on Contracts, 1057; Hill *v.* Hill, 1 N. J. L. 261; 1 Am. Dec. 206. See Brownlee *v.* Bolton, 44 Mich. 218.

[3] Rhodes *v.* Cleveland Rolling Mill Co., 17 Fed. Rep. 426; McNaughter *v.* Cassally, 4 McLean, 530; Mann *v.* United States, 3 Ct. of Cl. 404; Whitmore *v.* Coats, 14 Mo. 9; Rand *v.* White Mountains R. R. Co., 40 N. H. 79; Andrews *v.* Hoover, 8 Watts, 239; Ganson *v.* Madigan, 13 Wis. 67. And unaffected by his previous notice to the seller that he will not accept the property unless the seller chooses then to terminate the contract: Kadish *v.* Young, 108 Ill. 170; 48 Am. Rep. 548.

[4] Saladin *v.* Mitchell, 45 Ill. 79; Cook *v.* Brandeis, 3 Met. (Ky.) 555; Marshall *v.* Piles, 3 Bush, 249; Girard *v.* Taggart, 5 Serg. & R. 19; 9 Am. Dec. 327; Pollen *v.* Le Roy, 10 Bosw. 38; 30 N. Y. 549.

[5] Girard *v.* Taggart, 5 Serg. & R. 19; 9 Am. Dec. 327; Ashcom *v.* Smith, 2 Penr. & W. 211; 21 Am. Dec. 437.

not always conclusive, the real measure of damages being as in other cases of refusal to accept. The resale is evidence of what the goods were actually worth, but the jury are not bound by it.[1] Where a person orders an article to be manufactured of a certain size and kind, for a stipulated price, upon refusal of the purchaser to accept it, the manufacturer may recover the contract price.[2]

§ 2630. **Against Seller for not Delivering Goods.**— In an action against the seller for not delivering the goods, the measure of damages, the price remaining unpaid, is the difference between the contract price and the market value at the time appointed for delivery.[3] Where the price has been paid, it has been held that the plaintiff may recover the highest market price between the day fixed for delivery and the time the suit is brought, if there has been no unreasonable delay in bringing it,[4] or even to the time of rendering judgment.[5] On the breach of a contract to furnish goods, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser by reason of the non-delivery.[6] On breach of a contract

[1] Andrews *v.* Hoover, 8 Watts, 239.

[2] Bookwalter *v.* Clark, 11 Biss. 126; Ballentine *v.* Robinson, 46 Pa. St. 177. But when an artist prepares a statue or picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern, or style, or for a particular use or purpose, when he has fully performed his part of the contract, and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages, in an action against the vendee for breach of the contract, the full contract price of the manufactured article: Gordon *v.* Norris, 49 N. H. 376.

[3] Gainsford *v.* Carroll, 2 Barn. & C. 624; Startup *v.* Cortazzi, 2 Cromp. M. & R. 165; Williams *v.* Reynolds, 6 Best & S. 495; Pope *v.* Campbell, Hardin, 31; 3 Am. Dec. 722; Caldwell *v.* Reed, Litt. Sel. Cas. 366; 12 Am. Dec. 314; Dey *v.* Dox, 9 Wend. 129; 24 Am. Dec. 137; Dans *v.* Fieldler, 12 N. Y. 40; 61 Am. Dec. 130; Cannon *v.* Folsom, 2 Iowa, 101; 63 Am. Dec. 474; Ingram *v.* Rankin, 47 Wis. 406; 32 Am. Dec. 762; Marsh *v.* McPherson, 105 U. S. 709; Cullen *v.* Burns, 37 Ohio St. 236; Capen *v.* Glass Co., 105 Ill. 185; Hill *v.* Chipman, 59 Wis. 211; Stevens *v.* Lyford, 7 N. H. 360; Rose *v.* Bozeman, 41 Ala. 678; Smith *v.* Dunlop, 12 Ill. 184; Thompson *v.* Howes, 14 La. Ann. 45; Williams *v.* Wood, 16 Md. 220; McKnight *v.* Dunlop, 5 N. Y. 537; 55 Am. Dec. 370.

[4] Cannon *v.* Folsom, 2 Iowa, 101; 63 Am. Dec. 474; Myer *v.* Wheeler, 65 Iowa, 370.

[5] Brashaer *v.* Davidson, 31 Tex. 190; 98 Am. Dec. 525.

[6] Culin *v.* Woodbury Glass Works, 108 Pa. St. 220.

to sell fruit on the trees, the measure of damages is the market price at the orchard, or if there be no market price there, the price at the market, less the cost of taking it there, if the vendee was ready to take it.[1] On breach of a contract for the sale of costly personal property to be used for manufacturing purposes at a distant place, transportation to which is difficult, and there is no market value at the place of delivery, it may be estimated by deducting the cost of manufacturing and the price of the raw material from the market price of the manufactured article.[2] On breach of a contract to deliver goods purchased for a foreign market, the intended place of sale being known to the vendor, and it being impossible to discover the inferiority complained of until the goods reach their destination, the measure of damages is the difference between the market price of the goods contracted for at the date of the arrival and the price realized for the goods delivered, with costs and expenses of sale.[3] The measure of damages on breach of contract to furnish freight to be transported by the plaintiff for a stipulated sum is the actual loss to the plaintiff, and not the contract price; and the defendant may reduce the damages by showing that the plaintiff received freight from others in lieu of that which the defendant failed to furnish, or by proving in any other way that the injury was less than the contract price.[4]

The damages must be measured by the full market value, although the goods have become greatly enhanced in value since the sale by the discovery of a peculiar quality in the goods that was before unknown.[5] The buyer cannot, in general, claim increased damages for the loss of profit on a resale of the goods at a price

[1] Dabovich *v.* Emeric, 12 Cal. 171.
[2] Equitable Gas Light Co. *v.* Baltimore Coal Tar etc. Co., 65 Md. 73.
[3] Camden Consolidated Oil Co. *v.* Schlens, 59 Md. 31; 43 Am. Rep. 537.
[4] Shannon *v.* Comstock, 21 Wend. 457; 34 Am. Dec. 262.
[5] Josling *v.* Irvine, 6 Hurl. & N. 512; 30 L. J. Ex. 78.

higher than the market price at the time appointed for delivery;[1] nor for his trouble and expense in procuring the contract to be made;[2] nor for damages for delay in business, caused by the non-delivery of the articles; nor for expenses incurred in attempting to procure them.[3]

ILLUSTRATIONS. — A agreed to deliver coal from his mine to B, at a certain point. *Held*, that the difference between the contract price and the market price at the place of delivery, with cost of transportation added, was the measure of damages: *Johnson* v. *Allen*, 78 Ala. 387; 56 Am. Rep. 34. A contractor promised to deliver wheat at a certain time, but did not do so, and, after repeated subsequent demands and promises, was sued. *Held*, that damages for failure to deliver it were to be fixed by the price at the time he last promised: *McDermid* v. *Redpath*, 39 Mich. 372.

§ 2631. Where Goods are Bought for Specific Purpose. — The measure of damages for breach of a contract to deliver articles for a certain purpose is the difference between their value as furnished and as contracted for.[4] So where the goods are contracted for for a special use, known to the seller, he is liable for any loss occasioned by their not being supplied at all, or by their failing to satisfy the intended use. On a breach of warranty on a sale of an engine to be used in elevating grain at a warehouse, the warrantee is entitled to recover of the warrantor such damages as naturally, according to the usual course of things, would result from the breach; and the necessary expense incurred by the warrantee in putting up said engine would be such natural damages. So, also, the expense incurred in handling and storing grain while trying to work the engine, which proved a failure.[5] Upon the sale of garden or vegetable seeds with warranty, either express or implied, as to kind, and the vendor

[1] Williams v. Reynolds, 6 Best & S. 495; 34 L. J. Q. B. 221.
[2] Stevens v. Lyford, 7 N. H. 360.
[3] Porter v. Woods, 3 Humph. 56; 39 Am. Dec. 153; Buffalo Barbed Wire Co. v. Phillips, 64 Wis. 338.
[4] Stark v. Alford, 49 Tex. 260; Davis v. Fish, 1 G. Greene, 406; 48 Am. Dec. 387.
[5] Drake v. Sears, 8 Or. 209.

knows the use to be made of the seeds, he is liable, in case they are not of the kind warranted, for the difference in value between the value of the crop actually produced and of the crop which would have been produced by the seeds as warranted.[1] A druggist, who on being applied to for Paris green, knowing that it is required for killing cotton-worms, delivers an inferior article as Paris green, although in good faith, and without express warranty, is liable in damages for the failure of the crop caused thereby, and the measure of damages is the value of the crop just before its destruction, with the cost of the compound and its preparation and application, and interest on the moneys thus expended.[2]

But the contractor is not liable for the loss due to the special purpose for which the article was intended to be used, of which he was ignorant, or with reference to which he did not contract; as where the article was required to complete the repairs of a machine, of which he was not aware, it was held that he was not responsible for the loss caused by the delay in working the machine, because he did not contract with reference to that purpose, nor was it within his contemplation in contracting.[3]

ILLUSTRATIONS. — An action was brought for beach of warranty of a ship's cable. *Held*, that the damages recoverable were the value of an anchor which the cable was made and intended for holding, and which was lost through a defect in the cable: *Borradaile* v. *Brunton*, 8 Taunt. 535. An action was brought against a gas company for providing a defective pipe, under a contract to supply the plaintiff's premises with gas. The plaintiff was held entitled to recover the damages caused by an explosion of gas that had escaped and was set on fire through the negligence of a person approaching it with a light: *Bur-*

[1] Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438; 38 N. J. L. 496; 20 Am. Rep. 425; White v. Miller, 71 N. Y. 118; 27 Am. Rep. 13; 78 N. Y. 393; 34 Am. Rep. 544. But see, as holding that the measure of damages is the purchase-money with interest, and the expense of cultivation, not including prospective profits, Butler v. Moore, 68 Ga. 780; 45 Am. Rep. 508.

[2] Jones v. George, 61 Tex. 345; 48 Am. Rep. 280; 56 Tex. 149; 42 Am. Rep. 689.

[3] Portman v. Middleton, 4 Com. B., N. S., 322.

rows v. *March Gas Co.*, L. R. 5 Ex. 67. An action was against a carriage-builder for supplying a defective pole for use in a carriage, that was not reasonably fit for the purpose. *Held*, that he was responsible for the damage caused to the horses by reason of the pole breaking and frightening the horses: *Randall* v. *Newson*, L. R. 2 Q. B. D. 102. A manufacturer contracted to supply a thrashing-machine to a farmer by a certain day, to be ready for harvest. *Held*, that he was liable for the loss caused by want of the machine, in the crops being exposed to the weather while waiting for the machine, and in the expense of storing the corn instead of thrashing it out: *Smeed* v. *Foord*, 1 El. & E. 602. Defendant agreed to sell guano to plaintiff, to be used, as defendant knew, on plaintiff's cotton crop. Defendant delivered only one half of the quantity called for by the contract, and it was then too late for plaintiff to procure more elsewhere. *Held*, that the measure of damages was the difference in value between the cotton raised on the land on which the guano was used, and that raised on the adjoining land of the same quality, and cultivated in the same manner, on which no guano was used: *Bell* v. *Reynolds*, 78 Ala. 511; 56 Am. Rep. 52. A agreed to furnish B a superior brick for the front of his house. The superior brick not being forthcoming, B changed his plan without attempting to procure it elsewhere, and used inferior brick. *Held*, that he could not charge A with the difference in the value of the brick: *Sweeney* v. *Jamieson*, 2 Wash. 254.

§ 2632. **For Breach of Warranty Generally.** — Upon a contract of sale of a specific chattel with a warranty, the measure of damages for a breach of the warranty varies according to whether the chattel has been returned or kept. The chattel can be returned or refused only where the contract so provides, in the event of a breach of warranty, or where the contract is made conditional upon the warranty, or where the seller agrees to take it back, or where the sale was effected by a fraudulent warranty, and the buyer has repudiated it on that ground.[1] If the chattel has been returned, the measure of damages is the amount of price which was paid for it, unless it was returned under terms agreed upon to a different effect. If the chattel be kept, the measure of damages is the dimi-

[1] Leake on Contracts, 1064.

nution in value owing to the defect warranted against;[1] that is, the difference between its actual value and what its value would have been had it conformed to the warranty.[2] When the capacity of a saw-mill is less than as warranted by the vendor, the measure of the purchaser's damages is the difference between the value of its earnings and their value had the capacity been as represented.[3] On breach of warranty of the soundness of live-stock, the measure of damages is the difference between the value of the stock at the time they were purchased and the value as it would have been at the same time if they had been as they were warranted to be, and this measure cannot be increased by the care and feed wasted upon some of the stock which were sick.[4] One who knowingly sells animals with a contagious disease, representing them sound, is liable for consequent effects on other animals owned by the purchaser.[5]

The measure of damages for a failure of title to goods sold is the price paid, with interest.[6] Where they are sold for a lump price, and title fails as to a part of them, the measure of damage is the difference between the value of the entire lot and the value of the remaining portion.[7] The vendor can recover nominal damages only for breach of the implied warranty of title where a judgment for the

[1] Leake on Contracts, 1064; Fisk v. Tank, 12 Wis. 276; 78 Am. Dec. 737; Passinger v. Thorburn, 34 N. Y. 634; 90 Am. Dec. 753; Lewis v. Roundtree, 79 N. C. 122; 27 Am. Rep. 309; Nye v. Iowa etc. Works, 51 Iowa, 129; 33 Am. Rep. 121; Woodworth v. Woodburn, 20 Ill. 184.

[2] Tuttle v. Brown, 4 Gray, 457; 64 Am. Dec. 80; Burton v. Young, 5 Harr. 233; Hook v. Stovall, 26 Ga. 704; Crabtree v. Kile, 21 Ill. 180; Wallace v. Wren, 32 Ill. 146; Overbay v. Lighty, 27 Ind. 27; Street v. Chapman, 29 Ind. 142; Moulton v. Scruton, 39 Me. 287; Grose v. Hennessey, 13 Allen, 389; Fales v. McKeon, 2 Hilt. 53; Kiernan v. Rocheleau, 6 Bosw. 148; Muller v. Eno, 14 N. Y. 597; McGavock v. Wood, 1 Sneed, 181; Stoudenmeier v. Williamson, 29 Ala. 558.

[3] Walker v. France, 112 Pa. St. 203.

[4] Cline v. Myers, 64 Ind. 304.

[5] Rose v. Wallace, 11 Ind. 112; Sherrod v. Langdon, 21 Iowa, 518; Faris v. Lewis, 2 B. Mon. 375.

[6] Burt v. Dewey, 31 Barb. 540; Ware v. Weathnall, 2 McCord, 413; Arthur v. Moss, 1 Or. 193; Anding v. Perkins, 29 Tex. 348.

[7] Hoffman v. Chamberlain, 40 N. J. Eq. 663; 53 Am. Rep. 783; reversing 38 N. J. Eq. 40.

value of the chattel is recovered against him by the true owner, but the judgment is not satisfied.[1]

ILLUSTRATIONS. — Defendants, manufacturers of carriage-springs, sold to the plaintiffs, manufacturers of carriages, carriage-springs to be used by the plaintiffs in carriages to be manufactured by them, and warranted them. Some of the springs, being placed in the carriages, proved defective. *Held*, that the defendants were liable to the plaintiffs for the expense of renewing them and applying them: *Thoms* v. *Dingley*, 70 Me. 100; 35 Am. Rep. 310. In an action on a warranty in a sale of stock, that it would be "worth seven hundred dollars, market value, within one year from date," the plaintiff contended that the measure of damages was the difference between seven hundred dollars and the market value at the end of the year; defendant contended that the measure of damages was the difference between seven hundred dollars and the highest price the stock reached in market during the year. *Held*, defendant's contention was correct: *Woodward* v. *Powers*, 105 Mass. 108; 7 Am. Rep. 503.

§ 2633. Breach of Warranty of Description of Goods. — Upon a contract for the sale and delivery of goods of a described quantity and quality, the seller is bound to deliver goods answering to the description contracted for, which he substantially warrants; the buyer may refuse to accept inferior goods, and sue the seller for not delivering goods according to the contract, in which action the measure of damages is the value of goods of the description contracted for at the time appointed for delivery, or the difference between that value and the contract price, accordingly as he has or has not paid the price. If the buyer has accepted the goods, the measure of damages is the difference between the value of goods of the description contracted for and the value of those actually delivered and accepted.[2] If the seller knew that the buyer was buying for the purpose of resale, he may also be liable for the special damage occasioned to the buyer by reason of his not being able to complete such resale

[1] Burt *v.* Dewey, 40 N. Y. 283; 100 Am. Dec. 482.

[2] Leake on Contracts, 1065.

through the inferiority of the goods delivered.[1] If the buyer, having accepted the goods, is sued for the price, he may prove, in reduction of damages, the difference in value between the goods delivered and those contracted for, and diminish the price by that amount.[2]

§ 2634. Delay or Default by Carrier in Delivering Goods.—In an action against a carrier for default in delivering goods, the general measure of damages is the value of the goods at the place of destination at the time when they ought to have been delivered;[3] and the highest market value between the time of receipt by the carrier and suit brought has been allowed in some cases.[4] If there is no market for them at the place of destination, and the owner requires the goods for his own use in manufacturing enterprises, or the like, the expense of procuring them in some other mode, and the actual loss by expense of hands, etc., from the necessary suspension of business occasioned by the default, may be considered in estimating the damages.[5] But where the complaint only states the value of the goods at the shipping-point, and there is nothing to show that they were worth more at the place of destination, the plaintiff can only recover their value at the shipping-point, with interest from the time of the loss.[6]

[1] Leake on Contracts, 1066.

[2] Leake on Contracts, 1066.

[3] Bracket *v.* McNair, 14 Johns. 170; 7 Am. Dec. 447; O'Connor *v.* Forster, 10 Watts, 418; Ward *v.* R. R. Co., 47 N. Y. 29; 7 Am. Rep. 405; Armory *v.* McGregor, 15 Johns. 23; 8 Am. Dec. 205; McGregor *v.* Kilgore, 6 Ohio, 358; 27 Am. Dec. 260; Rathbone *v.* Neal, 4 La. Ann. 563; 50 Am. Dec. 579; Shaw *v.* R. R. Co., 5 Rich. 462; 57 Am. Dec. 769; Galena etc. R. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 575; Hand *v.* Baynes, 4 Whart. 204; 33 Am. Dec. 54; Dean *v.* Vaccaro, 2 Head, 488; 75 Am. Dec. 744; Laurent *v.* Vaughan, 30 Vt. 90; Lindley *v.* R. R. Co., 88 N. C. 547; The Mangalore, 9 Saw. 71; Texas etc. R. R. Co. *v.* Nicholson, 61 Tex. 491; Taylor *v.* Collier, 26 Ga. 122; Davis *v.* R. R. Co., 1 Hilt. 543; Wallace *v.* Vigus, 4 Blackf. 260; Perkins *v.* R. R. Co., 47 Me. 573; 74 Am. Dec. 507; Spring *v.* Haskell, 4 Allen, 112. But see, as holding their value at the place of reception and not at the place of delivery is the measure of damages in the absence of neglect or misconduct on the carrier's part, Edminson *v.* Baxter, 4 Hayw. (Tenn.) 112; 9 Am. Dec. 751.

[4] Arrington *v.* R. R. Co., 6 Jones, 68; 72 Am. Dec. 559.

[5] Cooper *v.* Young, 22 Ga. 269; 68 Am. Dec. 502.

[6] Blumenthal *v.* Brainerd, 38 Vt. 402; 91 Am. Dec. 349.

In the case of delay by the carrier in delivering, the consignee may recover for a fall in the market price during the delay.[1] For failure to deliver machinery transported within a reasonable time, the damage is the value of its use during the time it was improperly detained.[2] Unless a carrier has been notified of the urgent necessity for prompt carriage, he will be liable in case of his negligent delay only for the usual and ordinary damages.[3] Thus plaintiff cannot recover more than the difference between the market value of the goods when they should have been delivered, and their value when they were delivered, by showing a special contract with a third person, of which the carrier knew nothing.[4] The fact that the consignee was paying interest on a debt which he depended on the goods to satisfy is not an element of damages.[5] But to difference in value may be added any reasonable loss or expense occasioned by the delay.[6]

And the carrier is responsible for all such damages as may be taken to have been in the contemplation of both parties, at the time of the receipt of the goods, as a consequence of the failure to deliver them.[7] Where a piece of machinery was not delivered with the rest, whereby the whole was kept idle, it was held that the measure of damages was not what might have been made by the machinery during the time it was idle, but the legal interest on the capital invested, the price of the hire of

[1] Collard *v.* R. R. Co., 7 Hurl. & N. 79; Sisson *v.* R. R. Co., 14 Mich. 489; 90 Am. Dec. 253; Smith *v.* R. R. Co., 12 Allen, 531; 90 Am. Dec. 166; Peet *v.* R. R. Co., 20 Wis. 594; 91 Am. Dec. 446; Weston *v.* R. R. Co., 54 Me. 376; 92 Am. Dec. 553; Deming *v.* R. R. Co., 48 N. H. 455; 2 Am. Rep. 267; Devereux *v.* Buckley, 34 Ohio St. 16; 32 Am. Rep. 342; St. Louis etc. R. R. Co. *v.* Phelps, 46 Ark. 485; Kent *v.* R. R. Co., 22 Barb. 278; Medbury *v.* R. R. Co., 26 Barb. 564; Briggs *v.* R. R. Co., 28 Barb. 515; Jones *v.* R. R. Co., 29 Barb. 633. See Smith *v.* Griffith, 3 Hill, 333; 38 Am. Dec. 639.

[2] Priestley *v.* R. R. Co., 26 Ill. 205; 79 Am. Dec. 369.

[3] Pacific Express Co. *v.* Darnell, 62 Tex. 639.

[4] Columbus etc. R. R. Co. *v.* Flournoy, 75 Ga. 745.

[5] Houston etc. R. R. Co. *v.* Jackson, 62 Tex. 209.

[6] Nettles *v.* R. R. Co., 7 Rich. 190; 62 Am. Dec. 409.

[7] Simpson *v.* R. R. Co., L. R. 1 Q. B. D. 277.

the hands necessarily unemployed during the time, the cost of sending for the missing machinery, and all other damages that resulted necessarily from the defendant's negligence.[1] For the loss of a package containing architect's plans, the measure of damages is the reasonable expense of procuring new plans; but the consequent delay in constructing the house is not an element, if the carrier had no notice of the contents of the package, or their intended use.[2]

But damages that could not reasonably be contemplated by both parties as a consequence of a default in delivery are not recoverable.[3] Thus a carrier was held not responsible for the loss of profits by the manufacturer of a special article in which the goods were intended to be used by the owner;[4] nor for the loss of profit by a special mode of sale that had been arranged by the sender of the goods;[5] nor for the hotel expenses of the consignee while waiting for the arrival of the goods.[6] Where the carrier had delayed delivering a shaft of a mill sent for repairs, he was held not liable for loss of profits of the mill caused by its stoppage for want of the shaft.[7] Where he failed to deliver certain bales of cotton, he was held not liable for loss of profits caused by the mill having no cotton to work.[8] Where he failed to deliver coal, he was held not liable for loss of profits by the stoppage of an iron-mill through lack of the coal.[9] Where the contract is to transport specified goods for a given time to a place designated, the fact that a ground of the contract, known to the carrier, was the owner's contracts with third parties for sales of the goods to them, does not entitle him to recover of the

[1] Foard *v.* R. R. Co., 8 Jones, 235; 78 Am. Dec. 277.
[2] Mather *v.* American Express Co., 138 Mass. 55; 52 Am. Rep. 258.
[3] Hadley *v.* Baxendale, 9 Ex. 341.
[4] Wilson *v.* R. R. Co., 9 Com. B., N. S., 632.
[5] Great Western R. R. Co. *v.* Redmayne, L. R. 1 Com. P. 329.
[6] Woodger *v.* R. R. Co., L. R. 2 Com. P. 318.
[7] Hadley *v.* Baxendale, 9 Ex. 341; Thomas etc. Mfg. Co. *v.* R. R. Co., 62 Wis. 642; 51 Am. Rep. 725.
[8] Gee *v.* R. R. Co., 6 Hurl. & N. 211.
[9] Cooper *v.* Young, 22 Ga. 269; 68 Am. Dec. 503.

carrier the profits which he would have made but for the breach of the contract of carriage.[1] A carrier who at first wrongfully refused to deliver, but afterwards delivers, goods consigned to a manufacturer, is not liable for consequential damages arising from delay to the consignee's works caused by such refusal, or for a loss of profits from the same cause; but is liable for the expense of sending to the carrier's office a second time for the goods.[2]

Where the goods are delivered damaged, the measure is the difference between their value as damaged and their value at their destination had they been delivered in good order.[3] Where a machine is so damaged that the cost of repairing it would equal the cost of a new one, the consignee may recover its value, the freight paid, and interest from the time when it should have been delivered.[4] Where goods are sent to a consignee with an option to take them at a price stated, or to return them, the measure of damages for their loss by a carrier is the price fixed, with interest from the day the goods would, in the ordinary course of transportation, have reached the consignee.[5] The measure of damages against a carrier for loss of a draft, bill, note, or other security for the payment of money is *prima facie* the amount due on the same, but the defendant may reduce the damages by proof of payment, the maker's insolvency, or any fact tending to invalidate the security.[6]

[1] Harvey *v.* R. R. Co., 124 Mass. 421; 26 Am. Rep. 673.

[2] Waite *v.* Gilbert, 10 Cush. 177. On a breach of the carrier's agreement to carry salt by water to a market, it was held that the measure of damage was the excess in value at the place of destination at the time when it should have arrived there, over its value at the place of shipment and the agreed rates for transportation; and that the extra expense of transporting it by land was not recoverable: Ward's Central and Pacific Lake Co. *v.* Elkins, 34 Mich. 439; 22 Am. Rep. 544.

[3] Henderson *v.* Maid of Orleans, 12 La. Ann. 352; The Col. Ledyard, 1 Sprague, 530; Lewis *v.* Ship Success, 18 La. Ann. 1; Ingledew *v.* R. R. Co., 7 Gray, 86; Black *v.* R. R. Co., 45 Barb. 40; McGregor *v.* Kilgore, 6 Ohio, 358; 27 Am. Dec. 260.

[4] Thomas B. & W. Manufacturing Co. *v.* R. R. Co., 62 Wis. 642; 51 Am. Rep. 725.

[5] Magnin *v.* Dinsmore, 62 N. Y. 35; 20 Am. Rep. 442.

[6] Zeigler *v.* Wells, Fargo, & Co., 23 Cal. 179; 83 Am. Dec. 87.

Where a carrier unlawfully refuses to carry goods, the measure of damages is the difference between the value of goods at the point of destination when they should have arrived there, and their value at the same time at the place of detention, including necessary expenses incurred by such detention, and deducting reasonable charges of transportation.[1]

§ 2635. **In Carriage of Passenger.**—In an action by a passenger against a carrier for breach of the contract to deliver him at his destination, he may claim as damages the expense of getting there by other means, if there be any, or compensation for the trouble and inconvenience of walking there, if there be no other means of getting there, it being the direct object contemplated in the contract that he should reach his destination.[2] So a passenger negligently carried beyond his station may recover compensation for the inconvenience, loss of time, and labor of traveling back.[3] So damages may be recovered for any fraudulent or oppressive conduct on the part of the carrier producing great bodily or mental suffering.[4] So one who has been unlawfully and forcibly ejected is entitled to damages for the indignity and injury to his feelings.[5] One who is wrongly ordered by a conductor of a train to pay a fare or leave the train, and who leaves the train, is not limited in his action against the company to the price of the fare, but he may recover damages sustained by reason of an illness caused by his leaving the train at that point.[6] In an action against a carrier to recover damages for failing to carry plaintiff to San Francisco via Nicaragua, it was held that the time the plaintiff lost by reason of

[1] Galena etc. R. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 574; Michigan etc. R. R. Co. *v.* Caster, 13 Ind. 164; Houston etc. R. R. Co. *v.* Smith, 63 Tex. 322.

[2] Leake on Contracts, 1069.

[3] Pennsylvania R. R. Co. *v.* Aspell, 23 Pa. St. 147; 62 Am. Dec. 323.

[4] Jones *v.* Steamship Cortes, 17 Cal. 487; 79 Am. Dec. 142.

[5] Allen *v.* Camden etc. Steamboat F. Co., 46 N. J. L. 198.

[6] Yorton *v.* R. R. Co., 62 Wis. 367.

his detention on the isthmus, his expenses there and of his return to New York, the time he lost by reason of his sickness after he returned to New York, and the expenses of such sickness, so far as the same were occasioned by the defendant's negligence or breach of duty, were damages which the plaintiff was entitled to recover.[1] But in an action to recover damages against the master of a steamship for illegal expulsion from his vessel, no compensation can be obtained for the subsequent hardships and difficulties of the passenger expelled, caused by his failure to obtain transportation in other vessels.[2]

ILLUSTRATIONS. — A railroad company contracted with plaintiff to carry excursionists to a certain place, on an occasion of public amusements, at a certain reduced rate of fare. On its breach of the contract, *held*, that the plaintiff might recover the profits which he might have realized on sales of tickets actually made, and the difference in expense of transportation of those whom he had thus agreed to take on the faith of the contract, but nothing for profits of conjectural sales: *Houston etc. R. R. Co.* v. *Hill*, 63 Tex. 381; 51 Am. Rep. 642. By a collision on a railroad, a theatrical manager, who, with his troupe, was a passenger, was prevented from reaching his destination in time to fulfill an advertised engagement, for which tickets had been sold, and had to refund the ticket-money. *Held*, that he could not recover that amount: *Georgia R. R. Co.* v. *Hayden*, 71 Ga. 518; 51 Am. Rep. 274.

§ 2636. Contracts for Sale of Land — Damages in Action by Seller. — In an action by the seller against the purchaser of land, if the conveyance has been executed and accepted, the whole purchase-money is recoverable; but if the purchaser refuses to accept the conveyance, and the land remains the property of the vendor, the damages consist,—1. In the loss to the vendor of the costs of the sale and of the preparations for completing the contract.[3] If the purchaser has been in possession, the vendor may charge him with the profits made off the

[1] Williams v. Vanderbilt, 28 N. Y. 217; 84 Am. Dec. 333.
[2] Pearson v. Duane, 4 Wall. 605.
[3] Laird v. Pim, 7 Mees. & W. 474; Hurd v. Dunsmore, 63 N. H. 171.

land.[1] 2. The vendor is entitled to recover, for the loss of his bargain, the difference between the price agreed to be paid for the land, and its value at the time of the breach.[2]

§ 2637. Damages in Action by Purchaser. — The purchaser, where the seller does not make a good title and complete the sale, may recover the purchase-money he has paid, with interest, and the costs of making the contract of sale, and of investigating the title.[3] Where the vendor fails to complete by reason only of being unable to give a good title, the purchaser cannot recover for the loss of his bargain; he cannot, as a rule, claim any other damages than his expenses in the transaction, provided the vendor acted *bona fide*, and with a reasonable ground of belief that he had a good title.[4] Nor can the purchaser recover as damages the expenses incurred by him in the negotiation of the contract; nor the expense of a survey of the estate; nor the expense of a deed of conveyance prepared before ascertaining the state of the title; nor can he recover the costs of raising the purchase-money in readiness for payment, nor interest or loss upon it

[1] Laird *v.* Pim, 7 Mees. & W. 474.

[2] Hurd *v.* Dunsmore, 63 N. H. 171; Laird *v.* Pim, 7 Mees. & W. 474; Congregation Beth Elohim *v.* Central Presbyterian Church, 10 Abb. Pr., N. S., 484; Griswold *v.* Sabin, 51 N. H. 167; 12 Am. Rep. 76; Porter *v.* Travis, 40 Ind. 556; Old Colony R. R. Co. *v.* Evans, 6 Gray, 25; 66 Am. Dec. 394; Sawyer *v.* McIntyre, 18 Vt. 27; Garrard *v.* Dollar, 4 Jones, 175; 67 Am. Dec. 271; and see note to this case in 67 Am. Dec. 275–283.

[3] Hammond *v.* Hannin, 21 Mich. 374; 4 Am. Rep. 490; Hall *v.* Delaplaine, 5 Wis. 206; 68 Am. Dec. 57; Thompson *v.* Guthrie, 9 Leigh, 101; 33 Am. Dec. 225; Kelly *v.* Bradford, 3 Bibb, 317; 6 Am. Dec. 656; Blackwell *v.* Lawrence Co., 2 Blackf. 143; Bush *v.* Cole, 28 N. Y. 261; 84 Am. Dec. 343; Mack *v.* Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Pumpelly *v.* Phelps, 40 N. Y. 59; 100 Am. Dec. 468; Fernander *v.* Dunn, 19 Ga. 497; 65 Am. Dec. 607; Foley *v.* McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Herndon *v.* Harrisson, 34 Miss. 486; 69 Am. Dec. 399.

[4] Floureau *v.* Thornhill, 2 W. Black. 1078; Herndon *v.* Venable, 7 Dana, 371; Dunnica *v.* Sharp, 7 Mo. 71; Stewart *v.* Noble, 1 G. Greene, 26; Bain *v.* Fothergill, L. R. 6 Ex. 59; L. R. 7 Eng. & Ir. App. 158; Drake *v.* Baker, 34 N. J. L. 358; Mack *v.* Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Conger *v.* Weaver, 20 N. Y. 140; Cockcroft *v.* R. R. Co., 69 N. Y. 201; Foley *v.* McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Pumpelly *v.* Phelps, 40 N. Y. 59; 100 Am. Dec. 463.

while lying idle;[1] nor can he recover expenses incurred by him in erecting a building on his other land by reason of his not obtaining a right to put thereon a similar building standing upon the land agreed to be conveyed.[2] But where the vendor can give a good title, but he refuses to convey, or to do all that is necessary on his part to complete the contract, or where he knew he had no title when he made the contract, the purchaser may claim as damages the full benefit the contract would be to him, if completed;[3] hence he may recover for the loss of his bargain, the measure of damages being the value of the land at the time of the breach.[4] A vendor in good faith, believing he has title, covenanting to convey land, and discovering, before any part of the consideration money is paid, a defect in his title, is not liable to damages for a refusal to convey.[5]

The measure of damages for a failure or defect of title to part of the land conveyed is the relative value which the part taken away bears to the whole, as fixed by the price agreed upon for the whole, subject, however, to

[1] Hodges *v.* Litchfield, 1 Bing. N. C. 492; Hanslip *v.* Padwick, 5 Ex. 615; Sweetland *v.* Smith, 1 Car. & M. 585.

[2] Warner *v.* Bacon, 8 Gray, 397; 69 Am. Dec. 253.

[3] Foley *v.* McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Hall *v.* Delaplaine, 5 Wis. 206; 68 Am. Dec. 59; Tracy *v.* Gunn, 29 Kan. 508. "The rule, as between vendor and purchaser of real property, that if the purchase goes off from want of title in the vendor, the purchaser is only entitled to the expenses incurred, and cannot recover for the loss of his bargain, is an anomalous case. But this rule only applies to the particular case to make out a good title; if the sale goes off for any other reason, e. g., because the vendor refuses to complete the sale, the purchaser is entitled to full compensation for the loss of his bargain": Simons *v.* Patchett, 7 El. & B. 572.

[4] Griswold *v.* Sabin, 51 N. H. 167; 12 Am. Rep. 76; McConnell *v.* Dunlap, Hardin, 41; 3 Am. Dec. 723; Driggs *v.* Dwight, 17 Wend. 71; 31 Am. Dec. 283; Cox *v.* Henry, 32 Pa. St. 18; Drake *v.* Baker, 34 N. J. L. 358; Pumpelly *v.* Phelps, 40 N. Y. 59; 100 Am. Dec. 463; Hammond *v.* Hannin, 21 Mich. 374; 4 Am. Rep. 490; Kirkpatrick *v.* Downing, 58 Mo. 32; 17 Am. Rep. 678; Plummer *v.* Rigdon, 78 Ill. 222; 20 Am. Rep. 261; Doherty *v.* Dolan, 65 Me. 87; 20 Am. Rep. 677; Yokum *v.* McBride, 56 Iowa, 139. The rule or measure of damages for the breach of a contract to lease is the same as for a breach of contract to sell land: McClowry *v.* Croghan, 1 Grant Cas. 307. But it has been held in Alabama that the measure of damages is the value of the lease, and not the consideration paid, and this, although there was neither fraud nor wrongful conduct: Snodgrass *v.* Reynolds, 79 Ala. 452; 58 Am. Rep. 601.

[5] Baldwin *v.* Munn, 2 Wend. 399; 20 Am. Dec. 627.

proof by the parties that the part lost was of greater or less value from particular advantages or disadvantages.[1] The measure of damages for breach of a contract to convey land, in consideration of the performance of an act of uncertain value by the vendee, is not the value of the land, but the injury suffered by the vendee, where, before the performance on his part, the vendor gives him notice, *bona fide*, that he cannot convey for want of title; but the value of the land is the measure where the vendee has performed such contract on his part.[2] The measure of damages for the vendor's fraudulent misrepresentations as to the condition and situation of the land sold is the difference between the contract price and the actual value at the time of sale.[3]

The vendee of land under a parol agreement can maintain an action against the vendor, upon his refusal to comply with the contract, for compensation for the expense, trouble, and loss of time incurred, though he can recover nothing for the loss of the bargain.[4] If no money has been paid, and no expenses incurred, the damages are merely nominal.[5]

ILLUSTRATIONS. — A husband contracted to sell land. The wife, without collusion with the husband, refused to join in the deed. In an action for breach of the contract, *held*, that compensatory damages only were recoverable: *Burk* v. *Serrill*, 80 Pa. St. 413; 21 Am. Rep. 105. Defendant sold to plaintiff a tract of land with valuable buildings thereon, representing and believing that it contained 127 acres. It contained in fact only 81 acres. *Held*, that plaintiff was entitled to compensation for the deficiency, according to the average value of the land without the buildings, taking the price paid for the land with the buildings as the true value of both together: *Hoback* v. *Kilgore*, 26 Gratt. 442; 21 Am. Rep. 317.

[1] Beaupland *v.* McKeen, 28 Pa. St. 124; 70 Am. Dec. 115.
[2] Rohr *v.* Kindt, 3 Watts & S. 563; 39 Am. Dec. 53.
[3] Van Epps *v.* Harrison, 5 Hill, 63; 40 Am. Dec. 314.
[4] Welch *v.* Lawson, 32 Miss. 170; 66 Am. Dec. 606.
[5] McCafferty *v.* Griswold, 99 Pa. St. 270.

§ 2638. Measure of Damages in Other Cases of Breach of Contract.—The measure of damages for breach of a contract to employ plaintiff to cultivate a farm on shares is what he could have made on the farm;[1] for breach of a contract by one person to support another for his life, is the whole value of the contract;[2] for failure to erect a mill at the time stipulated in the contract, is the fair rental value of the mill during the time the owner is thus kept from its use;[3] for breach of a contract to pay cash and to give certain promissory notes for property sold and delivered, is the contract price of such property;[4] for breach of his contract by a warehouseman to deliver, on demand, wheat stored with him, is the value of the wheat at the time it should have been delivered;[5] for a breach of a contract to exchange one article for another, is the difference in value between the two articles;[6] for breach of an agreement not to engage in business at a certain place, is the actual damages sustained, and not merely the consideration paid;[7] for breach of contract of an insurance company for wrongful dismissal of the plaintiff from its service, is the value of probable renewals of policies actually obtained by him;[8] for breach of an agreement to assign a fire insurance policy which, by reason of the breach, became void, is the cost of insurance for the unexpired term of the policy, not the loss from the burning of the house;[9] for breach of a stipulation by an insurance company with an agent not to increase the rates of insurance during his employment, is what he would have earned had such increase of rates not been made;[10] for breach of a contract to make a road of a certain grade, is

[1] Hoy *v.* Gronoble, 34 Pa. St. 9; 75 Am. Dec. 628.
[2] Amos *v.* Oakley, 131 Mass. 413.
[3] Abbott *v.* Gatch, 13 Md. 314; 71 Am. Dec. 635.
[4] Worthy *v.* Jones, 11 Gray, 168; 71 Am. Dec. 696.
[5] Leonard *v.* Dunton, 51 Ill. 482; 99 Am. Dec. 568.
[6] Montelius *v.* Atherton, 6 Col. 224.
[7] Stewart *v.* Challacombe, 11 Ill. App. 379.
[8] Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347; 43 Am. Rep. 91.
[9] Dodd *v.* Jones, 137 Mass. 322.
[10] Life Ass'n of America *v.* Ferrill, 60 Ga. 414.

what it will cost to complete the grading as required by the contract;[1] for a breach of a contract for the exclusive sale of an article of merchandise, is the value of the agent's time during the period he was employed under the contract, with reasonable expenses added and diminished by the sum actually earned.[2]

The measure of damages on failure to deliver certificates of stock is its true value on the day it should have been delivered, with interest therefrom;[3] and also after-accrued dividends;[4] for a failure to return certain stock "borrowed, to be returned on demand," is the market value of such stock at the time the cause of action accrued;[5] for a failure of a broker dealing in futures to sell as directed by his customer, is the difference between the price at which the grain was furnished, and the price at which the broker was directed to sell, less his commissions and other proper charges.[6]

The measure of damages for breach of a contract in not delivering corn to be ground for defendant, by the plaintiff, at the mill of the latter, is the difference between the cost of grinding and the contract price;[7] for a breach of a contract to deliver logs to be sawed at plaintiff's mill, is the contract price of sawing, less the cost of doing the work, in labor, in wear and tear of machinery, in time of use of machinery, and value of superintendence;[8] for non-payment of a note, payable in railroad scrip, is the market value of the scrip when due;[9] for breach of a bond, payable in notes of a certain bank, is the value of the notes on the day the obligation became payable;[10] for a

[1] Carli *v.* Seymour, 26 Minn. 276.
[2] Wilson Sewing Machine Co. *v.* Sloan, 50 Iowa, 367.
[3] Bull *v.* Douglas, 4 Munf. 303; 6 Am. Dec. 518; Christian *v.* Miller, 3 Leigh, 78; 23 Am. Dec. 251. To the day of trial: Huntington *v.* English, 86 Pa. St. 247.
[4] Baltimore R. R. Co. *v.* Sewell, 35 Md. 238; 6 Am. Rep. 402, the corporation being the defendant.
[5] Fosdick *v.* Greene, 27 Ohio St. 484; 22 Am. Rep. 328; Day *v.* Perkins, 2 Sand. 357.
[6] Cothran *v.* Ellis, 107 Ill. 413.
[7] Oldham *v.* Kerchner, 81 N. C. 430.
[8] Dunn *v.* Johnson, 33 Ind. 54; 5 Am. Rep. 177.
[9] Parks *v.* Marshall, 10 Ind. 20.
[10] Lanier *v.* Trigg, 6 Smedes & M. 641; 45 Am. Dec. 293.

violation of a contract not to erect a ferry to conflict with the plaintiff's ferry, is the loss actually sustained;[1] for a breach of the contract of sale of a good-will, is not the amount of improper solicitation of the customers of the old firm, irrespective of its effect upon the business of the purchaser, but the injury sustained, and not ineffectual attempts to injure;[2] for breach of a certificate of permanent scholarship in a college, is the value of the scholarship, with interest, and where no marketable value is shown, the value is *prima facie* the price paid;[3] for the breach of a contract, and for hindering the plaintiff from completing his part thereof, is the value of the labor performed by plaintiff, and the profit he could fairly have derived from the labor he was prevented from performing;[4] for breach of a contract to pay a debt of the plaintiff, is the amount due on the debt at the time of suit brought;[5] for breach of a contract to furnish freight for a boat, is the price agreed to be paid, unless he can show that the damages actually sustained were less;[6] for breach of a contract to store fruit at a certain temperature, and decay of the fruit, occasioned by a higher temperature, is the diminution of market value;[7] for breach of a contract to pay joint debts, owing by the parties thereto, and to obtain the discharge of a mortgage on their property, is the full amount of the debts if the original liability therefor has been enforced;[8] for neglecting to insert an advertisement of a public sale of real estate, for which the publishers of a newspaper received payment in advance, is the amount paid to them for the publication of such advertisement.[9]

[1] Westfall *v.* Mapes, 3 Grant Cas. 198.

[2] Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

[3] Trustees of Howard College *v.* Turner, 71 Ala. 429; 46 Am. Rep. 326.

[4] Cunningham *v.* Dorsey, 6 Cal. 19.

[5] Richards *v.* Whittle, 16 N. H. 259.

[6] Dean *v.* Ritter, 18 Mo. 182.

[7] Hyde *v.* Mechanical Refrigerating Co., 144 Mass. 432.

[8] Lee *v.* Burrell, 51 Mich. 132.

[9] Eisenlohr *v.* Swain, 35 Pa. St. 107; 78 Am. Dec. 328.

ILLUSTRATIONS. — In consideration of the grant of a right of way over his land, a railroad agreed by parol to furnish D. for life with a free pass for himself and his family over its road. The pass was given for a while, and then refused. *Held*, that the measure of damages was the value of such pass, to be approximated as closely as the nature of the case would admit: *Erie and Pittsburgh R. R. Co.* v. *Douthet*, 88 Pa. St. 243; 32 Am. Rep. 451. A agreed with B that if the latter would proceed with his team to a place at a distance, he would furnish him with three thousand pounds of "back-loading" from that place; B did go with his team to the place, and A furnished him with only a portion of the freight agreed upon. *Held*, that B was entitled to recover for the whole amount agreed upon: *Burrow* v. *Pound*, 29 Mo. 435. A violated his contract to ship to B, a commission merchant, all his cotton for the season. *Held*, that B was entitled to recover the full commission; it appearing that the expenses connected with selling were nominal, B's skill, experience, and judgment being the chief factors in the case: *Moore* v. *Lawrence*, 16 Fed. Rep. 87. On A's failure to dismiss a suit as agreed, B's lands, to the alleged value of $5,000, were, without any special direction of the plaintiff, sold for $150. *Held*, that A was not liable in damages for the loss of the value of the land: *Travis* v. *Duffau*, 20 Tex. 49. The building of a jail was let, at public outcry, to the lowest bidder; the contract was taken at less than a fourth part of a fair price; the contractor failed to perform any part of his contract; it was let to another at public outcry, and the county sued the first contractor on his bond. *Held*, that the measure of damages was not the difference between the two bids, but the difference between a fair price at the first letting, and a fair price at the second letting: *Chambers* v. *Fort Bend County*, 14 Tex. 34. A contracted with B, to whom he had rented a mill, that he would put in additional machinery, etc., which was defectively done, and B sued for a breach of the contract. *Held*, that the measure of damages was the value of the use of that portion of the machinery which A had contracted to furnish, and which, by reason of his failure to do, B was unable to enjoy: *Green* v. *Mann*, 11 Ill. 613. P. engaged board and rooms in D.'s hotel from November 1st to May 1st, at $150 per week. P. left the rooms November 23d, and thereupon D. let them to another party for $125 per week. *Held*, that D. was entitled to recover the amount of the difference between the two rates after November 23d, with interest after May 1st: *De Lavallette* v. *Wendt*, 75 N. Y. 579; 31 Am. Rep. 494. Defendant, in consideration of the grant of a right of way through the plaintiff's land, agreed to build for the plaintiff a certain wagon-road, and also to fence both sides of

the way. In an action for the breach of these agreements, *held*, that plaintiff was entitled to recover what it would reasonably cost to construct the road and fence: *Taylor* v. *R. R. Co.*, 56 Cal. 317. A person having a policy of insurance on his life, the premium on which was about to become due, delivered money to an express company to be carried and delivered to the insurer. The money was not so delivered, and the policy lapsed. The express company had notice of the purpose for which the money was sent. *Held*, that the measure of damage against defendant was primarily the net value of the policy; but that the assured was bound to use reasonable means to reduce the loss, such as being reinstated or reinsured, and could not recover for such loss as might thus have been prevented: *Grindle* v. *Eastern Express Co.*, 67 Me. 317; 24 Am. Rep. 31. A chattel was let for one day at the "customary charge," which was one dollar. By mistake the chattel was not returned for five weeks. The plaintiff claimed one dollar per day for the whole term,—an amount greater than the value of the chattel. *Held*, that the price agreed upon for one day was not a standard of estimate for the whole term, and that the plaintiff could only recover the value of the use for the entire period: *Russell* v. *Roberts*, 3 E. D. Smith, 318.

§ 2639. Liquidated Damages in Contracts.—A contract may, in express terms, assess the amount of damages, or in other words, the sum of money to be paid by the one in default in the event of a breach.[1] Such an agreement is perfectly legal, and the sum agreed upon becomes due and payable by virtue of the agreement, without any further inquiry as to the amount of the damages.[2] The following are instances of liquidated damages in contracts, viz.: Where a building contract stipulates that if the building is not completed by a certain day the contractor will

[1] Pearson *v.* Williams, 24 Wend. 246; 26 Wend. 630; Williams *v.* Vance, 9 S. C. 374; 30 Am. Rep. 26; Lynde *v.* Thompson, 2 Allen, 456; Gilles *v.* Hall, 7 Phila. 425.

[2] Tardeveau *v.* Smith, Hardin, 175; 3 Am. Dec. 727. "Where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against plowing up a meadow, if the covenant be 'not to plow,' and there be a penalty, a court of equity will relieve against the penalty, or will even go further than that to preserve the substance of the agreement; but if it is worded, 'to pay five pounds an acre for every acre plowed up', there is no room for any relief against it; it is the substance of the agreement"; Lowe *v.* Peers, 4 Burr. 2228.

pay a certain named sum each week or month thereafter;[1] where a contract of sale for the delivery of iron at certain dates provided that if not delivered at the dates mentioned the seller should pay a fine of so much per ton, to be deducted out of the payment.[2] A contract may also be framed to secure the payment of a stated sum of money for the doing of a certain act, but without any absolute restriction against the act, which act then does not in itself constitute a breach of the contract, but only a condition precedent to the liability to pay, and the only breach consists in not paying the agreed price.[3]

§ 2640. **Penalties in Contracts.** — Instead of liquidated damages, the contract may name a certain sum generally as a penalty for non-performance. In this case, although the penalty be forfeited, and payable according to the terms of the contract, the court in general gives relief upon equitable principles against the full penalty by assessing and allowing only the damages in fact incurred.[4] Thus in bonds, the penalty is generally placed at double the sum, yet only the exact amount of damage caused by the non-performance can be recovered.[5]

§ 2641. **Damages on Bonds is Restricted to Amount of Penalty.** — In an action on a bond the obligee can in no case recover more than the amount of the penalty,[6]

[1] Fletcher *v.* Dyche, 2 Term Rep. 32; Jones *v.* St. John's College, L. R. 6 Q. B. 115; Watts *v.* Shephard, 2 Ala. 425; Worrall *v.* McClingham, 5 Strob. 115; Louis *v.* Brown, 7 Or. 326; Hall *v.* Crowley, 5 Allen, 304; 81 Am. Dec. 745. *Contra*, Muldoon *v.* Lynch, 66 Cal. 536; Wilcus *v.* Kling, 87 Ill. 107.

[2] Bergheim *v.* Blaenavon Iron Co., L. R. 10 Q. B. 319.

[3] Lowe *v.* Peers, 4 Burr. 2225; Legh *v.* Lillie, 6 Hurl. & N. 165. "There are three classes of covenants of this sort: 1. Covenants not to do particular acts, with a penalty for doing them; 2. Covenants not to do an act, with liquidated damages to be paid if the act is done; and 3. Covenants that acts shall not be done, unless subject to a certain payment": Bramwell, J., in Legh *v.* Lillie, 6 Hurl. & N. 165.

[4] Leake on Contracts, 1080; Gower *v.* Carter, 3 Iowa, 244; 66 Am. Dec. 71. The sum specified in a bond required by statute from a bridge-contractor is a penalty, and not liquidated damages: Nevada County *v.* Hicks, 38 Ark. 557.

[5] Leake on Contracts, 1081.

[6] Sedgwick on Damages, 425; Warden *v.* Nielson, 1 Murph. 275; 3 Am. Dec. 691; Carter *v.* Carter, 4 Day, 30; 4 Am. Dec. 177; Cherry *v.* Mann, Cooke, 268; 5 Am. Dec. 696. See

except that the penalty not being paid, interest may be recovered on it.[1]

§ 2642. **Aliter as to Other Instruments.** — But where the penalty is contained in any other instrument than a bond, the party entitled may bring an action for the breach, without regard to the penalty, and may recover damages in excess of the penal sum.[2]

§ 2643. **Liquidated Damages or Penalty — Construction of Instruments as to.** — Whether a sum named is to be considered as liquidated damages, or simply a penalty, is often a matter of difficulty. It is well settled that the question is not concluded or affected by the mere use of the words "penalty" or "liquidated damages."[3] Thus, even where it has been expressly declared in the contract "that the sum shall be liquidated and ascertained damages, and not a penalty or penal sum," or in other terms equally strong, it has nevertheless been construed, according to the general effect of the agreement, to be a penalty

note in 1 Am. Dec. 338, 340; Bank of U. S. *v.* Magill, 1 Paine, 662; Lawrence *v.* U. S., 2 McLean, 581; State *v.* Ford, 5 Blackf. 392; Lombard *v.* Mayberry, 24 Neb. 674; 8 Am. St. Rep. 234.

[1] Harris *v.* Clap, 1 Mass. 308; 2 Am. Dec. 27; Brainard *v.* Jones, 18 N. Y. 35; Smedes *v.* Hooghtaling, 3 Caines, 48; 2 Am. Dec. 250.

[2] Graham *v.* Bickham, 2 Yeates, 32; 1 Am. Dec. 328; Shreve *v.* Brereton, 51 Pa. St. 175; Holley *v.* Holley, Litt. Sel. Cas. 505; 12 Am. Dec. 342. "The penalty is auxiliary to the performance of the contract, and the party grieved may either claim the penalty as his debt at law, and assign his breach under the statute, or he may bring his action for damages upon the breach of the contract": Harrison *v.* Wright, 13 East, 343. "But where a party once takes the penalty, he totally discharges the other party from any future obligation, and has recovered all that he can ever claim under the agreement": Bird *v.* Randall, 1 W. Black. 387.

[3] Hoagland *v.* Segur, 38 N. J. L. 236; Watts *v.* Sheppard, 2 Ala. 425; Davis *v.* Freeman, 10 Mich. 188; Thorogood *v.* Walker, 2 Jones, 15; Shreve *v.* Brereton, 51 Pa. St. 175; Grand Tower Co. *v.* Phillips, 23 Wall. 471; Banage *v.* Krump, 3 Jones, 330; Foley *v.* McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Bagley *v.* Peddie, 16 N. Y. 469; 69 Am. Dec. 713; Dwinel *v.* Brown, 54 Me. 468, the court saying: "The words 'penalty,' 'forfeiture,' or 'liquidated damages,' are not conclusive, and the court will examine the other provisions of the contract, its subject-matter, the situation of the parties, and the course and usages of trade, as well as this particular language, and gather the intention of the parties from the whole taken together. If it impossible or difficult to compute the actual damages, the use of the word 'penalty' will not prevent the court from regarding the sum named as liquidated damages."

in legal operation, under which the remedy is restricted to the damages actually incurred.[1] On the other hand, there are numerous cases in which the parties have used the word "penalty," which seems *prima facie* to import a forfeiture, rather than a valuation of damage; yet the courts have held that the stipulated sum was, from the nature of the case, to be considered as liquidated damages and recoverable in full.[2] "Whether the sum mentioned in an agreement to be paid for a breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of law, to be decided by the judge, upon a consideration of the whole instrument."[3]

Where it is plain that the parties meant the sum fixed to be liquidated damages, the court will not interfere to frustrate that intention.[4] On the other hand, if it be doubtful, upon the whole agreement, whether the sum named was intended to be a penalty or liquidated damages, it will be construed to be a penalty, it being the tendency of the courts to consider the contract as creating a penalty to cover the damages actually sustained by a breach, rather than liquidated damages.[5] Where the

[1] Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 5 Bing. N. C. 390; Horner *v.* Flintoff, 9 Mees. & W. 678; Reindell *v.* Schell, 4 Com. B., N. S., 97; 27 L. J. Com. P. 146; In re Newman, L. R. 4 Ch. D. 724; Dennis *v.* Cummins, 3 Johns. Cas. 297; 2 Am. Dec. 160; Baird *v.* Tolliver, 6 Humph. 186; 44 Am. Dec. 298; Shreve *v.* Brereton, 51 Pa. St. 175; Curry *v.* Larer, 7 Pa. St. 470; 49 Am. Dec. 487; Moore *v.* Platte Co., 8 Mo. 467; Jackson *v.* Baker, 2 Edw. Ch. 471.

[2] Sainter *v.* Ferguson, 7 Com. B. 716; Sparrow *v.* Paris, 7 Hurl. & N. 594; 31 L. J. Ex. 137; Parfitt *v.* Chambre, L. R. 15 Eq. 36; Shreve *v.* Brereton, 51 Pa. St. 175; Duffy *v.* Shockey, 11 Ind. 70; 71 Am. Dec. 349.

[3] Sainter *v.* Ferguson, 1 Man. & G. 286; Chase *v.* Allen, 13 Gray, 42; Shute *v.* Hamilton, 3 Daly, 462; Whitfield *v.* Levy, 35 N. J. L. 149; Noyes *v.* Phillips, 60 N. Y. 408; Hamaker *v.* Schroers, 49 Mo. 406; Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45; Jaqueth *v.* Hudson, 5 Mich. 123.

[4] Lea *v.* Whitaker, L. R. 8 Com. P. 70; Williams *v.* Vance, 9 S. C. 344, 374; 30 Am. Rep. 26; Bagley *v.* Peddie, 5 Sand. 192; 16 N. Y. 469; 69 Am. Dec. 713; Bearden *v.* Smith, 11 Rich. 550; Crisdee *v.* Bolton, 3 Car. & P. 240; Dwinell *v.* Brown, 54 Me. 460; Brooks *v.* Hubbard, 3 Conn. 58; 8 Am. Dec. 154; Houghton *v.* Pattee, 58 N. H. 326.

[5] Shute *v.* Taylor, 5 Met. 67; Moore *v.* Platte Co., 8 Mo. 467; Foley *v.* McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Tayloe *v.* Sandiford, 7 Wheat. 13; Baird *v.* Tolliver, 6 Humph. 186; 44 Am. Dec. 298; Wallis *v.* Carpenter, 13 Allen, 19; Spencer *v.* Tilden, 5 Cow. 150; Shreve *v.* Brereton, 51 Pa. St. 175; Ricketson *v.* Richardson, 19 Cal.

matter is the payment of a debt or liquidated money demand, and the sum fixed upon is greater than the amount of the debt or demand, it is, as a rule, treated as a penalty, and not as liquidated damages.[1] If the performance of an undertaking or the payment of a debt be secured by a stipulation that in case of its not being performed or not being paid at the appointed time, a larger sum shall become payable, the stipulation for the payment of a larger sum is in the nature of a penalty, against which relief will be given. But if there be an existing debt, and an agreement is made for the payment of a smaller sum at a certain time, and in a certain manner, in discharge of the debt, but that if default be made the whole debt shall be payable, the reserved right to the original debt is not a penalty, and no relief can be obtained against it.[2] So where a debt is contracted to be paid by installments, subject to the stipulation that, in case of any installment not being paid when due, the whole sum remaining due shall become payable at once, such proviso does not operate as a penalty, and there is no relief against it.[3] Where one agrees to pay a certain sum as compensation in case he fails to perform the obligations of a previous contract at the time specified therein, such sum is not a penalty, but liquidated damages, and, unless excessive, the courts will enforce its payment.[4] Where a mortgage is made at a certain rate of interest, with a proviso that upon default in punctual payment a higher rate of interest shall be charged, the increase of interest is considered as a penalty, and courts of equity relieve against it, upon the

330; Colwell *v.* Lawrence, 38 N. Y. 71; Myer *v.* Hart, 40 Mich. 517; 29 Am. Rep. 553; Scofield *v.* Tompkins, 95 Ill. 190; 35 Am. Rep. 160; Cheddick *v.* Marsh, 21 N. J. L. 463.

[1] Tayloe *v.* Sandiford, 7 Wheat. 13; Scofield *v.* Tompkins, 95 Ill. 190; 35 Am. Rep. 160; Mason *v.* Callender, 2 Minn. 350; 72 Am. Dec. 103. In Kemble *v.* Farren, 6 Bing. 148, the court say: "That a large sum should become immediately payable, in consequence of the non-payment of a small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms."

[2] Thompson *v.* Hudson, L. R. 4 H. L. 1.

[3] Bonafous *v.* Rybot, 3 Burr. 1370.

[4] Hardee *v.* Howard, 33 Ga. 533; 83 Am. Dec. 176.

debtor paying the interest at the lower rate, with interest for the delay. But if the rate of interest be fixed, and the mortgagee agree to take less if paid punctually, this is a valid and binding agreement.[1]

Where an agreement for the payment of a fixed sum is made as to a matter of uncertain value, it is generally treated as liquidated damages.[2] Covenants between landlord and tenant for regulating the mode of farming and management of the land, as a covenant not to plow up ancient meadow, not to cultivate out of the regular course of husbandry, not to carry off manure, and the like, under penalties of an increased rent of so much per acre, are construed as imposing an increased rent recoverable in full, against which the lessee can obtain no relief.[3] And the excessive amount of the sum agreed upon as payable for a breach of uncertain value is not alone a sufficient ground for treating it as a penalty, and not liquidated damages, as it is competent for the parties to form their own estimate of the value.[4] The whole contract must be looked to, its subject-matter, the ease or difficulty of measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.[5] Where there is no inherent difficulty in ascertaining the actual damages, and the amount named will more than make the other party whole, and be an unconscionable recovery, it will be

[1] Nicholls v. Maynard, 3 Atk. 519.

[2] Green v. Price, 13 Mees. & W. 702; Hamilton v. Overton, 6 Blackf. 206; 38 Am. Dec. 136; Cotheal v. Talmage, 9 N. Y. 551; 61 Am. Dec. 717; Morse v. Rathburn, 42 Mo. 594; 97 Am. Dec. 359; Powell v. Burroughs, 54 Pa. St. 329; Chase v. Allen, 13 Gray, 42.

[3] Leake on Contracts, 1094.

[4] Leake on Contracts, 1096. "A person may set an extraordinary value upon a piece of land or wood; and if he choose to stipulate for five pounds or fifty pounds additional rent upon every acre broken up, or for any given sum upon every load of wood cut, I see nothing irrational in such a contract; it appears to me difficult to apply with propriety the word 'excessive' to the terms in which parties choose to contract with each other": Astley v. Weldon, 2 Bos. & P. 351.

[5] Mathews v. Sharp, 99 Pa. St. 560; Jones v. Burford, 74 Me. 439; Smith v. Wedgewood, 74 Me. 457.

regarded as a penalty.[1] So where a contract provides for a forfeiture of a sum so great that it is apparent that the provision was inserted *in terrorem*, it will be treated as a penalty, and not as liquidated damages.[2]

Agreements for the sale of a trade or business, or for a partnership or the employment of a person in a trade or business, frequently contain a clause providing against the carrying on the same trade or business within certain limits, and against the interference with clients or customers, and other terms of that kind intended to protect the business, and stipulating for the payment of a fixed sum for a breach of any such terms of the agreement; in such cases the sum is, in general, to be considered as the liquidated and ascertained damages to be recovered in full, and not as a penalty.[3]

Where the contract involves several distinct matters of various kinds, and one fixed sum is stipulated to be paid for any breach, of whatever kind, it is, in general, to be treated as a penalty for securing the performance of the contract, and not as liquidated damages; because it cannot have been fixed with any regard to the value or extent of the breach. It is said that "where articles of agreement contain covenants for the performance of several

[1] Davis *v.* United States, 17 Ct. of Cl. 201.

[2] Bradstreet *v.* Baker, 14 R. I. 546.

[3] Pierce *v.* Fuller, 8 Mass. 223; 5 Am. Dec. 102; Sainter *v.* Ferguson, 7 Man. G. & S. 716; Chrisdee *v.* Bolton, 3 Car. & P. 240; Jacquith *v.* Hudson, 5 Mich. 123; Rawlinson *v.* Clarke, 14 Mees. & W. 186; Green *v.* Price, 13 Mees. & W. 695; Nobles *v.* Bates, 7 Cow. 307; Smith *v.* Smith, 14 Wend. 468; Dakin *v.* Williams, 17 Wend. 447; Mott *v.* Mott, 11 Barb. 127; Lange *v.* Werk, 2 Ohio St. 519; Dunlop *v.* Gregory, 10 N. Y. 241; 61 Am. Dec. 746; California Steam Nav. Co. *v.* Wright, 6 Cal. 259; 65 Am. Dec. 511; Bagley *v.* Peddie, 16 N. Y. 469; 69 Am. Dec. 713; Duffy *v.* Shockey, 11 Ind. 70; 71 Am. Dec. 348; Holbrook *v.* Tobey, 66 Me. 410; 22 Am. Rep. 581; Muse *v.* Swayne, 2 Lea, 251; 31 Am. Rep. 607; Cushing *v.* Drew, 97 Mass. 445. "It cannot be said what damage a person may sustain by another setting up in business within a limited time or distance, nor how much he may be injured by the loss of one of his clients. And, therefore, in order to avoid all dispute, the parties are content to fix a certain sum": Parke, B., in Galsworthy *v.* Strutt, 1 Ex. 663. For cases holding that the sum named must be construed as a penalty, see Perkins *v.* Lyman, 11 Mass. 76; 6 Am. Dec. 158; Stearns *v.* Barrett, 1 Pick. 443; 11 Am. Dec. 223; Long *v.* Towl, 42 Mo. 545; 97 Am. Dec. 355; Burrell *v.* Doggett, 77 Mo. 545; Heatwole *v.* Gorrell, 35 Kan. 692.

things, and then one large sum is stated to be paid upon breach of performance, that must be considered as a penalty."[1] And that "where the sum will, in case of breaches of the agreement, be in some instances too large, and in others too small, a compensation for the injury, that sum must be considered a penalty."[2]

ILLUSTRATIONS — PENALTIES. — A contract between the manager of a theater and an actor, containing many stipulations on each side, of various degrees of importance, as to the times and manner of the performances, the regulations of the theater, and for the payment of salary at so much per night, provided that if either party should neglect to fulfill the said agreement, or any part thereof, he should pay to the other the sum of one thousand pounds. *Held*, that the sum was a penalty, and not liquidated damages, because it extended to the breach of any stipulation by either party, including the neglect to pay one night's salary: *Kemble* v. *Farren*, 6 Bing. 141; *Astley* v. *Weldon*, 2 Bos. & P. 346. A building contract provided for completion by a stated day, in default of which the contractor should forfeit ten pounds per week until completion, and contained various other stipulations, with a final provision that in case the contract should not be in all things duly performed, he should pay one thousand pounds "as liquidated damages." *Held*, that the latter sum was in the nature of a penalty, and that the employer could recover only the actual damages under the contract: *In re Newman*, L. R. 4 Ch. D. 724; 46 L. J. Ch. 57. An agreement for the sale of a public house, with the license, good-will of the business, trade fixtures, and stock in trade, and involving a variety of stipulations of different value concerning transfer of license, valuation of goods, time of possession, and such matters, contained a provision in express terms that if either party should fail to perform the agreement, he should pay to the other a specified sum of money. *Held*, to operate as a penalty: *Betts* v. *Burch*, 4 Hurl. & N. 506; 28 L. J. Ex. 267; *Magee* v. *Lavell*, L. R. 9 Com. P. 107; 43 L. J. Com. P. 131. A agreed to furnish B certain flour-machines of a fixed capacity, and providing that the machines "shall be retained without any price being paid by you, in case results are not as promised." *Held*, that the provision for retention was a penalty: *Pennypacker* v. *Jones*, 106 Pa. St. 237. A charter-party bound the

[1] Astley v. Weldon, 2 Bos. & P. 353; Foley v. McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Owens v. Hodges, 1 McMull. 106; Carpenter v. Lockhart, 1 Ind. 434; Thorogood v. Walker, 2 Jones, 15; Charleston Fruit Co. v. Bond, 26 Fed. Rep. 18.

[2] Davies v. Penton, 6 Barn. & C. 223.

parties, ship, freight, and merchandise "in the penal sum of estimated amount of freight." *Held*, a penalty: *Watts* v. *Camors*, 115 U. S. 353. In consideration of a right of way, a railroad covenanted that it would construct a lawful fence on each side of the track, and a crossing with cattle-guards at such places as the owner should designate, or in default thereof would pay one thousand dollars. *Held*, a penalty: *St. Louis etc. R. R. Co.* v. *Shoemaker*, 27 Kan. 677. A agreed to build a brick building, and to occupy such portion of the lot as would be satisfactory to B, and give him possession in three weeks, and a lease for six months, with the privilege of a twelve months' lease, and failing to do so, to pay certain damages. *Held*, that the damages were not liquidated: *Nash* v. *Hermosilla*, 9 Cal. 584; 70 Am. Dec. 676. A contract was made to deliver a quantity of staves, for which a party was to pay four hundred dollars, and make certain advances. It was agreed that a failure to perform the contract should subject the failing party "to pay the other the sum of five hundred dollars, as stipulated damages, without abatement or diminution." *Held*, a penalty: *Haldeman* v. *Jennings*, 14 Ark. 329. A contract for the delivery of stone contained the words: "In witness whereof, we bind ourselves to pay, each to the other, in case of failure by either of us on this contract, the sum of two thousand dollars, in case the said stone should not be delivered, or when delivered, paid for as above." *Held*, a penalty: *Goldsborough* v. *Baker*, 3 Cranch C. C. 48. A contract for the sale of land provided for the payment of over twenty-two thousand dollars purchase-money, by a certain day, as a precedent and essential condition, and that in case of any default in payment of the price, the vendor might declare the contract null and void, and retain any sums of money paid, and might sue and recover from the purchaser the whole or any part of the price that might be due and unpaid, as liquidated damages. Nothing was paid, and the vendor did not part with possession. *Held*, a penalty: *Scofield* v. *Tompkins*, 95 Ill. 190; 35 Am. Rep. 160. A railroad, instead of condemning land under the statute, contracted with the owner for the land on condition of doing certain work on specified streets within a certain time, agreeing that for every day after default it would pay the owner one dollar. *Held*, a penalty: *Hooper* v. *R. R. Co.*, 69 Ala. 529.

ILLUSTRATIONS (CONTINUED) — LIQUIDATED DAMAGES. — A contract was made to secure a government annuity to a person by a certain date, and if not legally secured before that date, to pay one hundred pounds a month until the annuity should be secured, in addition to the annuity, as a penalty for delay.

Held, that the full amount was recoverable: *Parfitt* v. *Chambre*, L. R. 15 Eq. 36. A person covenanted that in case of his marrying any other person than the covenantee, he would pay her one thousand pounds. *Held*, to be liquidated damages recoverable in full in the event specified: *Lowe* v. *Peers*, 4 Burr. 2225. Land was demised upon the terms that the tenant should not sell any hay off the premises, under the penalty of two shillings for each yard of hay so sold, to be recovered by distress, as for rent in arrear. *Held*, that the amount of penalties was recoverable by distress, under the agreement: *Pollitt* v. *Forrest*, 11 Q. B. 949. V. & M. agreed to consign and ship to W. & Co. five hundred bales of cotton, to be sold by them as cotton factors, on commission, and to pay as liquidated damages two dollars per bale for every bale of cotton less than five hundred bales which they might fail to consign and ship to them as stipulated. *Held*, liquidated damages: *Williams* v. *Vance*, 9 S. C. 344; 30 Am. Rep. 26. A partner agreed to sell his interest to his copartner. The property consisted of a store, and a stock of goods worth about twenty-five thousand dollars. The sale was to be at cost for most of the property, the terms cash on delivery, an appraisal was provided for if the parties could not agree, and either party breaking the contract was to forfeit five hundred dollars. *Held*, liquidated damages: *Maxwell* v. *Allen*, 78 Me. 32; 57 Am. Rep. 783. A contract for the sale of land, at about five thousand dollars, stipulated that the party failing to perform should pay two hundred dollars as "fixed and settled damages." *Held*, liquidated damages: *Brinkerhoff* v. *Olp*, 35 Barb. 27. A, in consideration of another having conveyed to him fourteen city lots for only twenty-one thousand dollars, covenanted that he would, by a certain day, erect two brick houses, or, in default thereof, pay to the grantor, on demand, the sum of four thousand dollars. *Held*, liquidated damages: *Pearson* v. *Williams*, 24 Wend. 244; 26 Wend. 630. A bond was executed by a company for the sum of fifty thousand dollars "as stipulated damages," conditioned to construct a portion of its road by a certain time, in consideration of a grant by a city of a right of way through its streets. *Held*, liquidated damages: *Indianola* v. *R. R. Co.*, 56 Tex. 594. A covenanted with B to procure and deliver to him, within a limited time, the certificate of third persons to a certain effect, and stipulated that if he failed to do so, he would pay him five hundred dollars liquidated damages. *Held*, liquidated damages: *Hamilton* v. *Overton*, 6 Blackf. 206; 38 Am. Dec. 136. A contract for the construction of the earth-work of a railroad provided that on failure to complete the work within a specified time the contract might be terminated and a reserved ten per cent on the

work done be "retained as liquidated damages." *Held*, liquidated damages: *Wolf* v. *R. R. Co.*, 64 Iowa, 380. A, having contracted with B to sell and deliver to him certain cattle, executed two agreements in writing, which he called his notes, and deposited in a bank with collaterals, by one of which he agreed to repay in case of default, seven thousand dollars, advanced to him, and by the other, to pay sixteen hundred dollars, in like event, as "stipulated damages." *Held*, that the sixteen hundred dollars was liquidated damages: *Yetter* v. *Hudson*, 57 Tex. 604.

PART VI. — THE ASSIGNMENT OF THE CONTRACT.

CHAPTER CXXVI.

ASSIGNMENT OF CONTRACTS.

§ 2644. Choses in action not assignable at common law.
§ 2645. Rule in equity.
§ 2646. Assignments not recognized in equity — Voluntary assignments.
§ 2647. Other cases.
§ 2648. Choses in action assignable by statute.
§ 2649. What things are assignable — Interests in lands.
§ 2650. Chattel and other rights.
§ 2651. Judgments.
§ 2652. Things not in existence.
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§ 2655. Form of assignments.
§ 2656. Order not communicated to payee.
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§ 2658. Notice of assignment necessary.
§ 2659. Form of notice.
§ 2660. Notice — To whom given.
§ 5661. Assent of debtor immaterial.
§ 2662. Extent of assignment.
§ 2663. Assignee takes subject to equities.
§ 2664. Exception.
§ 2665. Liability of assignor.
§ 2666. Assignment by new agreement of all parties.
§ 2667. Assignee may sue in his own name.

§ 2644. Choses in Action not Assignable at Common Law.—At common law a chose in action, i. e., a right arising from a contract, and a right of action for the breach of a contract, was not assignable by act of the parties.[1]

§ 2645. Rule in Equity.—The rule of the common law was not, however, followed in courts of equity, an

[1] Master *v.* Miller, 4 Term Rep. 340; Beecher *v.* Buckingham, 18 Conn. 110; 44 Am. Dec. 580.

equitable assignment of a chose in action being considered in the nature of an agreement on the part of the assignor to permit the assignee to make use of his name to recover by action at law, which a court of equity would specifically enforce.[1] No particular form was necessary.[2] Any order, writing, or act which made an appropriation of a fund was a good assignment in equity.[3] So an order to pay part of a fund not in existence will, upon the fund coming into existence, operate as an equitable assignment.[4]

§ 2646. **Assignments not Recognized in Equity — Voluntary Assignments.** — Equity will not assist a voluntary assignment of a contract or chose in action, nor an imperfect gift that is not completed in law.[5] But if the transaction, though it may be imperfect as a voluntary assignment or gift, can be construed as a declaration of trust, it will be carried into effect; because a complete declaration of trust does not require a valuable consideration to support it against the trustee.[6] In equity the consideration of natural affection will support the assignment of a bond to convey land.[7]

§ 2647. **Other Cases.** — The matter of the contract might be such as not to admit of a transfer or assignment, either at law or in equity; as in the case of a contract involving a personal relation or confidence between the

[1] Leake on Contracts, 1166; Crouch *v.* Credit Foncier, L. R. 8 Q. B. 380; Tibbets *v.* Gerrish, 25 N. H. 41; 57 Am. Dec. 307; Smith *v.* Brittain, 3 Ired. Eq. 347; 42 Am. Dec. 175.

[2] Tingle *v.* Fisher, 20 W. Va. 497.

[3] Shannon *v.* Hoboken, 37 N. J. Eq. 123; Bower *v.* Hadden Co., 30 N. J. Eq. 171.

[4] Risley *v.* Smith, 39 N. Y. Sup. Ct. 137. Reversed 64 N. Y. 576.

[5] Leake on Contracts, 1170.

[6] Elliston *v.* Elliston, 1 White and Tudor's Lead. Cas. 336. "A declaration of trust purports to be, and is in form and substance, a complete transaction, and the court need not look beyond the declaration of trust itself or inquire into its origin; whereas an agreement or attempt to assign is, in form and nature, incomplete, and the origin of the assignment must be inquired into by the court; and where there is no consideration, the court, upon its general principles, cannot complete what it finds imperfect": McFadden *v.* Jenkyns, 1 Hare, 462.

[7] Pawling *v.* Speed, Litt. Sel. Cas. 77; 12 Am. Dec. 269.

parties that is incapable of being transferred to other parties.[1] Accordingly, a contract between an author and a publisher for the publication of a work was held to be incapable of assignment by the publisher to another, on account of the personal trust reposed by the author in the publisher, nor is the benefit of such a contract transferred on the bankruptcy of the publisher to his trustee.[2] So equity will not enforce an assignment which is tainted with fraud or champerty.[3]

§ 2648. **Choses in Action Assignable by Statute.**—In most of the states all choses in action arising upon contract may be assigned so as to vest the title in the assignee.[4]

§ 2649. **What Things are Assignable—Interests in Lands.**—Estates and interests in lands and tenements are assignable. Thus the following have been held assignable: A bond to convey land;[5] an equity of redemption;[6] an estate at will;[7] the interest of a lessor;[8] a lease;[9] a mining privilege;[10] rent reserved in a lease;[11] the right to betterments.[12]

§ 2650. **Chattel and Other Rights.**—Generally, rights which are assignable in equity are assignable under the codes.[13] The test of whether a cause of action is assignable is, Would it survive to the executors or administrators of the assignor in case of his death? If it would, it is

[1] Leake on Contracts, 1168.
[2] Gibson *v.* Carruthers, 8 Mees. & W. 343; Stephens *v.* Benning, 1 Kay & J. 168.
[3] Fletcher *v.* Ferrel, 9 Dana, 372; 35 Am. Dec. 143.
[4] 1 Stimson's American Statute Law, 4031; Jordan *v.* Thornton, 7 Ark. 224; 44 Am. Dec. 546; Doering *v.* Kenamore, 86 Mo. 588; Snyder *v.* R. R. Co., 86 Mo. 613; Davis *v.* R. R. Co., 25 Fed. Rep. 786.
[5] Ensign *v.* Kellogg, 4 Pick. 1.
[6] Bigelow *v.* Willson, 1 Pick. 485.
[7] Cody *v.* Quarterman, 12 Ga. 386.
[8] Willard *v.* Tillman, 2 Hill, 274.
[9] Garner *v.* Byard, 23 Ga. 289; 68 Am. Dec. 527; Scott *v.* Berry, 46 Ga. 395.
[10] McBee *v.* Loftis, 1 Strob. Eq. 90.
[11] Van Rensselear *v.* Hays, 19 N. Y. 68; 75 Am. Dec. 278.
[12] Lombard *v.* Ruggles, 9 Me. 62.
[13] Strong *v.* Clem, 12 Ind. 39; 74 Am. Dec. 200; McMahon *v.* Allen, 12 Abb. Pr. 278; 34 Barb. 63.

assignable.[1] In New York all demands arising from injuries to property are assignable.[2] Thus a right of action for the conversion of personal property is assignable,[3] or a right of action for negligently setting a fire which runs over claimant's land.[4]

And the following have been held assignable: The claim of a sheriff for services which have been rendered and expenses which have been incurred in the execution of process;[5] an attorney's lien for services on a judgment;[6] costs due the clerk of a court;[7] a cause of action by a public officer against an intruder for wrongfully receiving the fees of the office;[8] a cause of action against a sheriff for making a false return, and for failing to return an execution within the time required by law;[9] a special tax bill;[10] a tax voted in aid of a railroad, after it has been collected by the county treasurer;[11] a contract in writing not to navigate certain waters for a certain term of years;[12] a right of action for injury to cattle;[13] the right to recover for infringements of a patent;[14] a county order for taxes refunded, payable at a fixed time, with interest;[15] a prom-

[1] Smith *v.* Smith, 9 Abb. Pr. 422; Devlin *v.* Mayor, 63 N. Y. 15; Dunning *v.* Fay, 38 Barb. 20; Gould *v.* Gould, 36 Barb. 275; Mackey *v.* Mackey, 43 Barb. 61; Rutherford *v.* Aiken, 3 Thomp. & C. 62; Drake *v.* Smith, 12 Hun, 533; Fried *v.* R. R. Co., 25 How. Pr. 285.

[2] Smith *v.* R. R. Co., 28 Barb. 606; Foy *v.* R. R. Co., 24 Barb. 383; Whitney *v.* Slauson, 30 Barb. 279; Gould *v.* Gould, 36 Barb. 275; Genet *v.* Howland, 45 Barb. 566; Byrbie *v.* Wood, 24 N. Y. 612; McBride *v.* Bank, 26 N. Y. 456; Merrill *v.* Grinnell, 30 N. Y. 614; Drake *v.* Smith, 12 Hun, 533; Alt *v.* Weidenberg, 6 Bosw. 178; Lamphire *v.* Hall, 26 How. Pr. 512.

[3] McKee *v.* Judd, 12 N. Y. 622; 64 Am. Dec. 515; Zabriskie *v.* Smith, 13 N. Y. 322; 64 Am. Dec. 551; Sherman *v.* Elder, 24 N. Y. 384; Fulton *v.* Baldwin, 37 N. Y. 650; Hicks *v.* Cleveland, 48 N. Y. 92; Duell *v.* Cudlip, 1 Hilt. 168; Graves *v.* Spier, 58 Barb. 386; Weissenstein *v.* Elias, 14 Hun, 533; Sheldon *v.* Wood, 2 Bosw. 277; Westcott *v.* Keeler, 4 Bosw. 572; Hodge *v.* Adee, 2 Lans. 318; Lazard *v.* Wheeler, 22 Cal. 142; More *v.* Massani, 32 Cal. 593.

[4] Fried *v.* R. R. Co., 25 How. Pr. 285.

[5] Birkbeck *v.* Stafford, 14 Abb. Pr. 285; 23 How. Pr. 236.

[6] Sibley *v.* Pine County, 31 Minn. 201.

[7] Ciples *v.* Blair, Rice Ch. 60.

[8] Platt *v.* Stout, 14 Abb. Pr. 184.

[9] Jackson *v.* Daggett, 24 Hun, 204.

[10] Kansas *v.* Rice, 89 Mo. 685.

[11] Manning *v.* Mathews, 70 Iowa, 503.

[12] Cal. Steam. Nav. Co. *v.* Wright, 6 Cal. 259; 65 Am. Dec. 511.

[13] Galveston etc. R. R. Co. *v.* Freeman, 57 Tex. 156.

[14] Shaw *v.* Lead Co., 20 Blatchf. 417.

[15] Brownlee *v.* Madison Co., 81 Ind. 186.

issory note payable in bank notes, though not negotiable;[1] a book-account;[2] a debt evidenced by a lost note;[3] the lien of a material-man or mechanic;[4] a claim against the winner at play;[5] a claim for damages for infringement of a trade-mark;[6] a verdict for damages, although the action in which the verdict was obtained was for a personal tort;[7] a policy of insurance, a loss having happened;[8] a policy of life insurance;[9] an undertaking given to procure an order of arrest;[10] a subscription made for the purpose of erecting a church.[11]

§ 2651. Judgments.— At common law, the assignment of a judgment did not authorize the assignee to bring an action on it in his own name.[12] But by statute in most of the states the assignee is given complete control of the judgment assigned to him.[13]

§ 2652. Assignment of Things not in Existence.— At law it is held that an assignment, to be valid, must be of a thing which, at the time, has an actual, potential existence.[14] But "courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present

[1] Wolfe v. Tyler, 1 Heisk. 313.
[2] Clark v. Wise, 34 Kan. 553.
[3] Long v. Constant, 19 Mo. 321; 61 Am. Dec. 559.
[4] Tuttle v. Howe, 14 Minn. 145; 100 Am. Dec. 205.
[5] Hendrickson v. Beers, 6 Bosw. 639.
[6] Julian v. Drill Co., 78 Ind. 406.
[7] Zoghaum v. Parker, 66 Barb. 341; 55 N. Y. 120.
[8] Walters v. Washington Ins. Co., 1 Iowa, 404; 63 Am. Dec. 451; Carter v. Ins. Co., 12 Iowa, 212.
[9] Clarke v. Allen, 11 R. I. 439; 23 Am. Rep. 496.
[10] Bamberger v. Kahn, 43 Hun, 411.
[11] Hopkins v. Upshur, 20 Tex. 89; 70 Am. Dec. 373.
[12] An informal assignment of a judgment insufficient to pass the legal title may yet operate to transfer the equitable ownership, and enable the assignee, as the real party in interest, to sue upon it: Kelley v. Love, 35 Ind. 106.
[13] Freeman on Judgments, sec. 421. The statute of Missouri directing the mode of assigning a judgment is cumulative, and does not prevent an assignment which would be good independently. If a sheriff is duly notified of any lawful assignment, he must hold any moneys collected on execution for the assignee: Burgess v. Cave, 52 Mo. 43.
[14] Needles v. Needles, 7 Ohio St. 432; 70 Am. Dec. 85; Moody v. Wright, 13 Met. 17; 46 Am. Dec. 706; Mitchell v. Winslow, 2 Story, 630; Thallheimer v. Brinckerhoff, 3 Cow. 623; 15 Am. Dec. 309; Skipper v. Stokes, 42 Ala. 255; 94 Am. Dec. 646; Hassie v. Congregation, 35 Cal. 388.

actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them."[1]

Thus the following have been held valid, viz.: An assignment of costs to accrue in a pending suit;[2] of the right to insurance money under a policy, before any loss has occurred;[3] of an expected legacy;[4] of an interest in the estate of a living ancestor;[5] of a mortgage of wood to be cut, or crops to be raised;[6] of a mortgage of a railroad to

[1] Welles, J., in Field *v.* Mayor, 6 N. Y. 179; 57 Am. Dec. 435; Payne *v.* Mayor, 4 Ala. 383; 37 Am. Dec. 744; Brackett *v.* Blake, 7 Met. 335; 41 Am. Dec. 442; Pierce *v.* Robinson, 13 Cal. 123; Bibend *v.* Liverpool etc. Ins. Co., 30 Cal. 86; Hassie *v.* Congregation, 35 Cal. 388; Hall *v.* Buffalo, 2 Abb. App. 307; Power *v.* Alger, 13 Abb. Pr. 475; Ely *v.* Cook, 9 Abb. Pr. 376; 28 N. Y. 365; Stover *v.* Eycleshimer, 4 Abb. App. 309; Billings *v.* O'Brien, 14 Abb. Pr., N. S., 246; Seymour *v.* R. R. Co., 25 Barb. 284; Wood *v.* Lester, 29 Barb. 145; Ruple *v.* Bindley, 91 Pa. St. 299; East Lewisburg etc. Co. *v.* Marsh, 91 Pa. St. 99; Ellet *v.* Butt, 1 Wood, 214; Dunham *v.* R. R. Co., 1 Wall. 268; Pennock *v.* Coe, 23 How. 130; First Nat. Bank *v.* Kimberlands, 16 W. Va. 592; Greene *v.* Bartholomew, 34 Ind. 235.

[2] Ely *v.* Cook, 9 Abb. Pr. 377; 2 Hilt. 418; 28 N. Y. 365.

[3] Bibend *v.* Ins. Co., 30 Cal. 86; Bergson *v.* Ins. Co., 38 Cal. 541.

[4] Bacon *v.* Bonham, 33 N. J. Eq. 614.

[5] Stover *v.* Eycleshimer, 46 Barb. 88; 4 Abb. App. 309; Fitzerland *v.* Vestal, 4 Sneed, 258. *Contra*, Needles *v.* Needles, 7 Ohio St. 432; 70 Am. Dec. 85; Murphy *v.* Murphy, 12 Ohio St. 416. In McDonald *v.* McDonald, 5 Jones Eq. 21, 175 Am. Dec. 435, it is said: "It is very clear that at the time when the instrument was executed, it could not operate as a conveyance or assignment of what it purported to transfer. Margaret McDonald, the defendant's intestate, was then living, and the plaintiff had but a mere possibility or expectancy of an interest in her estate. He was at the time one of her nearest blood relations, and had a chance, by outliving her, to become entitled to a part or to the whole of her estate, as heir at law and next of kin, but he had no interest, or possibility coupled with an interest, in it. It follows as a matter of course that he did not have anything which he could assign or transfer to another, either at law or in equity. But he had a right to make a contract to convey whatever interest he might in future have in his cousin's property, and such a contract, when fairly made upon a valuable consideration, the court of chancery will enforce whenever the property shall come into his possession. Thus it is said, and the assertion is well sustained by the authorities both in England and in this country, that 'chancery will give effect to the assignment of a mere expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance, as soon as the assignor has acquired the power to perform it.' See the American edition of White and Tudor's Equity Cases, 72 Law Lib. 202, 224, which cites Hobson *v.* Trevor, 2 P. Wms. 191; Beckley *v.* Newland, 2 P. Wms. 182; Wright *v.* Wright, 1 Ves. Sr. 409; Allston *v.* Bank of South Carolina, 2 Hill Ch. 235; Breckenridge *v.* Churchill, 3 J. J. Marsh. 13. See also Smith on Real and Personal Property, 457, and Fry on the Specific Performance of Contracts, 100 Law Lib. 263, and the cases, particularly, of Wiseman *v.* Roper, 1 Ch. Rep. 154; Alexander *v.* Duke of Wellington, 2 Russ. & M. 35; Persse *v.* Persse, 7 Clark & F. 279; Hinde *v.* Blake, 3 Beav. 235; and Meek *v.* Kettlewell, 1 Phila. 347."

[6] Ellet *v.* Butt, 1 Wood, 214; Wood *v.* Lester, 29 Barb. 145.

be constructed;[1] of a patent to be issued;[2] of proceeds of an expected sale of goods;[3] of rent yet to grow due;[4] of the right of one who has hired a chattel with privilege of purchase, rent paid meantime to be applied towards the price, and who has made payments under the agreement;[5] of wages or compensation to be earned under an existing contract.[6]

[1] Denham v. R. R. Co. 1 Wall. 268; Seymour v. R. R. Co. 25 Barb. 284.

[2] [illegible] v. Day, 6 Dutch. 1:1

[3] East Lewisburg etc. Co. v. Marsh, 41 Pa. St. 26.

[4] Demarest v. Willard, 8 Cow. 206.

[5] Hall v. Hamilton, 48 Ind. 32.

[6] Post v. Mayor, 6 N. Y. 179; 57 Am. Dec. 433; Hall v. Sullivan, 2 Allen, 317; Am. Dec. 3; [illegible] v. Mayor, 50 How. Pr. [illegible]; Bennett v. O'Brien, 14 Abb. Pr. N. S. [illegible]; Greene v. Lawton, 34 Ind. 360; Emery v. Lawrence, 8 Cush. 151; Angier v. New York Belting [illegible] R. 336; West v. Jewett, 2 Met. 508, 37 Am. Dec. 115; [illegible] v. Lincoln, 2 Allen, 4; Payne v. [illegible], 4 Ala. 353, 37 Am. Dec. [illegible]; Dow v. Dewey, 2 Allen, 41; Wallace v. Harvard College, 14 [illegible]; Page v. Lyman, 5 Gray, 48; [illegible] v. Allen, 29 Vt. [illegible] 85 Am. Dec. 287. It was held that the [illegible] preventing their being [illegible] process in garnishment [illegible] that the assignment was made [illegible] a good consideration [illegible] v. Martin, 12 [illegible] 40 Am. Dec. [illegible] where there is no contract when assignment is made, [illegible] v. [illegible], 1 [illegible] 24 Am. Dec. 508; [illegible] v. [illegible] [illegible] v. [illegible] [illegible] A [illegible] v. [illegible] 370. A [illegible] [illegible] 1 [illegible]

be earned by a physician in specified future years: Sawyer v. Sisken, 42 Ala. 255; 94 Am. Dec. 646. And see Purnell v. Mather, 35 Ala. 570. In Massachusetts an assignment of future services, there being no existing contract of service, has been held invalid; but cases are cited in the same state which hold that if the assignor is at the time under a contract of service, it is maintainable: Mitchell v. Quinn, 1 Gray, 133; 61 Am. Dec. 414. See also Hartley v. Tapley, 2 Gray, 566. An officer may assign his salary, though not payable at any time: Brackett v. Baker, 7 Met. 335; 41 Am. Dec. 442. In Pennsylvania assignment which professes to transfer a debt to arise for wages not yet earned, against any one by whom the assignor may thereafter be employed, is held to be ineffectual, even after the wages are earned: Jermyn v. Moffitt, 77 Pa. St. 349. In New Hampshire it is decided that wages to become due may be effectually assigned, provided there is at the time an existing contract under which they are to be earned: Garland v. Harrington, 51 N. H. 409. The like conclusion is reached in Connecticut: Hawley v. Bristol, 39 Conn. 26; Angier v. New York Belting Co. 39 Conn. 376. The distinction between the cases in which the wages are not earned under a contract existing at the time of the assignment, and those in which they are, is said to be, that in the former the future earnings are a mere possibility assigned with no interest, while in the latter the possibility of future earnings is assigned with an interest, and the right to them, though contingent, and liable to be defeated, is a vested right: Low v. Pew, 108 Mass. 347, 350; 11 Am. Rep. 357.

§ 2653. Assignment of Part of Demand.— At law, the assignment of part only of an entire demand is not valid, unless made with the consent of the debtor.[1] One of two obligees in a bond cannot assign his interest separately, so as to make his co-obligee and the assignee the legal holders of the bond.[2] A municipality is not bound to recognize a partial assignment of a contract to which it is a party;[3] nor is an employer bound to recognize a partial assignment of his employee's future earnings,—an assignment, for instance, of five dollars a month out of twenty to be earned.[4]

But in equity an assignment of part of a demand without the consent of the debtor is valid.[5] Where a note is

[1] Grain *v.* Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Gibson *v.* Cooke, 20 Pick. 15; 32 Am. Dec. 194; Palmer *v.* Merrill, 6 Cush. 287; 52 Am. Dec. 782; Miller *v.* Bledsoe, 1 Scam. 530; 32 Am. Dec. 37; Knowlton *v.* Cooley, 102 Mass. 234; Beardslee *v.* Morgner, 73 Mo. 22; St. Louis Bank *v.* Noonan, 88 Mo. 372.

[2] Boyd *v.* Holmes, 1 Ind. 480.

[3] Philadelphia's Appeal, 86 Pa. St. 179.

[4] Carter *v.* Nichols, 58 Vt. 553.

[5] Grain *v.* Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Risley *v.* Bank, 83 N. Y. 329; 38 Am. Rep. 421; Field *v.* Mayor, 6 N. Y. 179; 57 Am. Dec. 435; Trist *v.* Child, 21 Wall. 447; First Nat. Bank *v.* Kimberlands, 16 W. Va. 590; Gallinger *v.* Pomeroy, 3 G. Greene, 178; 54 Am. Dec. 496; James *v.* City of Newton, 142 Mass. 368; 56 Am. Rep. 692; Exchange Bank *v.* McLoon, 73 Me. 498; 40 Am. Rep. 388, the court saying: "It is universally admitted at the present day that the whole of a chose in action may be assigned, and the assignment be binding upon the debtor. This is but an equitable assignment, unknown to the ancient common law, but such as the later common law takes notice of and protects, allowing the assignee to use the legal remedies in the name of the assignor. But courts of law not, as such, exercising equitable jurisdiction do not protect or recognize an assignment of a part only of an entire demand. At law, a partial assignment may be good between the parties, and if the assignor collects the money, he would in such case hold it as the trustee of the assignee. But the assignee has no legal remedy against the debtor who does not become a party to the arrangement. The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and subdivided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear. In support of this doctrine as one of law, the following cases have been commonly cited and relied upon: Mandeville *v.* Welch, 5 Wheat. 277; Tiernan *v.* Jackson, 5 Pet. 580; Gibson *v.* Cooke, 20 Pick. 15; 32 Am. Dec. 194; Robbins *v.* Bacon, 3 Me. 346. In a court of equity, however, the objections to a partial assignment of a demand, which are formida-

owned by two, an assignment by one of his share is good in equity.[1] But an assignment of part of a chose in action by an order supported by a sufficient consideration, but not drawn against a particular fund, is not enforceable against the debtor even in equity.[2]

§ 2654. **What not Assignable.** — A claim for damages for a personal injury is not assignable;[3] nor any personal tort which does not survive to the personal representative of the assignor;[4] nor a right of action in trespass on the case for damages from deceit;[5] nor an action for conversion;[7] nor a mere right to file a bill in equity;[6] as, for example, a right to file a bill to set aside a legal instrument for fraud;[8] nor a right to sue in equity to redress a fraud;[9] nor a contract for the performance of personal

ble in a court of law, disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risk as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law with its present modes cannot, protect the rights and interests of all parties concerned. The debtor is not the only party whose interests should be considered. There is as much natural equity in many cases in protecting an assignment of a part of a claim as an assignment of the whole of it. Equitable assignments are the outgrowth of the requirements and refinements of the present business era. In many ways, directly and indirectly, do circumstances create assignments of parts of funds, in dealings through servants, tenants, consignees, bankers, and other agencies. Disastrous results will often be experienced by deserving and innocent persons, if this boon be not granted by courts of equity."

[1] Fordyce v. Nelson, 91 Ind. 447.

[2] Harris County v. Campbell, 68 Tex. 22; 2 Am. St. Rep. 467.

[3] Rice v. Stone, 1 Allen, 566; Linton v. Hurley, 104 Mass. 353; Norton v. Tuttle, 60 Ill. 130; Grant v. Ludlow, 8 Ohio St. 1; McGlinchy v. Hall, 58 Me. 152; Comegys v. Vasse, 1 Pet. 193; Brooks v. Handford, 15 Abb. Pr. 342; Hodgman v. R. R. Co., 7 How. Pr. 492; Nash v. Hamilton, 3 Abb. Pr. 37; Pulver v. Harris, 62 Barb. 503; 52 N. Y. 75. An action of slander is not assignable, and a recovery by the assignee cannot stand: Renfro v. Prior, 25 Mo. App. 402.

[4] Zabriskie v. Smith, 13 N. Y. 322; 64 Am. Dec. 551; Devlin v. Mayor, 63 N. Y. 15.

[5] Dayton v. Fargo, 45 Mich. 153.

[6] Wallen v. R. R. Co., 74 Mo. 521.

[7] Marshall v. Means, 12 Ga. 61; 56 Am. Dec. 444.

[8] Milwaukee etc. R. R. Co. v. R. R. Co., 20 Wis. 174; 88 Am. Dec. 740.

[9] Marshall v. Means, 12 Ga. 61; 56 Am. Dec. 444; Norton v. Tuttle, 60 Ill. 130; Milwaukee etc. R. R. Co. v. R. R. Co., 20 Wis. 174; 88 Am. Dec. 740; Morris v. Morris, 5 Mich. 171; Morrison v. Deaderick, 10 Humph. 342; Smith v. Harris, 43 Mo. 557; Crocker v. Bellangee, 6 Wis. 645; 70 Am. Dec. 489. *Contra*, Marvin v. Inglis, 39 How. Pr. 329.

services;[1] nor a contract to convey to a person one of four pieces of land, to be selected by him;[2] nor a license to keep a grocery,[3] or a ferry;[4] nor a non-patentable invention;[5] nor a parol license, to be exercised on the lands of another;[6] nor a pre-emption right;[7] nor a right of exemption;[8] nor a right of entry for condition broken, where the estate may continue after forfeiture incurred;[9] nor a guaranty of the performance of the covenants of a lease;[10] nor a vendor's warranty of title to personal property sold;[11] nor a vendor's lien for purchase-money;[12] nor a mechanic's lien;[13] nor an order drawn on another, and accepted by him, for the payment of a certain sum in goods, payable on condition that the payee should have in his hands, ready to be delivered to the drawer, a deed from the payee and wife for certain property described, and making the delivery of the goods and the deed simultaneous acts;[14] nor accounts to be made by a physician in the practice of medicine in specified future years;[15] nor a "labor ticket," or certificate for wages, issued by a corporation, and on its face "payable to employee only," and "not transferable."[16] An assignment by a public officer

[1] Hayes *v.* Willio, 4 Daly, 259; Davenport *v.* Gentry, 9 B. Mon. 427; Chapin *v.* Longworth, 31 Ohio St. 421. Where a contract is founded in personal trust and confidence, the assignee thereof cannot recover upon it without the consent of the party contracting with his assignor to the assignment: Lansden *v.* McCarthy, 45 Mo. 106; Palo Pinto Co. *v.* Gano, 60 Tex. 249. B binds himself to give theatrical performances for A at any place A might direct, and not to perform for any one else. A cannot assign his rights under the contract so as to give his assignee the right to prevent B from performing for other persons: Hayes *v.* Willio, 4 Daly, 259.

[2] McQueen *v.* Chouteau, 20 Mo. 222; 64 Am. Dec. 178.

[3] Lewis *v.* U. S., 1 Morris, 199; Munsell *v.* Temple, 8 Ill. 92.

[4] The Maverick, 1 Sprague, 23; Lombard *v.* Cheever, 8 Ill. 469.

[5] Albright *v.* Teas, 37 N. J. Eq. 171.

[6] Cowles *v.* Kidder, 24 N. H. 364; 57 Am. Dec. 287; Mendenhall *v.* Klinck, 51 N. Y. 246.

[7] Whitney *v.* Buckman, 13 Cal. 536.

[8] Eberhart's Appeal, 39 Pa. St. 509; 80 Am. Dec. 536.

[9] Gwynn *v.* Jones, 2 Gill & J. 173; Warner *v.* Bennett, 31 Conn. 468.

[10] Potter *v.* Gronbeck, 117 Ill. 404.

[11] Salle *v.* Light, 4 Ala. 700; 39 Am. Dec. 317.

[12] Hecht *v.* Spears, 27 Ark. 229; 11 Am. Rep. 784; Inglehart *v.* Armiger, 1 Blan't, 519; Elder *v.* Jones, 85 Ill. 384; Hammond *v.* Peyton, 34 Minn. 529.

[13] Griswold *v.* R. R. Co., 18 Mo. App. 52; Goodman *v.* Pence, 21 Neb. 459.

[14] Kingsbury *v.* Wall, 68 Ill. 311.

[15] Skipper *v.* Stokes, 42 Ala. 255; 94 Am. Dec. 646.

[16] Tabler *v.* Land etc. Co., 79 Ala. 377; 58 Am. Rep. 593.

of the future salary or fees of his office is contrary to public policy and void.[1] One cannot become the assignee of his own obligation; and when an obligation is transferred to an obligor by an instrument in the form of an assignment, instead of taking effect as such, it operates as an extinguishment of the obligor's liability.[2]

§ 2655. Form of Assignment.—An equitable assignment may be made in any way which shows a clear intention to assign, and either by words or acts. A deed or writing is not required.[3] Any writing or act which clearly indicates that the assignor intends to make over a fund belonging to him amounts, in equity, to an assignment of the fund.[4] Therefore, in equity, an order given by a creditor upon his debtor, or upon a trustee or agent holding funds at his disposal, for payment out of such funds, will operate as a valid equitable assignment of so much of the fund or debt as will satisfy the order in favor of the person to whom it is given.[5]

The delivery of a note, bill, or execution, with intent to transfer the debt, is a sufficient assignment of the note, bill or judgment.[6] In general, an indebtedness or right in action may be assigned orally.[7] A claim for money due for goods sold and delivered may be assigned by

[1] Rose v. Lawrence, 36 N. Y. 445; Jones v. Conn, 16 Ohio St. 272; Jones v. Brem, 47 How. Pr. 257; 2 Abb. N. S. 238; Lucas v. Hart, 2 Sand. Ch. 153; Bean v. Mansfield, 3 Ind. App. 201; Jones, State Bank v. Sinclair, 3 Wis. 78; Swanson v. Bank, 7 Wis. 336; 41 Am. Dec. 648; Wright v. Quirk, 1 Neb. 103; 91 Am. Dec. 414; Wortmann v. Bank, 2 Allen, 241. See the last three cases distinguished in Bank v. Lawrence, 36 N. Y. 448; 37 Am. Rep. 271.

[2] Brown v. Mack, 33 Ill. 332; 85 Am. Dec. 277.

[3] Lehman v. Commercial, etc., Mercantile v. Nixon, 1 Fed. 561; Thomson v. Thomson, 3 Bro. Ch. 381; Burrows v. Rutledge, 2 Desa. Eq. 34; Watson v. Bagley, 12 Pa. St. 164; 51 Am. Dec. 595.

[4] Brinkow v. Brinkow, 4 N. J. Eq. 278; Bank v. Bugg, 44 Mo. 18; 100 Am. Dec. 247.

[5] Shaw v. Lawson, 1 Ves. Sr. 331; Lewis v. Berry, 14 Barb. 511; Conway v. Cronin, 27 N. H. 47; Alexander v. Adams, 1 Serg. 47; 5 Am. Dec. 347; Kimball v. Morse, 31 N. J. Eq. 106.

[6] Jones v. Witter, 13 Mass. 304; Dunn v. Snell, 15 Wend. 470; Thomas v. Thomas, 2 Sandf. Ch. 79; 2 Barb. Ch. 220; Peterson v. Ely, 17 Johns. 214.

[7] Porter v. Pollard, 28 Me. 448; Crane v. Bugg, 4 Mich. 15; Tousmard v. Hamm, 2 Bail. 288; Bellows v. Bellows, 3 Vt. 446; Nye v. Brown, 33 Vt. 414.

parol.[1] So may a tenancy held by parol.[2] An assignment in writing is not necessary to transfer the title to securities delivered under the provisions of a trust deed.[3] An assignment of an inventor's interest in his invention may be by parol.[4] A non-negotiable note may be assigned by a blank indorsement and delivery.[5] A mortgage may be assigned by a writing without seal, or by mere delivery of the deed.[6] A judgment may be assigned by parol, or by a writing without a seal.[7]

§ 2656. Order not Communicated to Payee.—An order or direction given to the debtor or party holding the funds to pay over to another, not communicated to the latter, is incomplete as an assignment; it is a mere authority to the debtor to pay, and may be revoked at any time before it is acted upon, either by an express revocation, or by any disposition of the fund inconsistent with it.[8] An unaccepted draft is not an equitable assignment of the amount named in it in the drawee's hands.[9]

ILLUSTRATIONS.— A person, having accepted bills, paid money to his bankers for the expressed purpose of meeting the acceptances, and died before the bills became due. *Held*, that the holders of the bills had acquired no claim against the bankers in respect of the money, which was retained upon the general account of the principal: *Hill* v. *Royds*, L. R. 8 Eq. 290. An authority was given by a principal to an agent to receive payment from the debtor, and to pay over the amount to another. *Held*, not an assignment of the debt: *Rodick* v. *Gandell*, 12 Beav. 325. Notes were delivered to an agent for collection, with instructions to pay certain debts with the proceeds. *Held*, not to pass title in the notes to the creditors whose debts were to be paid: *Clark* v. *Cilley*, 36 Ala. 652; 76 Am. Dec. 343.

[1] Kessel *v.* Albetis, 56 Barb. 362.
[2] Ross *v.* Schneider, 30 Ind. 428.
[3] Vreeland *v.* Van Horn, 17 N. J. Eq. 137.
[4] Reed *v.* Van Ostrand, 1 Wend. 424; 19 Am. Dec. 529.
[5] Tibbets *v.* Gerrish, 25 N. H. 41; 57 Am. Dec. 307.
[6] Runyan *v.* Mersereau, 11 Johns. 534; 6 Am. Dec. 393; Gillett *v.* Campbell, 1 Denio, 520; Crain *v.* Paine, 4 Cush. 483; 50 Am. Dec. 807.
[7] Ford *v.* Stewart, 19 Johns. 342; Becton *v.* Ferguson, 22 Ala. 599.
[8] Scott *v.* Porcher, 3 Mer. 652. A creditor's agreement to pay an agent part of a sum collected from a debtor as compensation for collecting it is not an equitable assignment of any part of the debt: Plater *v.* Meng, 30 Fed. Rep. 308.
[9] Grammel *v.* Carmer, 55 Mich. 201; 54 Am. Rep. 363.

§ 2657. Order on Debtor to Pay. — A mere order on a debtor to pay his debt to a third party, which in equity, on notice to the debtor, may amount to an assignment, is inoperative at law to charge him. The debtor may pay the third party, in which event he is discharged, but he is not bound to do so.[1] He remains liable to the original creditor, who may revoke the order before it is acted on.[2] A mere acknowledgment by the debtor of the order will not charge him.[3] But after the debtor has made himself liable to the assignee to pay the order, the creditor cannot revoke it.[4] In equity, however, such an order is a valid assignment without any formal acceptance by the debtor.[5] But if the order does not specify the fund on which it is drawn, it does not become a valid assignment until it is accepted by the drawee.[6] Thus an unaccepted check or bill of exchange is no equitable assignment of the amount standing to the credit of the drawer on the books of the bank.[7]

§ 2658. Notes of Assignment Necessary. — The assignment of a debt may be valid as against the assignor without any notice to the debtor;[8] but it is not complete and binding as against the debtor and other parties subsequently acquiring an interest in the debt or fund until

[1] Leake on Contracts, 1186.
[2] Leake on Contracts, 1186.
[3] Brind v. Hampshire, 1 Mees. & W. 365.
[4] Hodgson v. Anderson, 3 Barn. & C. 842.
[5] Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423; First Nat. Bank v. Kimberlands, 16 W. Va. 590; People v. Comptroller, 77 N. Y. 48; Nesmith v. Drum, 8 Watts & S. 9; 42 Am. Dec. 260; Martin v. Maner, 10 Rich. 271; 70 Am. Dec. 223; Mandeville v. Welch, 5 Wheat. 285; Robbins v. Bacon, 3 Me. 346; Corser v. Craig, 1 Wash. 424. Otherwise as to part of a fund, unless expressly assented to by the drawee: Shuttleworth v. Bruce, 7 Robt. 160; Gibson v. Finley, 4 Md. Ch. 75; Walker v. Mauro, 18 Mo. 564; Blin v. Pierce, 20 Vt. 25.
[6] Hutter v. Ellwanger, 4 Lans. 8; Harris v. Clark, 3 N. Y. 93; 51 Am. Dec. 352. See Adams v. Darby, 28 Mo. 162; 75 Am. Dec. 115.
[7] Chapman v. White, 6 N. Y. 412; 57 Am. Dec. 465; Rosenthal v. Mastin, 17 Blatchf. 322; Ætna Nat. Bank v. Bank, 46 N. Y. 87; 7 Am. Rep. 314; Duncan v. Beelin, 60 N. Y. 153; Kimball v. Donald, 20 Mo. 577; 64 Am. Dec. 209; Bank v. Bogy, 9 Mo. App. 338; Ford v. Angelrodt, 37 Mo. 50; 88 Am. Dec. 174; Bush v. Foote, 58 Miss. 5; 38 Am. Rep. 310. *Contra*, Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522.
[8] Muir v. Schenck, 3 Hill, 228; 38 Am. Dec. 633.

such notice has been given. For until he has notice of the assignment, it is competent for the debtor to discharge the debt by a *bona fide* payment regularly made to his original creditor or to his order; and a payment or discharge that is effectual against the creditor will exclude the assignee who claims under him.[1] An assignee of a claim is bound by a settlement between the assignor and the debtor, if the debtor has received no notice of the assignment.[2] It is also competent for the debtor to discharge the debt by a *bona fide* payment to any other assignee of his creditor before notice of the prior assignment; and therefore a subsequent assignee who has no notice of the prior assignment may intervene to claim the debt or fund, and by giving notice to the debtor obtain a priority of claim over the prior assignee who has neglected to give notice.[3] As between prior and subse-

[1] Whitington *v.* Tate, L. R. 4 Ch. 288; Richards *v.* Griggs, 16 Mo. 416; 57 Am. Dec. 240; Van Buskirk *v.* Ins. Co., 14 Conn. 141; 36 Am. Dec. 473; Muir *v.* Schenck, 3 Hill, 228; 38 Am. Dec. 633; Smith *v.* Ewer, 22 Pa. St. 116; 60 Am. Dec. 73; Gaullagher *v.* Caldwell, 22 Pa. St. 300; 60 Am. Dec. 85; Merchants' Bank *v.* Hewitt, 3 Iowa, 93; 66 Am. Dec. 49; Dodd *v.* Brott, 1 Minn. 270; 66 Am. Dec. 541; Hogan *v.* Black, 66 Cal. 41; Hobson *v.* Stevenson, 1 Tenn. Ch. 203.

[2] Randall *v.* Reynolds, 52 N. Y. Sup. Ct. 145.

[3] Dearle *v.* Hall, 3 Russ. 1; Loveridge *v.* Cooper, 3 Russ. 30; Foster *v.* Blackstone, 1 Mylne & K. 297; Foster *v.* Cockerell, 3 Clark & F. 456; Van Buskirk *v.* Ins. Co., 14 Conn. 141; 36 Am. Dec. 473; Flickey *v.* Lovey, 4 Baxt. 173; Clodfelter *v.* Cox, 1 Sneed, 330; 60 Am. Dec. 157; Ward *v.* Morrison, 25 Vt. 600; Barrow *v.* Porter, 44 Vt. 587; Bishop *v.* Holcomb, 10 Conn. 444; Murdock *v.* Finney, 21 Mo. 138. *Contra*, Muir *v.* Schenck, 3 Hill, 228; 38 Am. Dec. 633; Robinson *v.* Weeks, 6 How. Pr 167: Bush *v.* Lathrop, 22 N. Y. 549; Greentree *v.* Rosenstock, 61 N. Y. 593; Freund *v.* Importers' etc. Bank, 76 N. Y. 356. In Clodfelter *v.* Cox, 1 Sneed, 339, 60 Am. Dec. 157, it is said: "There is an irreconcilable conflict of authority upon this subject. The weight of American authority seems to be that the assignment of a chose in action is complete in itself, and vests a perfect title in the assignee, as against third persons without notice of the assignment to the debtor. But the contrary of this is the settled doctrine of the English as well as of some of the courts of this country at the present day. The latter we consider as the more reasonable and safe practical rule, and have accordingly held on more than one occasion that the assignment of a chose in action is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor; and this, not only as regards the debtor, but likewise as to third persons. And, therefore, as between successive purchasers or assignees of a chose in action, he is entitled to preference who first gives notice to the debtor, although his assignment be subsequent to that of the other. To perfect the assignment, not merely as against the debtor, but also as against creditors and subsequent *bona fide* purchasers,

quent assignees of the same debt, it is not necessary to the validity of the first assignment that notice thereof should be given to the debtor.[1]

§ 2659. **Form of Notice.**—The notice of the assignment of the debt or fund need not, in general, be given in writing, or in any formal manner, or even with the express intention or purpose of securing the assignment,[2] notice in fact of the assignment, for whatever purpose given, or however informally acquired, being sufficient to bind the debtor.[3] Special notice is unnecessary; it is enough if the party has such knowledge of facts and circumstances as is sufficient to put him on inquiry.[4] The notice may be in general terms, without mentioning the amount of the fund assigned or charged; but if it give particulars of the amount of the charge, or of the fund charged, it will not be extended constructively in effect beyond the express terms.[5]

ILLUSTRATIONS.—W. said to B., "If there is anything found due from you to M., I want you to pay it to me." B. said he "had been requested to do the same by two others," whereupon W. said, "I claim it." *Held*, not sufficient notice to B. of an assignment having been made from M. to W.: *Cahoon* v. *Morgan*, 38 Vt. 234. The plaintiff held a due bill of the defendant, and assigned it to A by indorsing it in blank, and A called on the defendant and demanded payment, who said he would settle it the next week, in New York, and afterwards paid it, in New York, to the assignor. *Held*, in a suit against A, in the assignor's name, that

notice must be given. Hence it follows that an attachment by a creditor, in the period intervening between the assignment and the notice, will have preference."

[1] Tingle *v.* Fisher, 20 W. Va. 497; Bradley *v.* Root, 5 Paige, 632.

[2] Leake on Contracts, 1175.

[3] "The principle of law is, that what a man knows for one purpose he knows for all; and you do not inquire whether he learnt it in one character or in another". Per Wigram, V. C., in Meux *v.* Bell, 1 Hare, 88; Smith *v.* Smith, 2 Cromp. & M. 231; Edwards *v.* Scott, 1 Man. & G 962; 2 Scott N R. 266; Alletson *v.* Chichester, L. R. 10 Com. P. 319; 44 L. J. Ch. 153; Ex parte Agra Bank, L. R. 3 Ch. 555; 37 L. J. Ch. 121; Lloyd *v.* Banks, L. R. 3 Ch. 488; 37 L J. Ch. 881; overruling Brown's Trusts, L. R. 5 Eq. 88; 37 L. J. Ch. 171.

[4] Anderson *v.* Van Alen, 12 Johns. 343; United States *v* Sturges, 1 Paine, 525; United States *v.* Clark, 1 Paine, 629; Kellogg *v.* Krauser, 14 Serg. & R 137; 16 Am. Dec. 480.

[5] Bright's Trusts, 21 Beav. 430; Woodburn *v.* Grant, 22 Beav. 493.

the payment was a defense, the assignee not having shown the due bill to the defendant, nor explicitly stated that it had been assigned by the payee: *Meghan* v. *Mills*, 9 Johns. 64.

§ 2660. **Notice — To Whom Given.** — Notice to an attorney binds his client;[1] to a director of a company, binds the company;[2] to one partner, is notice to the partnership.[3] Notice of assignment given to one of several joint debtors, or to one of several co-trustees, although he may not be the acting trustee, is sufficient, and will be effectual to protect the assignment, so long as the person having the notice or knowledge of the matter continues a joint debtor or trustee.[4]

§ 2661. **Assent of Debtor Immaterial.** — At common law the debtor could not be charged with a personal liability to the assignee without a distinct contract or promise on his part.[5] But in equity the assignment is good, and binds the debtor without any assent on his part, and even notwithstanding his dissent.[6]

§ 2662. **Extent of Assignment.** — An assignment of a debt carries with it all collateral securities which the creditor may hold for its enforcement,[7] and all the remedies which the assignor had.[8] The assignment of a bond secured by a mortgage or deed of trust carries them,[9] as it does, also, a guaranty of collection given by a previous assignor.[10] An assignment of a bond and mortgage, and "the moneys due and to grow due thereon," carries a note for which they are held as collateral.[11] An

[1] Tibbits *v.* George, 5 Ad. & E. 107.
[2] Gale *v.* Lewis, 9 Q. B. 730.
[3] Duncan *v.* Chamberlayne, 11 Sim. 123.
[4] Smith *v.* Smith, 2 Cromp. & M. 231; Meux *v.* Bell, 1 Hare, 73; Wiles *v.* Greenhill, 31 L. J. Ch. 1.
[5] Leake on Contracts, 1177.
[6] Leake on Contracts, 1177; Hall *v.* Ins. Co., 111 Mass. 53; 15 Am. Rep. 1; Brill *v.* Tuttle, 81 N. Y. 454; 37 Am. Rep. 515.
[7] Lindsey *v.* Bates, 42 Miss. 397; Waller *v.* Tate, 4 B. Mon. 529; Hurt *v.* Wilson, 38 Cal. 263.
[8] Morris *v.* McCulloch, 83 Pa. St. 34.
[9] Miller *v* Hoyle, 6 Ired. Eq. 269.
[10] Craig *v.* Parkis, 40 N. Y. 181; 100 Am. Dec. 469.
[11] Belden *v.* Meeker, 2 Lans. 470; 47 N. Y. 307.

assignment of a judgment carries with it a mortgage given to secure the debt,[1] and the damages afterwards given upon the dissolution of an injunction and upon appeal.[2] An assignment of a promissory note secured by a mortgage carries also the mortgage.[3] The assignment of a note given to secure the purchase-money for real estate carries the vendor's lien on the property.[4] The assignment of the principal carries with it the interest.[5] An assignment of a claim against a steamboat for supplies carries with it the statutory lien.[6] The transferee of a note, pending a suit on it, acquires an interest in the judgment afterwards obtained on it.[7] Words in an assignment of a mortgage describing the mortgage as "a certain mortgage made by A B," imply a warranty that the signature of the name A B to the paper is not a forgery.[8] The assignment of a non-negotiable demand, arising on contract, before due, defeats a set-off by the debtor of an independent cross-demand on which no right of action had accrued at the time of the assignment.[9] Where the assignment of a contract is absolute in form, although really it is security for a debt less than the sum due on the contract, the assignee, in suing the party liable under the contract, is not limited in his recovery to the amount due to him from his assignor.[10]

An assignment of a debt does not carry a right of action for a wrong against a third party, although arising

[1] Cathcart's Appeal, 13 Pa. St. 416; Bolen *v.* Crosby, 49 N. Y. 183.

[2] Marshall *v.* Craig, 3 Bibb, 291.

[3] Perot *v.* Levasseur, 21 La. Ann. 529; Brown *v.* Blydenburgh, 7 N. Y. 141; 57 Am. Dec. 507.

[4] Perry *v.* Roberts, 30 Ind. 244; 95 Am. Dec. 689. When the vendor conveys land by deed, taking the note of the vendee for the purchase-money, a mere assignment of the note does not transfer to the assignee the benefit of the vendor's lien upon the land for the payment of the purchase-money; but where the assignment is made as collateral security for the notes of the vendor, such peculiar equitable circumstances exist that in such case the assignee, holding the lien as well for the benefit of the assignor as for himself, is subrogated to all his equities: Carlton *v.* Buckner, 28 Ark. 66.

[5] Mabry *v.* Memphis, 12 Heisk. 539.

[6] Strother *v.* Hamburg, 11 Iowa, 59.

[7] Dugas *v.* Mathews, 9 Ga. 510; 54 Am. Dec. 361.

[8] Corwin *v.* Wesley, 34 N. Y. Sup. Ct. 109.

[9] Fuller *v.* Steiglitz, 27 Ohio St. 355; 22 Am. Rep. 312.

[10] Ginocchio *v.* Amador Canal and Mining Co., 67 Cal. 493.

from the same subject-matter.[1] The assignment of a note executed for the rent of land as collateral security does not confer the landlord's lien upon the assignee, or entitle him to attach the crop raised on the land, for the debt.[2] The assignment of a bond for a deed of lands does not invest the assignee with a right to rents which have already accrued.[3] An assignment of a claim for land damages cannot enable the assignee to maintain an action for a breach of the covenant against encumbrances, which might have been maintained by the assignor by virtue of his deed of the land, the taking of which afforded the claim for damages.[4] The assignment of a continuing contract which has been partly performed does not transfer a right of action for a previous breach of the contract.[5] An assignment of "all the goods, wares, merchandise, and personal property of every kind" does not include an equitable interest in a contract.[6] The assignee of a note given for the purchase price of land, who takes it without recourse against the assignor, cannot enforce the lien of the vendor.[7] Costs are only an incident of a verdict, and do not pass by an assignment which does not pass the verdict.[8]

§ 2663. **Assignee Takes Subject to Equities.**—The assignee of a debt or chose in action takes it subject to all the equities that may have arisen respecting it between the assignor and the debtor at the time of the assignment; as claims for the allowance of payments made in discharge of the debt, or claims to set-off, or to an adjustment of accounts between them.[9] The assignor can give no better

[1] Morris *v.* McCulloch, 83 Pa. St. 34.

[2] Roberts *v.* Jacks, 31 Ark. 597; 25 Am. Rep. 584.

[3] Van Driel *v.* Rosierz, 26 Iowa, 575.

[4] New York etc. R. R. Co. *v.* Drury, 133 Mass. 167.

[5] Love *v.* Van Every, 18 Mo. App. 196.

[6] Kendall *v.* Almy, 2 Sum. 278.

[7] Hall *v.* Click, 5 Ala. 363; 39 Am. Dec. 327.

[8] Lawrence *v.* Martin, 22 Cal. 173.

[9] Leake on Contracts, 1179; Bush *v.* Lathrop, 22 N. Y. 535; Walker *v.* Johnson, 13 Ark. 522; Timms *v.* Shannon, 19 Md. 296; 81 Am. Dec. 632; Blydenberg *v.* Thayer, 1 Abb. App. 156; Martin *v.* Richardson, 68 N. C. 255; Colquitt *v.* Bonner, 2 Ga. 155;

right than he himself has at the time.[1] For example, the assignee of a mortgage takes it subject to all defenses existing between the original parties.[2] So the assignee from an assignee takes subject to any equities between the original creditor and the first assignee.[3] A *bona fide* purchaser of a judgment from an assignee takes the same subject to any equities between the judgment creditor and his assignee.[4] A party to whom a security, standing in the name of an executor, as such, is assigned in discharge of the private debt of the executor, takes it with notice of a breach of trust, if there is one.[5] Where there has been an agreement between the parties that one debt should be set off against the other, one of the parties cannot assign the evidence of indebtedness, and thereby defeat the agreement.[6]

If the security was void from the beginning, the assignee would be in no better situation than the creditor, and would take nothing.[7] So if the security be voidable by the debtor on the ground of fraud, or if there be any other ground for setting it aside or rectifying it as against the creditor, the assignee of the creditor would take it subject to the right of avoidance, or other rights and

Scott *v.* Shreve, 12 Wheat. 605; State Mut. Ins. Co. *v.* Roberts, 31 Pa. St. 438; Faull *v.* Tinsman, 30 Pa. St. 108; Ludwick *v.* Crull, 2 Yeates, 464; 1 Am. Dec. 362; Buckner *v.* Smith, 1 Wash. (Va.) 296; 1 Am. Dec. 463; Smith *v.* Tunno, 1 McCord Ch. 443; 16 Am. Dec. 617; Moore *v.* Holcombe, 3 Leigh, 597; 24 Am. Dec. 683; Cary *v.* Bancroft, 14 Pick. 315; 25 Am. Dec. 393; Jones *v.* Hardesty, 10 Gill & J. 404; 32 Am. Dec. 180; Foot *v.* Ketchum, 15 Vt. 258; 40 Am. Dec. 678; Natchez *v.* Minor, 9 Smedes & M. 544; 48 Am. Dec. 727; York *v.* McNutt, 16 Tex. 13; 67 Am. Dec. 607; Warner *v.* Whitaker, 6 Mich. 133; 72 Am. Dec. 65; Ayres *v.* Campbell, 9 Iowa, 213; 74 Am. Dec. 346; Robeson *v.* Roberts, 20 Ind. 155; 83 Am. Dec. 308; Dearborn *v.* Nelson, 61 N. H. 249.

[1] Jack *v.* Davis, 29 Ga. 219; Wilson *v.* Bowden, 26 Ark. 151; Shotwell *v.* Webb, 23 Wis. 375; Gray *v.* Thomas, 18 La. Ann. 412; Smith *v.* Rogers, 14 Ind. 224; Ely *v.* McKnight, 30 How. Pr. 97; Beebe *v.* Bank, 1 Johns. 529; 3 Am. Dec. 353; Trustees *v.* Wheeler, 61 N. Y. 105; Hill *v.* McPherson, 15 Mo. 204; 55 Am. Dec. 142.

[2] Ingraham *v.* Disborough, 47 N. Y. 421; Mott *v.* Clark, 9 Pa. St. 399; 49 Am. Dec. 566; Bryant *v.* Vix, 83 Ill. 11. But see Farmers' Nat. Bank *v.* Fletcher, 44 Iowa, 252.

[3] Cutts *v.* Guild, 57 N. Y. 229.

[4] Cutts *v.* Guild, 57 N. Y. 229.

[5] Parrish *v.* Brooks, 4 Brewst. 154.

[6] Martin *v.* Richardson, 68 N. C. 255.

[7] Turton *v.* Benson, 1 P. Wms. 496; Parker *v.* Clarke, 30 Beav. 54; Woodson *v.* Barrett, 2 Hen. & M. 80; 3 Am. Dec. 612; Williams *v.* Judy, 3 Gilm. 282; 44 Am. Dec. 699.

equities of the debtor.[1] The assignee will also become subject to equities that arise against the assignor subsequent to the assignment, if they arise before he gives notice of the assignment to the debtor.[2] After notice, the right is in the assignee only, and the debtor cannot set off or charge against him any claims against the assignor contracted subsequently to the notice; but he will be entitled to set off claims then subsisting, though they do not become payable until after the notice.[3]

§ 2664. **Exceptions.** — An important exception to the rule occurs with regard to bills of exchange and promissory notes and other instruments recognized by law or constituted by statute as negotiable.[4] So the debtor, by express contract, or by implication from the contract, may exclude himself from setting up any rights or equities against the assignee.[5] Thus where an obligor induces an assignee to take the instrument by declaring that he has no defense to it, he cannot afterwards set up any defense.[6] An assignee of a contract to deliver goods is not affected by equities arising between the original parties after the delivery of the goods.[7] A *bona fide* purchaser of a chose in action not negotiable, from one to whom the owner has assigned the apparent absolute ownership upon the faith of such ownership, obtains a valid title as against such owner, although the assignee had not such title.[8] Acts and declarations of the assignor made subsequent to the assignment do not bind the assignee.[9]

ILLUSTRATIONS. — A made an agreement to deliver rice to B or his assigns. B afterwards, by an indorsement on the back

[1] Graham *v.* Johnson, L. R. 8 Eq. 36.
[2] Cavendish *v.* Geaves, 24 Beav. 163.
[3] Jeffryes *v.* Bank, L. R. 2 Eq. 674; Watson *v.* R. R. Co., L. R. 2 Com. P. 593.
[4] See Title Negotiable Instruments, *ante*.
[5] Leake on Contracts, 1181; Woodson *v.* Barrett, 2 Hen. & M. 80; 3 Am. Dec. 612.
[6] Weaver *v.* Lynch, 25 Pa. St. 449; 64 Am. Dec. 713; Eldred *v.* Hazlett, 32 Pa. St. 316; Scott *v.* Sadler, 52 Pa. St. 214; Hardin *v.* Helton, 50 Ind. 323.
[7] Ford *v.* Sproule, 2 A. K. Marsh. 528; 12 Am. Dec. 439.
[8] Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41; 14 Am. Rep. 173.
[9] Kimball *v.* Huntington, 10 Wend. 675; 25 Am. Dec. 590.

of the agreement, directed the rice to be delivered to C, which was accepted and signed by A. *Held*, that there was a new contract, which excluded any equities between A and B: *Lane* v. *Winthrop*, 1 Bay, 116; 1 Am. Dec. 599. A was the owner of a certificate of indebtedness of the state of New York, which he transferred to B with a written assignment. The transfer was induced by false representations, and the promises of B were not fulfilled. B transferred the certificate to the bank of M., which took it on the faith of the assignment. *Held*, that the bank was entitled to hold the certificate against A: *Moore* v. *Metropolitan Nat. Bank*, 55 N. Y. 41; 14 Am. Rep. 173.

§ 2665. Liability of Assignor. — The assignor of a chose in action impliedly warrants that he has a good title to it.[1] The assignor of a bond impliedly covenants that he has a right to transfer what his assignment purports to pass.[2] There is no implied warranty on the part of the assignor of a bond that the obligee will pay it, or that he will repay the consideration in case the obligee fails.[3] No covenants for title are implied in the assignment of a lease.[4] The assignee may recover from his assignor the costs expended by him in prosecuting an unfounded claim which the assignor had falsely represented to be valid.[5]

ILLUSTRATIONS. — The mortgagee of premises assigned the mortgage to plaintiff. The premises were afterwards, and after the maturity of the mortgage, conveyed in fee by the mortgagor to the mortgagee, and by him to the defendant. The assignment of the mortgage was not recorded. *Held*, that plaintiff's lien was not invalidated by failure to have the assignment recorded, and that it was prior to defendant's title: *Purdy* v. *Hun-*

[1] Ledwich *v.* McKim, 53 N. Y. 307; Stroh *v.* Hess, 1 Watts & S. 153; Giffert *v.* West, 33 Wis. 617.

[2] Emmerson *v.* Claywell, 14 B. Mon. 18; 58 Am. Dec. 645; Winstell *v.* Hehl, 6 Bush, 62.

[3] Garretsie *v.* Van Ness, 2 N. J. L. 20; 2 Am. Dec. 333; Looney *v.* Pinkston, 1 Over. 384; Whiteman *v.* Childress, 6 Humph. 303; Lawrence *v.* Daugherty, 5 Yerg. 453; Jackson *v.* Crawford, 12 Serg. & R. 165; Robinson *v.* White, 4 Litt. 238; Walker *v.* Scott, 2 Nott & McC. 286. On the other hand, in Virginia, it is held that the assignor of a bond is liable to the assignee, if the latter, after using due diligence, fails to recover against the obligor: Mackie *v.* Davis, 2 Wash. (Va.) 119; 1 Am. Dec. 482. And this ruling has been adhered to in this state: See Goodhall *v.* Stuart, 2 Hen. & M. 114; Saunders *v.* Marshall, 4 Hen. & M. 455; Smith *v.* Triplett, 4 Leigh, 599.

[4] Blair *v.* Rankin, 11 Mo. 440; Waldo *v.* Hall, 14 Mass. 486.

[5] Cartwright *v.* Carpenter, 7 How. (Miss.) 328; 40 Am. Dec. 66.

tington, 42 N. Y. 334; 1 Am. Rep. 532. The vendor of land took two bonds, maturing at different dates, for the unpaid purchase-money. He assigned to plaintiff the bond last falling due. *Held*, that the assigned bond was entitled to priority of payment, and that want of due diligence on the part of the assignee did not affect such priority: *McClintic* v. *Wise's Administrator*, 25 Gratt. 449; 18 Am. Rep. 694.

§ 2666. **Assignment by New Agreement of All Parties.** —The assignment of a debt may be rendered effectual in law by an agreement of all the parties that the debtor, in consideration of his discharge by the assignor, should undertake a new contract to pay the assignee.[1] So by agreement of all parties the liability for a debt may be assigned from one debtor to another.[2] Such a transaction frequently occurs upon a change in a firm of partners; the debt of the original firm may, by an agreement of all the parties, be effectually transferred to the new firm, so as to render them liable to the creditor in substitution of the former. So where a change in a firm is occasioned by the retirement or death of one of the partners, an assignment of a debt of the original firm may be effected by the creditor accepting, either expressly or by his continued dealing, the liability of the continuing partners.[3]

[1] Leake on Contracts, 1185. Mr. Leake says: "Such a transaction is frequently adopted to enable the creditor to pay a debt of his own by means of the debt due to him. The transaction is thus stated in a simple form: 'Suppose A owes B one hundred pounds, and B owes C one hundred pounds, and the three meet, and it is agreed between them that A shall pay C the one hundred pounds. B's debt is extinguished, and C may recover that sum against A.' In the case supposed, C gives a consideration for the promise of A to him in the satisfaction and discharge of the debt of B, and receives a consideration for his discharge of B in the promise of A; A receives a consideration for his promise to C in the satisfaction and discharge of his debt to B; B receives consideration for the discharge of his debt to A in the satisfaction and discharge of his debt to C; but without agreement and consideration between all the parties, the new contract, in assignment of the debt, would be incomplete. Accordingly, where, in the like relation between the parties, A merely requested C to charge B's debt to him, and C sent in his account to that effect, it was held to be not sufficient evidence of the acceptance of A as debtor instead of B, and B remained liable: Cuxon *v.* Chadley, 3 Barn. & C. 591. So it was held to be no answer to the claim of B against A that it had been agreed between the parties that A should pay C instead of B, unless it was further shown that the debt of B to C had been discharged": Cochrane *v.* Green, 9 Com. B., N. S., 448.

[2] Leake on Contracts, 1188.

[3] Thompson *v.* Percival, 5 Barn. & Adol. 925, Lyth *v.* Ault, 7 Ex. 669.

§ 2667. Assignee of Chose in Action may Sue in his Own Name.—At common law, an action upon an assigned chose in action was required to be brought in the name of the assignor, unless the debtor had expressly promised the assignee to be responsible to him.[1] But in those states where choses in action are made assignable, the assignee may maintain in his own name any action thereupon which the original obligee or payee might have brought.[2] The Michigan statute allowing the assignee to sue in his own name upon a contract is only permissive in its provisions, and the assignee is still at liberty to sue in the name of the contracting party.[3] Under a general statutory provision that "every action must be prosecuted in the name of the real party in interest," the assignee of a chose in action must bring suit in his own name, even though such chose in action is not assignable at common law.[4] The New Jersey statute authorizing the assignee of a chose in action to sue therefor in his own name after the death of the assignor makes it an essential condition of such right of action that the assignment shall have been for valuable consideration.[5] An assignee of a debt may bring an action for it in the assignor's name, even against his consent and without his knowledge, if such use of his name is necessary to enforce payment of the debt; but on application of the nominal plaintiff, indemnity against costs would be required, and in default thereof, the proceedings might be set aside or stayed.[6]

[1] Skinner *v.* Somes, 14 Mass. 107. The assignees of an account cannot authorize the assignor to bring suit thereon in his own name, while they retain the absolute property in it: Peck *v.* Dodds, 10 Nev. 204.

[2] 1 Stimson's American Statute Law, sec. 4032; Hooker *v.* Eagle Bank, 30 N. Y. 83; 86 Am. Dec. 351; Peterson *v.* Chemical Bank, 32 N. Y. 21; 88 Am. Dec. 298; Roberts *v.* Corbin, 26 Iowa, 315; 96 Am. Dec. 146.

[3] Sisson *v.* R. R. Co., 14 Mich. 489; 90 Am. Dec. 252.

[4] Long *v.* Heinrich, 46 Mo. 603.

[5] Andrews *v.* Rue, 34 N. J. L. 402.

[6] Farmers' etc. Bank *v.* Humphrey, 36 Vt. 554; 86 Am. Dec. 671.

TITLE XXV.

LICENSES.

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CHAPTER CXXVII.

LICENSES.

§ 2668. License defined — Construction of.
§ 2669. License by law or necessity.
§ 2670. Implied license.
§ 2671. License personal to licensee — Not assignable.
§ 2672. Revocable at will of licensor.
§ 2673. Theaters and places of public amusement.
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§ 2675. When license not revocable.
§ 2676. Duties and liabilities of licensor and licensee.
§ 2677. Abuse of license.

§ 2668. License Defined — Construction of. — A license is an authority given to do some act or acts on the land of another, without giving any estate in the land itself.[1] It differs from an easement in that the latter is a permanent interest, with a right at all times to enter and enjoy it, while the continuance of the former depends on the will of the person who has created it.[2] A license cannot be ripened into a right by lapse of time.[3] Where

[1] 3 Kent's Com. 452; Cook *v.* Stearns, 11 Mass. 533; Cheever *v.* Pearson, 16 Pick. 273; Mumford *v.* Whitney, 15 Wend. 380; 30 Am. Dec. 60; Prince *v.* Case, 10 Conn. 378; 27 Am. Dec. 675; Wynn *v.* Garland, 19 Ark. 23; 68 Am. Dec. 190; Rhodes *v.* Otis, 33 Ala. 578; 73 Am. Dec. 439; Riddle *v.* Brown, 20 Ala. 412; 56 Am. Dec. 202; Freeman *v.* Underwood, 66 Me. 229. So one holding a chattel for a time, paying monthly sums for a particular use, and no other, and prohibited from selling or loaning, is a mere licensee, having no interest liable to attachment or execution: Reinmiller *v.* Skidmore, 7 Lans. 161.

[2] 3 Kent's Com. 452; Hazleton *v.* Putnam, 3 Pinn. 107; 54 Am. Dec. 158; Thompson *v.* McElarney, 82 Pa. St. 174.

[3] Coalter *v.* Hunter, 4 Rand. 58; 15 Am. Dec. 726.

the license is given on condition, it is not operative, except on the performance of that condition.[1] A license may be created by parol,[2] except where the interest it gives in the land is one required under the statute of frauds to be in writing.[3] So every license that authorizes such acts as are not only required to be performed upon the land, but which gives some usufruct of the land itself,—a grant of an incorporeal hereditament,—must be created and transferred by deed.[4] An express license will not be extended by construction.[5] It is not exclusive to the licensee, unless such intention is clearly shown.[6] A license to erect a bridge will not extend to rebuilding it after it has been destroyed.[7] So a license to erect a dam for temporary purposes ends by the decay of the dam.[8] Under a license from city authorities for the erection of a telephone line, there is no right to enter private property and cut off the limbs of the trees, although they project over the sidewalk.[9]

ILLUSTRATIONS.—A tenant for life agreed to sell, and gave possession of the premises to his vendee. *Held*, not a contract of sale, but a license to enter and occupy until such license was revoked: *Van Deusen* v. *Young*, 29 N. Y. 9.

§ 2669. License by Law or Necessity.—There are many cases in which, wholly independent of the express

[1] Mumford *v.* Whitney, 15 Wend. 380; 30 Am. Dec. 60; Freeman *v.* Headley, 33 N. J. L. 523.

[2] Dolittle *v.* Eddy, 7 Barb. 74; Hill *v.* Hill, 113 Mass. 103; 18 Am. Rep. 455; Bachelder *v.* Sanborn, 24 N. H. 479; Cheever *v.* Pearson, 16 Pick. 273; Fuhr *v.* Dean, 26 Mo. 116; 69 Am. Dec. 484; Wynn *v.* Garland, 19 Ark. 23; 68 Am. Dec. 190; Woodbury *v.* Parshley, 7 N. H. 237; 26 Am. Dec. 739; Lockhart *v.* Geer, 54 Wis. 133; Harmon *v.* Harmon, 61 Me. 227; 14 Am. Rep. 556.

[3] Mumford *v.* Whitney, 15 Wend. 380; 30 Am. Dec. 60; Snowden *v.* Wilas, 19 Ind. 10; 81 Am. Dec. 370; Tanner *v.* Valentine, 75 Ill. 624.

[4] Kamphouse *v.* Gaffner, 73 Ill. 453.

[5] Wheelock *v.* Noonan, 108 N. Y. 179; 2 Am. St. Rep. 405.

[6] Silsby *v.* Trotter, 29 N. J. Eq. 228.

[7] Hall *v.* Boyd, 14 Ga. 1; Gardner *v.* Rowland, 2 Ired. 247; Androscoggin Bridge Co. *v.* Bragg, 11 N. H. 102. But permission to build a railroad over one's land imports authority to use it afterwards: Harlow *v.* R. R. Co., 41 Mich. 336.

[8] Hepburn *v.* McDowell, 17 Serg. & R. 383; 17 Am. Dec. 677.

[9] Telephone Co. *v.* Hunt, 16 Lea, 456; 57 Am. Rep. 237.

or implied permission of the owner, the law or the necessity of the case gives a license to go upon another's land. A common instance of this arises in the case of an officer of the law armed with process, who — with certain limitations — may go on a man's land and into his house to serve the writ in his lands.[1] So the law gives one a right to enter and abate a nuisance.[2] So if a highway is out of repair, or obstructed, a traveler having occasion to make use of it may lawfully pass upon the adjoining premises, carefully avoiding any unnecessary injury.[3] So the statutes which permit lands to be taken for public purposes, and provide for preliminary surveys, in order to determine the necessity for any particular appropriation, license an entry upon lands for that purpose.[4] Where a fire breaks out in a city, the public authorities or private individuals may enter upon private premises to prevent the spread of the flames, and they may even, if necessary, destroy the property to prevent the spread of the fire.[5]

§ 2670. Implied Licenses. — A license may be implied.[6] Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become

[1] Swain *v.* Mizner, 8 Gray, 182.

[2] See *ante*, Torts.

[3] Absor *v.* French, 2 Show. 28; Taylor *v.* Whitehead, Doug. 749; Bullard *v.* Harrison, 4 Maule & S. 387; Campbell *v.* Race, 7 Cush. 408; 54 Am. Dec. 728; Williams *v.* Safford, 7 Barb. 309; Hedgepeth *v.* Robertson, 18 Tex. 858. So if a private way is obstructed by the owner of the adjoining land, it would be justifiable to pass over his land to avoid the obstruction: Kent *v.* Judkins, 53 Me. 160; 87 Am. Dec. 544; Leonard *v.* Leonard, 2 Allen, 543; Farnum *v.* Platt, 8 Pick. 339; 19 Am. Dec. 330; Compare Taylor *v.* Whitehead, Doug. 749; Williams *v.* Safford, 7 Barb. 309; Boyce *v.* Brown, 7 Barb. 80; Holmes *v.* Seeley, 19 Wend. 506.

[4] Walther *v.* Warner, 25 Mo. 277; Bloodgood *v.* R. R. Co., 14 Wend. 51; 18 Wend. 9; 31 Am. Dec. 313; Fox *v.* R. R. Co., 31 Cal. 538; Mercer *v.* McWilliams, Wright, 132.

[5] Darlington *v.* New York, 31 N. Y. 164; 88 Am. Dec. 248; New York *v.* Lord, 18 Wend. 126; Stone *v.* New York, 25 Wend. 157; Surocco *v.* Geary, 3 Cal. 69; 58 Am. Dec. 385; American Print Works *v.* Lawrence, 21 N. J. L. 257; 23 N J. L. 9, 590; 57 Am. Dec. 420; McDonald *v.* Red Wing, 13 Minn. 38.

[6] Gowen *v.* Phila. Exchange Co., 5 Watts & S. 143; 40 Am. Dec. 489.

his customers; the physician and the lawyer invite them to their respective offices, and so on. So every man, by implication, invites others to come to his house as they may have proper occasion, either of business, of courtesy, for information, etc.[1] "But the invitation is limited by the purpose; it would be an abuse of the implied license, and a trespass, if one, instead of visiting a dealer's shop for the purposes of the business carried on there, were to assemble his associates there for some political or other purpose, for which the shop had not been thrown open. No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise."[2] Custom must determine in these cases what the limit is of the implied invitation.[3] And until notice has been given of the owner's withdrawal of the invitation, or of the changed character of the place, a person cannot be made liable as a trespasser.[4] So there is an implied license to one to go on another's property to remove goods which he purchased while there, to get goods which are there under an express license, or to recover his property which has been wrongfully carried there.[5] A license from a mother to a son to open the family tomb to deposit the corpse of a deceased son will be implied.[6]

Where a person builds a house on the land of another with his consent, this gives an implied license to occupy it during the pleasure of the owner of the land.[7] A license to take stone implies a license to draw it carefully over the grantor's land.[8] It is no trespass to enter upon a man's premises to obtain settlement of a debt, even though it be not yet due.[9] The servants of a wife who

[1] Cooley on Torts, 303, citing Gowen v. Phila. Exchange, 3 Watts & S. 141; 40 Am. Dec. 487.
[2] Cooley on Torts, 303.
[3] Cooley on Torts, 303, citing Kay v. R. R. Co., 65 Pa. St. 269; 3 Am. Rep. 628.
[4] R. R. Co. v. Hanning, 15 Wall. 649.
[5] See *ante*, Trespass — Torts.
[6] Lakin v. Ames, 10 Cush. 198. And see Fletcher v. Evans, 140 Mass. 241.
[7] Harris v. Gillingham, 6 N. H. 9; 23 Am. Dec. 701.
[8] Clark v. R. R. Co., 28 Vt. 103.
[9] Lehman v. Shakleford, 50 Ala. 437.

has been divorced from her husband for his fault may peaceably enter afterwards to remove her goods from the husband's premises.[1] One who has sold property by conditional sale, and who, when the condition is not complied with, enters peaceably the house of the vendee, with assistance, to take the property away, is not a trespasser for so doing, though the property is not found, it being furniture for use there.[2]

ILLUSTRATIONS. — The defendant in an action of trespass had been in the habit for thirty years of visiting the house of the plaintiff, and crossing his grounds without objection, the families being upon intimate terms. *Held*, an implied license: *Martin* v. *Houghton*, 45 Barb. 258. Permission was allowed for many years by the occupants of stores in a block to teamsters to drive over the alley at each end thereof and the space in the rear, without objection from any one. *Held*, a license from each occupant to use the driveway for delivering goods at the stores of the others: *Thayer* v. *Jarvis*, 44 Wis. 388.

§ 2671. License Personal to Licensee—Not Assignable. —It is personal to the licensee, and is not capable of being transferred or assigned by him.[3] But it may frequently be construed to cover the agents and servants of the grantee.[4] Thus if one has a right of way across land, in order to reach a field that he is cultivating, his children also have the same right.[5]

§ 2672. Recoverable at Will of Licensor. — A license depends on the will of the licensor; it is therefore revocable by him at any time,[6] even though a consideration

[1] Kallock *v.* Perry, 61 Me. 273.
[2] Walsh *v.* Taylor, 39 Md. 592.
[3] Emerson *v.* Fiske, 6 Me. 200; 19 Am. Dec. 206; Foot *v.* R. R. Co., 23 Conn. 214; Hill *v.* Cutting, 113 Mass. 107; Cowles *v.* Kendall, 24 N. H. 364; 57 Am. Dec. 287; Mendenhall *v.* Klinck, 51 N. Y. 246; Jackson *v.* Babcock, 4 Johns. 418; Harris *v.* Gillespie, 6 N. H. 11; Fuhr *v.* Dean, 26 Mo. 116; 69 Am. Dec. 484; Ruggles *v.* Lesure, 24 Pick. 187; Carleton *v.* Redington, 21 N. H. 291; Riddle *v.* Brown, 20 Ala. 412; 56 Am. Dec. 202.
[4] Curtis *v.* Galvin, 1 Allen, 217; Sterling *v.* Warden, 51 N. H. 217; 12 Am. Rep. 80.
[5] Powers *v.* Harlow, 53 Mich. 507; 51 Am. Rep. 154.
[6] Drake *v.* Wells, 11 Allen, 141; Hill *v.* Hill, 113 Mass. 103; 18 Am. Rep. 455; Bartlett *v.* Prescott, 41 N. H. 493; Mumford *v.* Whitney, 15 Wend. 380; 30 Am. Dec. 60; Hitchens *v.* Shaller, 32 Mich. 496; Smart *v.* Sandars, 5 Com. B. 894; Chynowith *v.* Tennery, 10 Wis. 397; Desloge *v.* Pearce, 38 Mo. 588; Tanner *v.* Valen-

ing the manager to a liability in tort. In this case, the holder, a colored man, attempted to enter the theater, and was prevented from so doing by the manager. The court, however, thought the plaintiff entitled to recover in an action of contract the money paid by him for the ticket, and all lawful damages which he sustained by the breach of the contract implied by the sale and delivery of ticket.[1] In a subsequent case in the same state, the same principle was applied to a concert ticket.[2] On the other hand, in Pennsylvania, it has been held that a ticket to a reserved seat in a theater confers more than a revocable license, and partakes more of the nature of a lease entitling the holder to peaceable ingress and egress, and exclusive possession of the seat during the designated performance.[3]

No action lies against the proprietor of a theater who advertises the price of reserved seats for a certain performance, and then refuses to sell certain seats demanded, even though they are not already sold.[4] A visitor to a theater or place of amusement of similar character is entitled to a seat; if his ticket calls for a particular seat, he is entitled to that; if not, then he is entitled to any unoccupied seat not previously sold to another.[5] The neglect of the proprietor to mark a seat "taken" gives no right to it to another if it were actually purchased by another.[6] Persons who have entered because assured that there is room, if there is in fact no room, have a right to leave and demand their money; they have no right to go into a private box.[7] A statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission after the opening of the doors, is unconstitu-

[1] McCrea v. Marsh, 12 Gray, 211; 71 Am. Dec. 745.

[2] Simon v. Scherpf, 1 Allen, 133; 79 Am. Dec. 717.

[3] Drew v. Peer, 93 Pa. St. 238. And see Mahoney v. Staples, 7 Ala. L. J. 213.

[4] Pearce v. Spalding, 12 Mo. App. 141.

[5] Commonwealth v. Powell, 30 Leg. Int. 100.

[6] Commonwealth v. Powell, 30 Leg. Int. 100.

[7] Lewis v. Arnold, 4 Car. & P. 354.

tional.[1] A license to the public to enter a railroad depot is revocable except when it is for the purpose of taking passage on the trains.[2]

§ 2674. License, how Revoked.— Being personal to the grantor as well as to the grantee, it is revoked by a sale or conveyance of the land,[3] or by the commencement of an action for damages by the licensor,[4] or a levy of an execution against the licensor on the land.[5] So a parol license to pass over land is revoked by the licensor's appropriation of the land to any use inconsistent with enjoyment of the license.[6] A license is also revoked by the death of the grantor of it,[7] or, indeed, of either licensor or licensee.[8] The license is considered revoked if not acted upon within a reasonable time.[9] So bringing an action to continue it would amount to a revocation,[10] and so would attempting to assign it.[11] And a license terminates when the purpose for which it was given is served.[12] A license to a partnership is revoked by the dissolution of the partnership.[13]

[1] District of Columbia, *v.* Saville, 1 McAr. 581; 29 Am. Rep. 616. And see Civil Rights Cases, 109 U. S. 3.

[2] Com. *v.* Power, 7 Met. 596; 41 Am. Dec. 465.

[3] Yeakle *v.* Jacob, 33 Pa. St. 376; Harris *v.* Gillingham, 6 N. H. 9; 23 Am. Dec. 700; Houx *v.* Leat, 26 Mo. 178; 72 Am. Dec. 202; Hays *v.* Richardson, 1 Gill & J. 336; Stevens *v.* Stevens, 11 Met. 251; 45 Am. Dec. 203; Seidensberger *v.* Speer, 17 Me. 123; Prince *v.* Case, 10 Conn. 375; 27 Am. Dec. 675; Blaisdell *v.* R. R. Co., 51 N. H. 483; Cobb *v.* Fisher, 121 Mass. 169; Drake *v.* Wells, 11 Allen, 141; Carter *v.* Harlan, 6 Md. 20; Groendyke *v.* Cramer, 2 Ind. 382; Mendenhall *v.* Klinck, 51 N. Y. 246; Estes *v.* China, 56 Me. 407; Dark *v.* Johnston, 55 Pa. St. 154; 93 Am. Dec. 732; Dame *v.* Dame, 38 N. H. 429; 75 Am. Dec. 195; Jenkins *v.* Lykes, 19 Fla. 148; 45 Am. Rep. 19; Cox *v.* Leviston, 63 N. H. 283.

[4] Lockhart *v.* Geir, 54 Wis. 133.

[5] Taylor *v.* Gerrish, 59 N. H. 569.

[6] Simpson *v.* Wright, 21 Ill. App. 67.

[7] Carter *v.* Page, 4 Ired. 424; De Haro *v.* U. S., 5 Wall. 599; Putney *v.* Day, 6 N. H. 430; 25 Am. Dec. 470.

[8] Ruggles *v.* Lesure, 24 Pick. 190; Johnson *v.* Carter, 16 Mass. 443; Prince *v.* Case, 10 Conn. 375; 27 Am. Dec. 675. But not by the death of one of two licensees: Chandler *v.* Spear, 22 Vt. 388.

[9] Hill *v.* Lord, 48 Me. 83; Parsons *v.* Camp, 11 Conn. 525; Gilmore *v.* Wilbur, 12 Pick. 120; 22 Am. Dec. 410; Hill *v.* Hill, 113 Mass. 103; 18 Am. Rep. 455; Sterling *v.* Warden, 51 N. H. 217; 12 Am. Rep. 80; Hoit *v.* Stratton Mills, 54 N. H. 109; 20 Am. Rep. 119.

[10] Joy *v.* Hull, 4 Vt. 455; 24 Am. Dec. 625.

[11] Jackson *v.* Babcock, 4 Johns. 418; Dark *v.* Johnston, 55 Pa. St. 164; 93 Am. Dec. 732.

[12] Hepburn *v.* McDowell, 17 Serg. & R. 383; 17 Am. Dec. 677; Veghte *v.* Raritan, 19 N. J. Eq. 142.

[13] Barksdale *v.* Hairston, 81 Va. 764.

§ 2675. When License not Revocable. — An executed license cannot be revoked; in other words, an act lawful when it was done, in virtue of the license and permission of the owner of the land, cannot be rendered unlawful by a subsequent revocation of such authority.[1] Where the license is connected with a grant, it cannot be revoked so as to defeat the grant to which it was incident.[2] "A mere license," it is said in a leading English case, "is revocable, but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat the grant to which it was incident."[3] Thus where one sells chattels on his own land, the accompanying license cannot be revoked until the purchaser has had a reasonable time to enter and remove them.[4] And as a general rule, the licensee should have a reasonable time for removing off the premises of another what he has been licensed to put thereon.[5] So on the principle of estoppel it has been held in many cases that a parol license (even under the statute of frauds) cannot be revoked where the

[1] Cheever v. Pearson, 16 Pick. 275; Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Fuhr v. Dean, 26 Mo. 116; 69 Am. Dec. 484; Wickersham v. Orr, 9 Iowa, 253; 74 Am. Dec. 348.

[2] Wood v. Manley, 11 Ad. & E. 34; Wood v. Leadbitter, 13 Mees. & W. 845; Hewitt v. Johnson, 7 Ex. 75; Jackson v. Babcock, 4 Johns. 418; Ferris v. Irving, 28 Cal. 645; Watson v. King, 4 Camp. 292; Russell v. Hubbard, 59 Ill. 325; Bonney v. Smith, 17 Ill. 531; Travers v. Crane, 15 Cal. 12; Brocken v. R. R. Co., 27 Ind. 346; Brigham v. Salene, 15 Or. 208. And such a license may be transferred: Miller v. State, 39 Ind. 267; Beattie v. Butler, 21 Mo. 313; 64 Am. Dec. 234; Thompson v. McElarney, 82 Pa. St. 174; Boults v. Mitchell, 15 Pa. St. 371; Heflin v. Bingham, 56 Ala. 566; 28 Am. Rep. 776.

[3] Wood v. Leadbitter, 13 Mees. & W. 845.

[4] Claflin v. Carpenter, 4 Met. 583; Parsons v. Camp, 11 Conn. 525; Nettleton v. Sikes, 8 Met. 34; Greeley v. Stilson, 27 Mich. 153; Harmon v. Harmon, 61 Me. 222; 14 Am. Rep. 556; Owens v. Lewis, 49 Ind. 489; 15 Am. Rep. 295; Long v. Buchanan, 27 Md. 502 92 Am. Dec. 653; Clark v. R. R. Co., 28 Vt. 103.

[5] Dame v. Dame, 38 N. H. 429; 75 Am. Dec. 195; Mellor v. Watkins, L. R. 9 Q. B. 404; Doty v. Gorham, 5 Pick. 487; 16 Am. Dec. 417; Pratt v. Ogden, 34 N. Y. 20; Selden v. Canal Co., 29 N. Y. 634; Russell v. Richards, 10 Me. 429; 25 Am. Dec. 254; Owens v. Lewis, 49 Ind. 489; 15 Am. Rep. 295; Partridge v. First Church, 39 Me. 631; Marston v. Gale, 24 N. H. 176; Freeman v. Headly, 33 N. J. L. 524; Davis v. Townshend, 10 Barb. 333.

licensor has permitted, on the faith of it, the licensee to go on and make valuable improvements on his land.[1]

Some courts hold that after the license has been acted upon, and considerable expenditures made, it should not be revoked without making compensation to the licensee.[2] Other cases go still further, and hold that where the licensor has stood by and seen the licensee make large expenditures in reliance upon his license, and which will be wholly or in great part lost to him if the license should be recalled, these facts are sufficient to create an estoppel *in pais* which will preclude him from revoking.[3] Others, again, enforce the contract, on the ground that it has been taken out of the statute of frauds by part performance.[4]

[1] Wilson *v.* Chalfant, 15 Ohio, 248; 45 Am. Dec. 574; Dark *v.* Johnston, 55 Pa. St. 154; 93 Am. Dec. 732; Ocean Mfg. Co. *v.* Sprague Mfg. Co., 34 Conn. 524; Foster *v.* Browning, 4 R. I. 47; 67 Am. Dec. 505; Ricker *v.* Kelly, 1 Me. 117; 10 Am. Dec. 43, note; Rerick *v.* Kern, 14 Serg. & R. 267; 16 Am. Dec. 497; Fuhr *v.* Dean, 26 Mo. 116; 69 Am. Dec. 484; Wynn *v.* Garland, 19 Ark. 23; 68 Am. Dec. 190; Rhodes *v.* Otis, 33 Ala. 587; 73 Am. Dec. 439; Wickersham *v.* Orr, 9 Iowa, 253; 74 Am. Dec. 349; Southwestern R. R. Co. *v.* Mitchell, 69 Ga. 114; Texas etc. R. R. Co. *v.* Jarrell, 60 Tex. 267; Campbell *v.* R. R. Co., 110 Ind. 490. But the right at law to revoke a license acted upon with expenditure of moneys is fully recognized in a number of cases: Prince *v.* Case, 10 Conn. 375; 27 Am. Dec. 675; Johnson *v.* Skillman, 29 Minn. 95; 43 Am. Rep. 192; Owen *v.* Field, 12 Allen, 457; Clute *v.* Carr, 20 Wis. 559; 91 Am. Dec. 442; Hetfield *v.* R. R. Co., 29 N. J. L. 571; Druse *v.* Wheeler, 22 Mich. 439; Selden *v.* Delaware etc. Canal Co., 29 N. Y. 634; Foster *v.* Browning, 4 R. I. 47; 67 Am. Dec. 505; Houston *v.* Laffee, 46 Vt. 505; Carleton *v.* Redington, 21 N. H. 291; Kamphouse *v.* Gaffner, 73 Ill. 453; Miller *v.* Tobie, 41 N. H. 84; Marston *v.* Gale, 24 N. H. 176; Ruggles *v.* Lesure, 24 Pick. 187.

[2] Addison *v.* Hack, 2 Gill, 221; 41 Am. Dec. 421; Rhodes *v.* Otis, 33 Ala. 578; 73 Am. Dec. 439; Snowden *v.* Wilas, 19 Ind. 10; 81 Am. Dec. 370; Woodbury *v.* Parshley, 7 N. H. 237; 26 Ann. 739; Androscoggin Bridge *v.* Bragg, 11 N. H. 102; Sampson *v.* Burnside, 13 N. H. 264; Hall *v.* Chaffee, 13 Vt. 150; Hazleton *v.* Putnam, 3 Pinn. 107; 54 Am. Dec. 158; Bush *v.* Sullivan, 3 G. Greene, 344; 54 Am. Dec. 506.

[3] Swartz *v.* Swartz, 4 Pa. St. 353; 45 Am. Dec. 697; Rerick *v.* Kern, 14 Serg. & R. 267; 16 Am. Dec. 497; Lacy *v.* Arnett, 33 Pa. St. 169; Cumberland R. R. Co. *v.* McLanahan, 59 Pa. St. 23; Huff *v.* McCauley, 53 Pa. St. 206; 91 Am. Dec. 203; Sheffield *v.* Collier, 3 Kelly, 82; Cook *v.* Pridgen, 45 Ga. 331; 12 Am. Rep. 582; Snowden *v.* Wilas, 19 Ind. 10; 81 Am. Dec. 370; Lowe *v.* Miller, 27 Ind. 534; 46 Am. Dec. 188; Wilson *v.* Chalfant, 15 Ohio, 248; 45 Am. Dec. 574; Ricker *v.* Kelly, 1 Me. 117; 16 Am. Dec. 497; Russell *v.* Hubbard, 59 Ill. 335; McKellip *v.* McIlhenny, 4 Watts, 317; 28 Am. Dec. 711; Davis *v.* Sonder, 10 Phila. 113. See note to Rerick *v.* Kern, 14 Serg. & R. 267, in 16 Am. Dec. 501, 506.

[4] Rerick *v.* Kern, 14 Serg. & R. 267; 16 Am. Dec. 501; Snowden *v.* Wilas, 19 Ind. 10; 81 Am. Dec. 370; Lowe *v.* Miller, 27 Ind. 534; 46 Am. Dec. 188; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241; 8 Am. Dec. 696; Strickler *v.* Todd, 10 Serg. & R. 63; 13 Am. Dec. 649; McKellip *v.* McIlhenny, 4 Watts, 317;

In these cases the license is not treated as a personal privilege merely, but is considered as pertaining to the property, so as to pass with it on a sale, so that the death of the licensor or licensee, or the sale of the servient tenement, or the decay of the thing erected, would not revoke it.[1] So a license coupled with an interest is not revocable.[2] A railroad which, by consent of the owner, is put in possession of a way over his land, with a covenant from him for further assurance, has a license coupled with an interest, and which is not subject to revocation.[3]

§ 2676. **Duties and Liabilities of Licensor and Licensee.** — The general rule is, that the licensor assumes to the licensee no duty, except to refrain from acts willfully injurious to him, unless he had received a consideration for the license, or in certain other cases where the law requires care even towards licensees and trespassers.[4] In acting upon the license, the licensee is bound to use due care, and to do nothing on the land which will be injurious.[5] An express license exempts the licensee from damages for injuries necessarily resulting from doing the act in a careful manner; but not for damages for anything beyond that.[6]

§ 2677. **Abuse of License.** — A license, whether given by the owner or by the law, is lost by abusing it.[7] But a

Wheatley *v.* Chrisman, 24 Pa. St. 289; 64 Am. Dec. 657; Campbell *v.* McCoy, 31 Pa. St. 263; Dark *v.* Johnston, 55 Pa. St. 164; 93 Am. Dec. 732; Lacy *v.* Arnett, 33 Pa. St. 169; Hall *v.* Chaffee, 13 Vt. 157, note; Wilson *v.* Chalfant, 15 Ohio, 248; 45 Am. Dec. 574.

[1] Lacy *v.* Arnett, 33 Pa. St. 169; Thompson *v.* McElarney, 82 Pa. St. 174; Rerick *v.* Kern, 14 Serg. & S. 267; 16 Am. Dec. 479; Snowden *v.* Wilas, 19 Ind. 10; 81 Am. Dec. 370.

[2] United States *v.* R. R. Co., 1 Hughes, 178; Long *v.* Buchanan, 27 Md. 502; 92 Am. Dec. 653; Cool *v.* Lumber Co., 87 Ind. 531; Simons *v.* Morehouse, 88 Ind. 391; Thompson *v.* McElarney, 82 Pa. St. 174.

[3] New Jersey etc. R. R. Co. *v.* Van Syckle, 37 N. J. L. 496.

[4] See Title *ante*, Negligence; Kay *v.* R. R. Co., 65 Pa. St. 269; 3 Am. Rep. 628.

[5] Eaton *v.* Winnie, 20 Mich. 156; 4 Am. Rep. 377.

[6] Woodruff *v.* Beekman, 43 N. Y. Sup. Ct. 282; McKnight *v.* Ratcliff, 44 Pa. St. 159.

[7] Cushing *v.* Adams, 18 Pick. 110. If a party having a right of way licenses the owner of the soil to build an arch over the way, but such owner unnecessarily and unreasonably obstructs the way in building the arch, an action on the case will lie for the abuse of the license: Id.

distinction is taken in respect to the consequences of the abuse between a license given by the law and a license given by the owner. If the license was given by the law, an abuse not only terminates it, but revokes it; and it is presumed, from the misbehavior of the licensee, that he entered originally with the intent to do the wrong he has actually committed, and not in good faith under his license. The wrong-doer is thereupon held responsible as a trespasser *ab initio;* a trespasser in the entry itself, as in everything done afterwards.[1] But when the license is given by the party himself, the abuse of it has no such retroactive effect. The licensee does not become a trespasser *ab initio*, but he is liable simply for his abuse or misconduct.[2]

[1] Six Carpenters' Case, 8 Coke, 290; 1 Smith's Lead. Cas.; Dickson *v.* Parker, 3 How. (Miss.) 219, 34 Am. Dec. 78.

[2] Edelman *v.* Yakel, 27 Pa. St. 26; Dumont *v.* Smith, 4 Denio, 319; Van Brunt *v.* Schenck, 13 Johns. 414; Ferrin *v.* Symonds, 11 N. H. 363; Jewell *v.* Mahood, 44 N. H. 474; 84 Am. Dec. 90; Cushing *v.* Adams, 18 Pick. 110; Ballard *v.* Noaks, 2 Ark. 45; Stone *v.* Knapp, 29 Vt. 501; Faulkner *v.* Anderson, Gilmer, 221.

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